RATANLAL & DHIRAJLAL

THE CODE OF CRIMINAL PROCEDURE

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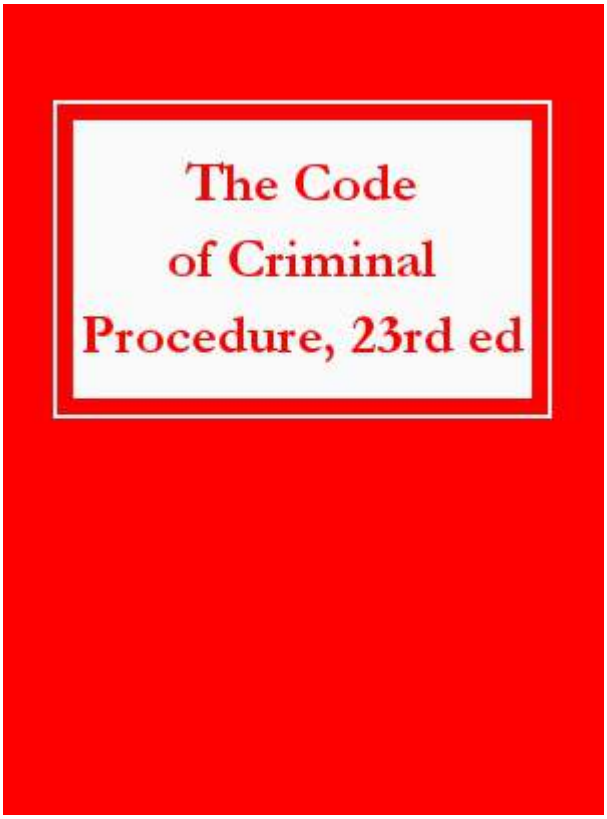
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The Code of Criminal Procedure, 23rd ed



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The Code of Criminal Procedure, 1973

(Act No. 2 of 1974)

[25th January 1974]

An Act to consolidate and amend the law relating to Criminal Procedure.

BE it enacted by Parliament in the Twenty-fourth Year of the Republic of India as follows:—

The Code of Criminal Procedure, 1973

CHAPTER I PRELIMINARY

[s 1] Short title, extent and commencement.—

(1) This Act may be called the Code of Criminal Procedure, 1973.

(2) It extends to the whole of India[1] [***]:

Provided that the provisions of this Code, other than those relating to Chapters VIII, X and XI thereof, shall not apply—

(a) to the State of Nagaland,

(b) to the tribal areas,

but the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification.

***Explanation.*— In this section, "tribal areas" means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong.**

(3) It shall come into force on the 1st day of April, 1974.

The Code of Criminal Procedure, 1973 (CrPC), came into effect from 1 April 1974. It received the assent of the President on 25 January 1974. For its application to the Union Territories of Andaman and Nicobar Islands, Dadra and Nagar Haveli and Lakshadweep, see the Code of Criminal Procedure (Amendment) Regulation, 1974 (I of 1974).

There was at first no uniform law of criminal procedure for the whole of India. There were separate Acts, mostly rudimentary in their character, to guide the procedure of the Courts in the erstwhile provinces and the presidency towns. Those applying to the presidency towns were first consolidated by the Criminal Procedure Supreme Courts Act (XVI of 1852), which in course of time gave place to the High Court' Criminal Procedure Act (XIII of 1865). The Acts of Procedure applying to the provinces were replaced by the general Criminal Procedure Code (Act XXV of 1861), which was replaced by Act X of 1872. It was the Criminal Procedure Code of 1882 (Act X of 1882) which gave for the first time a uniform law of procedure for the whole of India both in presidency towns and in the moffusil; it was supplanted by the Code of Criminal Procedure, 1898 (Act V of 1898). This last-mentioned Act had been amended by many amending Acts, the most important being those passed in 1923 and 1955. The extensive amendments of 1955 were made with intent to simplify procedure and speed up trials. The State Governments too made a large number of amendments to the Code

of 1898. But, on the whole, the Code of 1898 remained unchanged for a very long period.

In the meanwhile, the Law Commission, as first constituted, presented its report on the Reform of Judicial Administration (14th Report) on 26 September 1958. The Commission after being reconstituted was asked by the Central Government to undertake a detailed examination of the Code of Criminal Procedure, 1898. After making recommendations separately on some specific problems arising out of certain provisions in the Code, the Commission, under the chairmanship of Shri JL Kapur, submitted a very comprehensive Report on 19 February 1968, on sections 1 to 176 of the Code. The Commission was again reconstituted in 1968. After its reconstitution, the Commission made a detailed study of the Code, met Judges and representatives of the various Bar Associations in different parts of the country, received suggestions from various quarters and ultimately submitted a detailed report, namely, the Forty-first Report, in September 1969. These recommendations of the Commission were examined by the Government in the light of the following basic considerations:

(i) An accused person should get a fair trial in accordance with the accepted principles of natural justice;

(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to the society; and

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.[2.]

Thereafter, a draft Bill, Bill No. XLI of 1970, was introduced in the Rajya Sabha on 10 December 1970. The Bill was referred to a Joint Select Committee of both the Houses of Parliament and finally emerged in its present form and passed by both the Houses.

Ordinarily, the Code does not affect (1) any special law (section 41, Penal Code), (2) any local law (section 42, Penal Code), (3) any special jurisdiction or power, or (4) any special form of procedure (see section 5).

With the above exceptions, the Code extends to the whole of India except the State of Jammu and Kashmir. This provision excluding Jammu and Kashmir from the application of the Act was held to be not violative of Article 1 of the Constitution.[3.]

The above-mentioned position is no longer valid in the light of the recent amendment wherein the words "except the State of Jammu and Kashmir" has been omitted.[4.]

However, an order for attachment of salary for the recovery of maintenance in favour of a wife has been held to be executable notwithstanding the fact that the husband was in the service of the Income-tax Department in J&K.[5.] A Constitution Bench of the Supreme Court in *Anita Kushwaha v Pushap Sudan*[6.] was seized of a challenge that section 406 CrPC did not extend to the State of Jammu and Kashmir and cannot, therefore, be invoked to direct any such transfer. It was held that absence of an enabling provision cannot be construed as a prohibition against transfer of cases to or from the State of Jammu and Kashmir. The provisions of Articles 32, 136 and 142 are wide enough to empower the Supreme Court to direct such transfer in appropriate situations, no matter Central Code of Civil and Criminal Procedures do not extend to the State nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers the Supreme Court to transfer cases.

The provisions of the Code, other than those relating to Chapters VIII (Security for Keeping the Peace and for Good Behaviour), X (Maintenance of Public Order and Tranquillity) and XI (Preventive Action of the Police), do not apply to the State of

Nagaland and to the tribal areas as defined in the Explanation. However, the concerned State Government is empowered to apply such provisions with modifications, if necessary, either to the whole or any part of the State of Nagaland and tribal areas.

The Criminal Procedure Code is mainly an adjective law of procedure. The object of a CrPC is to provide a machinery for the punishment of offenders against the substantive criminal law,[7.] e.g., the Indian Penal Code (IPC). In fact, the two Codes are to be read together. Some terms are specially defined in the Criminal Procedure Code, but in the absence of such definition, the definitions set out in the IPC are to be adopted [section 2(*y*)]. The Code also provides machinery for punishment of offences under other Acts. It is, however, worth noting that the Code is not a pure adjective law. There are certain provisions of the Code which partake of the nature of substantive law, e.g., prevention of offences (Chapters VIII, X and XI) and maintenance proceedings (Chapter IX).

Enactments regulating the procedure of courts seem usually to be imperative and not merely directory.[8.] In other words, the rules of procedure are enacted to be obeyed. The object of these rules is to simplify and shorten proceedings. It is not always easy to keep strictly to the line of procedure prescribed, and irregularities do occur now and then in trials of cases. The Code itself divides such irregularities into two classes: (1) irregularities which do not vitiate proceedings (section 460) and (2) irregularities which vitiate proceedings (section 461). It also provides that no error, omission or irregularity in a trial shall vitiate a finding, sentence or order unless it has occasioned a failure of justice (sections 464 and 465). The Code further preserves the inherent right of the High Court to make orders (1) to give effect to any order under the Code, or (2) to prevent abuse of the process of any Court, or (3) to secure the ends of justice (section 482).

The provisions of the Code are procedural, where the violation of any provision does not cause prejudice it has to be treated as directory despite the use of the word "shall". So while interpreting section 202(2) (proviso), the Supreme Court said examination of all the witnesses cited by the complainant was not mandatory.[9.]

[s 1.1] Amendments.—

The Code, being a Parliamentary Legislation, can be amended only by another Act or by an Ordinance but cannot be amended by a simple notification issued by State Government. Criminal Law comes under List III (Concurrent List) of the Seventh Schedule of the Constitution; therefore, both State and Centre have powers to amend Criminal Law.[10.] Moreover, a Central Act can be amended even by a State Act only after obtaining assent of the President *vide* Article 254(2) of the Constitution of India. Notification No. 777/VIII-9 4 (2)-87, dated 31 July 1989 published in UP Gazette, which purported to amend CrPC 1973, without the assent of the President was held to be illegal.[11.]

[s 1.2] How far exhaustive.—

So far as it deals with any point specifically, the Code must be deemed to be exhaustive, and the law must be ascertained by reference to its provisions; but where a case arises, which demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court did not have the power to make such order as the ends of justice required.[12.] Absence of any provision on a particular matter in the Code does not mean that there is no such power in a criminal Court which may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by law.[13.]

[s 1.3] Limitation period.—

In general, there is no limitation of time in filing complaints. They can be filed at any time. But it is to be remembered that delay in the filing of complaints is attended with two evils: first, the memory of witnesses is likely to fade by passage of time; and, secondly, valuable links of evidence may disappear, e.g., death of witnesses, destruction of property, *etc.* The Limitation Act, 1963, provides periods of limitation within which appeals and revision applications should be filed (Articles 114, 115 and 131). A specific chapter in the Code, *viz.*, Chapter XXXVI, containing sections 467 to 473 prescribes limitations for taking cognizance of certain offences.

[s 1.4] Citizens' right to set criminal law in motion.—

It is trite law that ordinarily, it is open to anyone, even a stranger, to set the criminal law in motion.[14.] In certain classes of offences, however, it is only the person aggrieved who can start the proceedings (see sections 195 to 199, *infra*).

[s 1.5] Tribal area.—

"Tribal Areas" means the territories which immediately before 21 January 1972 were included in the tribal areas of Assam as referred to in para 20 of the Sixth Schedule of our Constitution other than those within local limits of the municipality of Shillong.

Paragraph 5(1) of the Fifth Schedule, Part B of our Constitution runs as under:—

> Notwithstanding anything in this Constitution, the Governor may by public notification, direct that any particular Act of the Parliament or of the legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the state subject to such exceptions and modifications, as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

In exercise of this power, the Governor of Andhra Pradesh issued a notification published in the Gazette of 29 March 1974 directing that this Code shall apply to the Scheduled areas in the State of Andhra Pradesh subject to the modification that in section 1(2) of this Code after the existing proviso, the following proviso shall be inserted:

> *Provided further* that the provisions of this Code shall not apply on and from the 1st day of April, 1974 to the Scheduled areas in the State of Andhra Pradesh, but the State Government may by notification, apply such provisions or any of them to the whole or part of such scheduled areas with effect from such date or dates and with such supplemental, incidental or consequential modifications as may be specified in the notification.
>
> This direction came into force on 1-4-1974.

By virtue of this notification, another proviso has been added, directing the tribal areas, which are scheduled areas also, will be governed by the provisions of the Criminal Procedure Code, 1898. This Code shall not apply to the tribal areas of Andhra Pradesh.[15.]

1. The words "except the State of Jammu and Kashmir" has been omitted by the Jammu and Kashmir Reorganisation Act, 2019 (34 of 2019), sections 95, 96 and Fifth Sch, Table-1 (w.e.f. 31-10-2019).
2. Statement of Objects and Reasons, See Gazette of India Extraordinary, Pt II, section 2, pp 1309–1310.
3. *KRK Vara Prasad v UOI*, AIR 1980 AP 243 (DB).
4. Omitted by the Jammu and Kashmir Reorganisation Act, 2019 (34 of 2019), sections 95, 96 and Fifth Sch, Table-1 (w.e.f. 31-10-2019).
5. *Madhav Kumar Anand v Sudesh Kumar*, 1984 Cr LJ NOC 175 (Punj).
6. *Anita Kushwaha v Pushap Sudan,* (2016) 8 SCC 509 : AIR 2016 SC 3506 : 2016 Cr LJ 4151 : 2016 (7) Scale 235 .
7. *Mona Puna*, (1892) 16 Bom 661.
8. Maxwell on the Interpretation of Statutes, 10th Edn, p 379.
9. *Shivjee Singh v Nagendra Tiwary,* AIR 2010 SC 2261 : (2010) 7 SCC 578 .
10. As for example, in the State of Uttar Pradesh, section 438 of the Code has been deleted and anticipatory bails are filed under Article 226 of the Constitution.
11. *Virendra Singh v State of UP*, 2002 Cr LJ 4265 (All).
12. *Nagen Kundu v Emperor*, AIR 1934 61 Cal 498 .
13. *Hansraj*, (1942) Nag 333; *Rahim Sheikh v Emperor*, (1923) 50 Cal 872 , 875 : AIR 1923 Cal 724 .
14. *Re Ganesh Narayan Sathe*, ILR (1889) 13 Bom 600 .
15. *Re State of Andhra Pradesh*, 1992 Cr LJ 1827 (AP) : AIR 1961 AP 448 .

The Code of Criminal Procedure, 1973

CHAPTER I PRELIMINARY

[s 2] Definitions.—

In this Code, unless the context otherwise requires,—

(a) "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence;

(b) "charge" includes any head of charge when the charge contains more heads than one;

(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

COMMENT

In order to be a cognizable case under this section, it would be enough if one or more (not necessarily all) of the offences are cognizable offences. The Code does not contemplate any case to be partly noncognizable.[16.]

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

***Explanation.*— A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;**

In general, a complaint into an offence can be filed by any person, except in cases of offences relating to marriage, defamation and offences mentioned in sections 195 to 197.[17.]

A complaint in a criminal case is what a plaint is in a civil case. It is one of the modes in which a Magistrate can take cognizance of an offence (section 190). The requisites of a complaint are: (1) an oral or a written allegation; (2) that some person known or unknown has committed an offence; (3) it must be made to a Magistrate[18.] and (4) it must be made with the object that he should take action.[19.] No form is prescribed which the complaint may take. The word has a wide meaning.[20.] There is no particular format of a complaint. A petition addressed to a Magistrate, containing an allegation that an offence has been committed and ending with a prayer that the culprit be suitably dealt with, is a complaint. Thus, no format is envisaged and nomenclature is also immaterial.[21.]

The words "complainant" and "informant" are not words of literature and cannot be used interchangeably. In a case registered under section 154 of the Code, the State is the prosecutor and the person whose information is the cause for lodging the report is the informant. However, the complainant is the person who lodges the complaint. The word "complaint" is defined in the Code to mean any allegation made orally or in writing to a Magistrate. Therefore, these words carry different meanings.[22.]

[s 2.1] Allegations of fact constitute complaint.—

It is the "allegations of fact" which constitutes a complaint. An omission to mention the offence made out by the facts, or the mentioning of a wrong section of the IPC, does not vitiate a complaint and does not take away the jurisdiction of the Court to try a person complained against for the offences which can be made out on the basis of the allegation in the complaint.[23.] A charge-sheet submitted by police cannot be regarded as complaint.[24.] Where offences mentioned in section 195(1)(b)(i) could be taken cognizance of only on a complaint in writing of that court or some other court to which that court is subordinate, a police report could not be treated as a complaint.[25.] However, where a private complaint discloses two offences, one mentioned in section 195(1)(b)(ii) and the other not so mentioned, the cognizance of the other may be taken by the Magistrate.[26.]

[s 2.2] Complaint and police report.—

A "police report" as defined under clause (r) has been expressly excluded from the definition of complaint, but the Explanation makes it clear that the report made by the police officer shall be deemed to be a complaint in a case where after investigation it discloses the commission of a non-cognizable offence. In such a case, the police officer shall be deemed to be the complainant. A Protest petition, filed by the accused against final report of police, is not a "complaint".[27.]

[s 2.3] Need not state ingredients of offences.—

It is not necessary that a complaint should contain in verbatim all the ingredients of the offence. More important than that is the laying down of the factual foundation of the offence.[28.]

(e) "High Court" means,—

- **(i) in relation to any State, the High Court for that State;**
- **(ii) in relation to a Union territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court;**
- **(iii) in relation to any other Union territory, the highest Court of criminal appeal for that territory other than the Supreme Court of India;**

COMMENT

The whole of India, that is, the territories to which the Code extends (see clause (f)), is divided into States and Union territories. (1) For each State, the High Court of that State; (2) for Union territory to which the jurisdiction of the High Court of a State has been extended, that High Court; and (3) for other Union territories, the highest Court of

criminal appeal for that territory (but not the Supreme Court) are High Courts within the meaning of this clause.

(f) "India" means the territories to which this Code extends;

(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;

COMMENT

Where a Sessions Judge convicted a person under various sections of IPC, but in appeal, it was revealed that the convict was a "delinquent juvenile", who ought to have been governed by Juvenile Justice Act, 1986, the AP High Court set aside the conviction and sentence and directed inquiries to be held as provided for in the Juvenile Justice Act. The High Court further clarified that "inquiry" is a term different from trial. The definition of "inquiry" in section 2(g) CrPC excludes "trial".[29.]

From the definition of the word "inquiry" given in the Code, it is clear that inquiry under the Code is relatable to a judicial act and not the steps taken by police which are either investigation after the stage of section 154 of the Code or termed as "Preliminary Inquiry" and which are prior to the registration of FIR.[30.]

It has been held that where no specific mode or manner of inquiry is provided under section 202 of the Code, the inquiry mandated under section 202 is an inquiry under section 2(g).[31.]

The stage of inquiry commences, insofar as the court is concerned, with filing of charge-sheet. Trial is distinct from an inquiry and must necessarily succeed it. Section 2(g), which defines inquiry, clearly envisages inquiry before the actual commencement of the trial and is an act under the Code by the Magistrate or the Court. The word "inquiry" is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the Court on filing of charge-sheet.[32.]

In the inquiry envisaged under section 202 of the Code, the witnesses are examined, whereas under section 200 of the Code, examination of the complainant only is necessary. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry. Thus, where the Magistrate has examined the complainant on solemn affirmation and two witnesses and only thereafter he had directed for issuance of process, it could be said that the Magistrate has held inquiry as mandated under section 202 of the Code.[33.]

(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

COMMENT

[s 2.4] Investigation and inquiry.—

In criminal matters, inquiry is different from a trial. Inquiry stops when trial begins. The ambit of an inquiry is wider than trial. Trial presupposes the idea of an offence, but inquiry relates to offences and matters which are not offences vide security proceedings and other proceedings and other inquiries relating to dispute about possession of immovable property, *etc.* All those proceedings before a Magistrate prior

to the framing of a charge which do not result in conviction can be termed as inquiry.[34.] An inquiry preparatory to commitment of a case to the Sessions under section 209 is inquiry within the meaning of section 2(g).[35.] Similarly, the proceedings under section 209 fall within the term inquiry.[36.] The three terms "investigation", "inquiry" and "trial" denote three different stages of a criminal case. The first stage is reached when a police officer either by himself or under orders of a Magistrate investigates into a case (section 202). If he finds that no offence has been committed, he reports the fact to a Magistrate who drops the proceedings and the case comes to an end (section 203). But if he is of a contrary opinion, he sends up the case to a Magistrate. Then begins the second stage, which is either a trial or an inquiry. The Magistrate may deal with the case himself, and either convict the accused or discharge or acquit him. In cases of serious offences, the trial is before the Sessions Court which may either discharge the accused or convict or acquit him (Chapter XVIII). The main purpose of an investigation is collection of evidence, and it must be conducted by a police officer or a person enjoying the powers of a police officer or authorised by a Magistrate in his behalf or a person in authority.[37.]

[s 2.5] Collection of evidence.—

The definition of the term is not exhaustive. An "investigation" means search for material and facts in order to find out whether or not an offence has been committed. It does not matter whether it is made by a police officer or a custom officer or any other officer authorised to investigate into the matter of an offence committed under a law other than the IPC.[38.] The arrest and detention of a person for the purpose of investigation of a crime forms an integral part of the process of investigation.[39.] Examining witnesses and arranging raids for the purpose of dealing with a complaint by an Inspector of Anti-Corruption Department was included within the meaning of the word "investigation".[40.] Searches are also proceedings for the collection of evidence and therefore part of investigation under section 2(h).[41.] Medical examination of the arrested person also forms part of the investigation.[42.] The word "investigation" has to be read and understood in the light of not only the powers conferred on police officers but the restrictions placed on them in the use and exercise of such powers.[43.]

[s 2.6] FIR, requisite for investigation.—

The provisions of Chapter XII of the Code apply to investigations conducted by CBI "Police" referred to in the Chapter for the purposes of investigation would apply to officers under the Delhi Police Establishment Act. On completion of an investigation, CBI has to file its report in the manner prescribed by section 173(2). A direction for conducting investigation requires registration of FIR beforehand. An investigation into the fact whether the death in question was suicidal or homicidal could have been taken up only after registration of FIR. That is why the CBI was justified in registering the FIR.[44.]

The term "investigation" in section 2(h) and (o) and "officer incharge of Police Station" in section 2(o) have been held to be inclusive and have expansive meaning. They must be given liberal interpretation.[45.]

(i) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath;

COMMENT

The term "judicial proceeding" includes any proceedings in the course of which evidence is or may be legally taken on oath[46]. It includes "inquiry" and "trial" but not investigation. It is also explained in section 193 and referred to in sections 192 and 228 of the IPC.

(j) "local jurisdiction", in relation to a Court or Magistrate, means the local area within which the Court or Magistrate may exercise all or any of its or his powers under this Code [47][and such local area may comprise the whole of the State, or any part of the State, as the State Government may, by notification, specify];

(k) "metropolitan area" means the area declared, or deemed to be declared, under section 8, to be a metropolitan area;

COMMENT

The colonial presidency towns, Bombay, Calcutta and Madras, and the city of Ahmedabad are deemed to have been declared as metropolitan area by the respective State Governments. Section 8 empowers the State Governments to declare by notification an area comprising a city or town with a population exceeding one million to be a metropolitan area.

(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;

(m) "notification" means a notification published in the Official Gazette;

(n) "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871 (1 of 1871);

COMMENT

The term "offence" is more elaborately defined in section 40 of the Indian Penal Code, 1860.[48] There is also a special definition of offence under section 39 of this Code. Maintenance proceedings under Chapter IX of this Code do not relate to any offence as defined in this section.[49]

An offence would always mean an act of omission or commission which would be punishable under any law for the time being in force.[50] The Supreme Court has observed that adults willingly engaging in sexual relations outside marital settings do not commit an offence.[51]

(o) "officer in charge of a police station" includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;

(p) "place" includes a house, building, tent, vehicle and vessel;

(q) "pleader", when used with reference to any proceeding in any Court, means a person authorised by or under any law for the time being in force, to practise in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding;

COMMENT

Under the inclusive part of the definition, a non-legal person appointed with the permission of the Court will also be included.[52.] However, such permission may be withdrawn half way through the proceedings if the representative proves himself to be reprehensible.[53.]

(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173;

(s) "police station" means any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf;

COMMENT

A beat house, unless it is declared generally or specially by the State Government to be a police station, cannot be held to be a police station.[54.] Where the boundary between two police station areas is declared or specified by the Government as the midstream of a river, and that river changes its course, such change will automatically determine increase or decrease in the territorial jurisdiction under the police stations.[55.] Criminal Investigation Department and Corps of Detectives are covered by the definition of "police station" under section 2(s).[56.]

(t) "prescribed" means prescribed by rules made under this Code;

(u) "Public Prosecutor" means any person appointed under section 24 and includes any person acting under the directions of a Public Prosecutor;

COMMENT

A Public Prosecutor, though an executive officer, is, in a larger sense, also an officer of the Court. He is bound to assist the Court with his fairly considered view, and the Court is entitled to have the benefit of the fair exercise of his function.[57.]

An advocate General who is asked by the Governor to represent an accused in a Session Court does not become a Public Prosecutor within the meaning of clause (4) of section 2 unless he is appointed as such Public Prosecutor under section 24 of the Code.[58.]

(v) "sub-division" means a sub-division of a district;

(w) "summons-case" means a case relating to an offence, and not being a warrant-case;

[59.] **[(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir];**

(x) "warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

COMMENT

The division of cases into summons and warrant cases is based on the quantum of punishment which can be awarded. Those cases which are punishable with imprisonment for two years and under are summons cases, and the rest are all warrant cases. The division marks ordinary cases from serious ones, and determines the mode of trials. The procedure for the trial of summons cases is provided by Chapter XX, while that for warrant cases is dealt with in Chapter XIX. It may be noted that summons will

be issued in all summons cases, and warrant in all warrant cases, unless the Magistrate thinks fit to issue summons (section 204).

When no prejudice is caused in adopting a procedure of summons case instead of warrant case, it will be an irregularity curable under section 465 of the Code.[60.]

A summons case can be tried as a warrant case in the interest of justice. Similarly, a case being tried as warrant case may be proceeded under summons procedure in the midst of the case, if the justice demands. However, a Magistrate should pass a specific order to this effect and the order-sheet should disclose such a change of procedure, although omission is not fatal.[61.]

(y) words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.

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16. *Vadlamudi Kutumba Rao v State of Andhra Pradesh*, (1961) 2 Cr LJ 605 .
17. *Re Ganesh Narayan Sathe*, ILR (1889) 13 Bom 600 ; *Farzand Ali v Hanuman Prasad*, (1896) ILR 18 All 465; *Miyabhai Pirbhai v The State*, (1963) 2 Cr LJ 141 : 4 Guj LR 253 : AIR 1963 Guj 188 .
18. *J&K v Ismail Sher,* 1979 Cr LJ 557 .
19. **See** *Bharat Kishore Lal Singh Deo v Judhistir Modak*, (1929) ILR 9 Pat 707 : AIR 1929 Pat 473 ; Lakhan, (1937) All 162 .
20. *Bhimappa v Laxman*, AIR 1970 SC 1153 : 1970 Cr LJ 1132 .
21. *Mohd Yousuf v Afaq Jahan*, AIR 2006 SC 705 : (2006) 1 SCC 627 .
22. *Ganesha v Sharanappa,* AIR 2014 SC 1198 : (2014) 1 SCC 87 : 2014 Cr LJ 1146 (SC).
23. *Ram Brichha Misra*, (1947) All 796 : AIR 1948 All 121 ; *Belsand Sugar Co v The State*, (1965) 2 Cr LJ 398 : AIR 1965 Pat 369 .
24. *Surajmani Srimali v State of Orissa*, 1980 Cr LJ 363 .
25. *K Rama Krishnan v Station House Officer*, 1986 Cr LJ 392 (Ker).
26. *Rajendra Singh v Surendra Singh*, 1992 Cr LJ 3749 (MP) : 1192 (0) MP LJ 650 .
27. *Mahendra Pal Sharma v State of UP*, 2003 Cr LJ 698 (All).
28. *Rajesh Bajaj v State (NCT) of Delhi,* AIR 1999 SC 1216 : 1999 Cr LJ 1833 : (1999) 3 SCC 259 .
29. *Bandela Ailaiah v State of AP*, 1995 Cr LJ 1083 (AP) : 1994 (2) Andh LT 519 .
30. *Lalita Kumari v Govt of UP,* AIR 2014 SC 187 : (2014) 2 SCC 1 : 2014 Cr LJ 470 (SC) [Five-Judge Constitution Bench].
31. *Vijay Dhanuka v Najima Mamtaj*, (2014) 14 SCC 638 : 2014 Cr LJ 2295 : 2014 (4) Scale 413 .
32. *Hardeep Singh v State of Punjab*, AIR 2014 SC 1400 : (2014) 3 SCC 92 : 2014 Cr LJ 1118 (SC) [Five-Judge Constitution Bench].
33. *Vijay Dhanuka v Najima Mamtaj,* 2014 Cr LJ 2295 (SC) : (2014) 14 SCC 638 .
34. *Alim v Taufiq*, 1982 Cr LJ 1264 (All).
35. *Chauthmal v State of Rajasthan*, 1982 Cr LJ 1403 (Raj) : 1982 WLN 396 ; *Tuneshwar Prasad Singh v State of Bihar*, AIR 1978 Pat 225 : 1978 Cr LJ 1080 .
36. *Swaroop Singh v State of Rajasthan*, 1976 Cr LJ 1655 (Raj).

37. *UP v Sant Prakash,* 1976 Cr LJ 274 , 283 (All—FB).
38. *Directorate of Enforcement v Deepak Mahajan*, AIR 1994 SC 1775 : (1994) 3 SCC 440 .
39. *Baldev Singh v State of Punjab*, 1975 Cr LJ 1662 , 1665 (Punj—FB).
40. *Maha Singh*, 1976 Cr LJ 346 : AIR 1976 SC 449 : (1976) 1 SCC 644 : AIR 1976 SC 456 : (1976) 2 SCC 808 .
41. *Krishan Kumar v State of Haryana*, ILR (1978) 2 Punj 305 .
42. *Ananth Kumar Naik v State of Andhra Pradesh*, 1977 Cr LJ 1797 , 1799 (AP).
43. *Asstt Collector of CEC Preventive v V Krishnamurthy*, 1983 Cr LJ 1880 .
44. *Ashok Kumar Todi v Kishwar Jahan*, AIR 2011 SC 1254 : (2011) 3 SCC 758 .
45. *Nirmal Singh Kahlon v State of Punjab*, AIR 2009 SC 984 : (2009) 1 SCC 441 . It was also observed in this case that by virtue of the provision in Article 21 of the Constitution, fair trial includes fair investigation.
46. *Asoke Kumar Chaudhuri v Kunal Saha,* AIR 2017 SC 618 .
47. Ins. by Act 45 of 1978, section 2 (w.e.f. 18-12-1978).
48. Section 40 "Offence".—Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter VA and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 118, 119, 120, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

49. *Anil Kumar Jha v State of Bihar*, 1992 Cr LJ 2510 (Pat) : 1992 (40) BLJR 707 .
50. *SEBI v Ajay Agarwal*, AIR 2010 SC 3466 : (2010) 3 SCC 765 .
51. *S Khushboo v Kanniammal,* AIR 2010 SC 3196 : (2010) 5 SCC 600 .
52. **See** *Dorabshah v Emperor*, (1925) 28 Bom LR 102 : AIR 1926 Bom 218 .
53. *Harishankar Rastogi v Girdhari Sharma*, 1978 Cr LJ 78 : AIR 1978 SC 1019 : (1978) SCC (Cri) 168 .
54. *Srimanta v State*, AIR 1960 Cal 519 : 1960 Cr LJ 1078 .
55. *Narayan Das v Bolta Ram*, 1973 Cr LJ 818 (FB); *Nar Bahadur Bhandari v State,* 2003 Cr LJ 2799 (Sikh), absence of a declaration as to a particular area to be a police station by the State Government under section 2(a) was held to be of no consequence for the lodging of an FIR. This was so because the Superintendent of Police of that area was an officer incharge of the police station under section 5(3) of the Delhi Special Police Establishment Act, 1946.
56. *Narasimaiah v State of Karnataka*, 2002 Cr LJ 4795 (Kant).
57. *The State of Bihar v Ram Naresh*, AIR 1957 SC 389 , 393 : 1957 Cr LJ 567 : 1957 SCR 279 .
58. *TA Rajendra v PV Ayyappan*, 1986 Cr LJ 1287 (Ker).
59. Ins. by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), section 2 (w.e.f. 31-12- 2009).
60. *Prem Das v State*, AIR 1961 All 590 (FB) : 1961 Cr LJ 737 .
61. *Kishori Lal v Mahadeo*, 1993 Cr LJ 1173 (All).

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CHAPTER I PRELIMINARY

[s 3] Construction of references.—

(1) In this Code,—

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,—

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,—

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area;

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code,—

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

(b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters—

(a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.

[s 3.1] State Amendments

Andaman and Nicobar Islands (U.T.).— *The following amendments were made by Regn. 1 of 1974, S. 3 (w.e.f. 30-3-1974).*

S. 3A.—(1) In its application to Union Territory of Andaman and Nicobar Islands, after S. 3, S. 3A shall be inserted as follows—

"3A. Special provision relating to Andaman and Nicobar Islands.—(1) References in this Code to—

(a) the Chief Judicial Magistrate shall be construed as references to the District Magistrate or, where the State Government so directs, also to the Additional District Magistrate;

(b) a Magistrate or Magistrate of the first class or of the second class or Judicial Magistrate of the first class or of the second class, shall be construed as references to such Executive Magistrate as the State Government may, by notification in the Official Gazette, specify.

(2) The State Government may, if it is of opinion that adequate number of persons are available for appointment as Judicial Magistrates, by notification in the Official Gazette, declare that the provisions of this section shall, on and from such day as may be specified in the notification, cease to be in force and different dates may be specified for different islands.

(3) On the cesser of operation of the provisions of this section, every inquiry or trial pending, immediately before such cesser before the District Magistrate or Additional District Magistrate or any Executive Magistrate, as the case may be, shall stand transferred, and shall be dealt with, from the stage which was reached before such cesser, by such Judicial Magistrate as the State Government may specify in this behalf."

Arunachal Pradesh & Mizoram.— *The following amendments were made by Gaz. of Ind., dt. 20-3- 1974. Pt. II, Section 3(ii), Ext., p. 421 (w.e.f. 1-4- 1974).*

S. 3(5).—In its application to the Union Territories of Arunachal Pradesh and Mizoram this provision stands modified as under:

(*i*) After sub-section (4) insert following sub-section (5)—

"(5) Notwithstanding anything contained in the foregoing provisions of this sub-section—

(i) Any reference in such of the provisions of this Code, as apply to the Union Territories of Arunachal Pradesh and Mizoram, to the Court mentioned in column (1) of the Table below shall, until the Courts of Session and Courts of Judicial Magistrates are constituted in the said Union territories, be construed, as references to the Court of Magistrate mentioned in the corresponding entry in column (2) of that Table.

Table

1	2
Court of Session or Sessions Judge or Chief Judicial Magistrate.	District Magistrate.
Magistrate or Magistrate of the First Class or Judicial Magistrate of the First Class.	Executive Magistrate.

(ii) the functions mentioned in clause (a) of sub-section (4) shall be exercisable by an Executive Magistrate."

Nagaland.—*The following amendments were made by Nagaland Gaz., dated 19-6-1975, Extra. No. 15*.

S. 3(5).—Modifications of the provisions with reference to the State of Nagaland are as follows:—

(a) After sub-section (4) following sub-section (5) which shall be deemed always to have been inserted:—

"(5) Notwithstanding anything contained in the foregoing provisions of this section—

(i) any reference in such of the provisions of this Code as apply to the State of Nagaland to the Court and authority mentioned in column (1) of the Table below shall, until the Courts of Session and Court of Judicial Magistrates are constituted in the said areas, be construed as references to the Court and authority mentioned in the corresponding entry in column (2) of that Table.

Table

1	2
Court of Session or Sessions Judge or Chief Judicial Magistrate.	District Magistrate or Additional District Magistrate
Magistrate or Magistrate of the First Class or Judicial Magistrate of the First Class.	Executive Magistrate.

(ii) references mentioned in sub-section (3) to a Judicial Magistrate and functions mentioned in sub-section (4) exercisable by a Judicial Magistrate and Executive Magistrate shall be construed as references to and exercised by, Deputy Commissioner and Additional Deputy Commissioner and Assistant to Deputy Commissioner appointed under any law in force:

Provided that an Assistant to Deputy Commissioner shall exercise such powers of a Judicial Magistrate as may be invested by the Governor."

[s 3.2] Separation of judiciary from executive.—

This section is the natural result of separation of the judiciary from the executive and allocations of functions between the Executive Magistrate and the Judicial Magistrates made in Chapter II of the Code. The revised set-up of Magistracy under different names for different areas necessitated introduction of the section to explain the corresponding Magistrates for each area. The first two sub-sections are concerned with references to Magistrates and Courts in the present Code; the third sub-section substantially equates the present set-up with corresponding set-up in any enactment passed before the commencement of the Code. "Any enactment passed before the commencement of this Code" means the repealed Code of Criminal Procedure, 1898, also.[62.] Sub-section (4) divides the functions exercisable by Magistrate under any law other than the Code into judicial and administrative or executive functions in clauses (a) and (b) and entrusts exercise of these functions respectively to the Judicial Magistrate and the Executive Magistrate.[63.]

[s 3.3] Appointment of Special Judge.—

The Notification for appointment of a special Judge related to allocation of cases registered at a police station to an existing Court of Special Judge of a particular District. The impugned Notification allocated certain cases to courts of Special Judges already established with consultation of the High Court. Thus, no further consultation with the High Court was required. Once a group of cases was allocated to the special court, other special courts could not deal with them.[64.]

62. *Somari Rai v Raghu Nath Prasad Sharma*, 1977 Cr LJ 718 (Pat) overruled in *Radha Devi v Mani Prasad Singh*, 1980 Cr LJ NOC 61 (Pat) : AIR 1980 Pat 41 (FB).

63. *Mammoo v State of Kerala*, AIR 1980 Ker 18 : 1980 Cr LJ NOC 75 (Ker); **Also see**, *AP Police Officers' Association*, 1981 Cr LJ 641 (AP).

64. *Prakash Singh Badal v State of Punjab*, AIR 2007 SC 1274 : (2007) 1 SCC 1 .

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[s 4] Trial of offences under the Indian Penal Code and other laws.—

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Sections 4 and 26 govern every criminal proceeding both as regards the tribunal by which a crime is to be tried and as to the procedure to be followed. The combined operation of sections 4(2) and 26(b) CrPC is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code, where the enactment which creates the offence indicates no special procedure.[65.]

Where a resident of Kerala had committed embezzlement in United Arab Emirates, it was held that Kerala police had powers to investigate, without prior sanction of the Government of India, an offence committed by an Indian citizen. It was further held that the proviso to section 188 CrPC requiring prior sanction of the Government of India is mandatory but applies only to inquiry or trial and does not apply to pre- inquiry stage, and as such it does not bar issuing summons, warrants or taking any other steps preliminary to an enquiry, and the proviso is not a condition precedent in taking cognizance of such offences.[66.]

Even where an offence is committed outside India by a citizen of India, it is subject to the jurisdiction of the courts of India.[67.]

[s 4.1] "Otherwise".—

The word "otherwise" points to the fact that the expression "dealt with" is all comprehensive and that investigation, inquiry or trial are some aspects of dealing with the offences.[68.] In view of the provisions of section 4, the power of releasing the motor vehicle seized under the Act has been conferred on specified authorities. Therefore, impliedly in this regard, the power of the Magistrate, being a court of general jurisdiction, will stand excluded.[69.]

A special court, established for trial of offences under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, can also take cognizance and try an offence under the IPC (such as offence under section 376 IPC) along with the offences under the Act in the same proceedings, without committal by Magistrate, if the offences are committed in the same transaction.[70.] The expression "subject to any enactment .... otherwise dealing with such offences", in section 4(2), was taken by the Supreme Court to mean "in the absence of any contrary provision in any other law,

provisions of the Code would apply." Section 5 does not nullify this effect of section 4(2).[71.]

[s 4.2] "Any other law".—

The words "any other law" in this section do not cover contempt of a kind punishable summarily by the High Courts.[72.] Where no Court of Municipal Magistrate has been established, the Supreme Court held that the ordinary Criminal Courts of general jurisdiction can take cognizance of the offences committed under the Municipal Act, rules regulations or by-laws made thereunder.[73.]

If the offence committed is cognizable, provisions of Chapter XII containing section 154 and onward would become applicable and it would be the duty of the police to register the FIR and investigate into the same. Section 4 CrPC provides that provisions of the Code would be applicable where an offence under the IPC or any other law is being investigated, inquired into, tried or otherwise dealt with. Thus, offences under any other law could also be investigated, inquired into or tried with according to the provision of the Code except in case of an offence where the procedure prescribed thereunder is different than the procedure prescribed under the Code.[74.]

[s 4.3] Fair trial.—

A fair trial means a trial in which bias or prejudice for or against the accused, witnesses or the cause which is being tried is eliminated. The Supreme Court stressed the importance of a fair trial in criminal cases. It was observed that adjournments are sought on the drop of hat by counsel, even though witnesses are present in court. The Supreme Court deprecated the conduced of a trial where cross-examination of one witness was done one year and eight months after his examination-in-chief.[75.] Dipak Misra J (speaking for the Bench) observed as follows:

> There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The court has a sacrosanct duty to see that the trial is conducted as per law.[76.]

[s 4.4] No copyright in judgment, being public property.—

A judgment is an affirmation by an authorised societal agent of the State speaking by warrant of law in the name of the State. Judgments belong to the State and its people. A judgment cannot therefore be treated as a document over which copyright can be claimed. Every judgment is a public document.[77.]

[s 4.5] Trial Commencement of.—

"Trial" means determination of issues adjudging the guilt or the innocence of a person. The person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same. Thus, the trial

commences only on charges being framed; it does not commence on the cognizance being taken.[78.]

[s 4.6] Expeditious hearing and disposal.—

For expeditious hearing of a case, every party must co-operate. It would not be proper for the Supreme Court to give any direction to a Magistrate regarding fixing of dates in a criminal case as it depends upon the docket of the Court. Any direction for out of turn hearing of a case would have the effect of putting some other case behind. But the Court directed that the Magistrate should make all possible endeavours to decide a criminal case expeditiously.

[s 4.7] Special Court.—

A Special Court has been constituted under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Supreme Court has described such special Court as essentially a Court of Session. It cannot take cognizance of an offence straightaway without the case being committed to it by a Magistrate.[79.]

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65. *Directorate of Enforcement v Deepak Mahajan*, AIR 1994 SC 1775 : (1994) 3 SCC 440 .
66. *Mohd. Sajeed K v State of Kerala*, 1995 Cr LJ 3313 (Ker).
67. *AV Mohan Rao v M Kishan Rao,* (2002) 6 SCC 174 : AIR 2002 SC 2653 : (2002) 111 Comp Cas 390 .
68. *Delhi Administration v Ram Singh*, AIR 1962 SC 63 : (1962) 1 Cr LJ 106 : (1962) 2 SCR 694 .
69. *Sharangdhar Sharma v State of Bihar*, 1992 Cr LJ 2063 (Pat) : 1992 (40) BLJR 393 .
70. *Re Director General of Prosecution,* 1993 Cr LJ 760 (Ker).
71. *Gangula Ashok v State of AP,* AIR 2000 SC 740 : 2000 Cr LJ 819 : (2000) 2 SCC 504 .
72. *Sukhdev Singh v Teja Singh*, AIR 1954 SC 186 : 1954 Cr LJ 460 .
73. *Attiq-ur-Rehman v Municipal Corp of Delhi*, AIR 1996 SC 956 : 1996 Cr LJ 1997 .
74. *Vishal Agrawal v Chhattisgarh State Electricity Board,* AIR 2014 SC 1539 : (2014) 3 SCC 696 : 2014 Cr LJ 1317 (SC).
75. *Vinod Kumar v State of Punjab,* AIR 2015 SC 1206 : (2015) 3 SCC 220 .
76. *Ibid*, Para 41 at p 1223 (of AIR).
77. *Infoseck Solutions v Kerala Law Times*, AIR 2007 Ker 1 : (2006) 4 Ker LT 311 . A judgment which has been reported by a particular reporter giving it his own lay out, head notes, comments, *etc.* becomes the subject matter of his copyright. **Also see** *Eastern Book Co v DB Modak*, (2008) 1 SCC 1 : AIR 2008 SC 809 .
78. *Hardeep Singh v State of Punjab,* AIR 2014 SC 1400 : (2014) 3 SCC 92 : 2014 Cr LJ 1118 (SC) [Five-Judge Constitution Bench].
79. *Moly v State of Kerala*, AIR 2004 SC 1890 : (2004) 4 SCC 584 .

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[s 5] Saving.—

Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

Ordinarily, the Code will not affect (i) any special law (see section 41, Penal Code); (ii) any local law (see section 42, Penal Code); (iii) any special jurisdiction or power, and (iv) any special form of procedure.

[s 5.1] "In the absence of any specific provision to the contrary".—

These words mean a specific provision that the Code is to override the special law.[80.] The Calcutta High Court has held that these words mean and contemplate a provision specifically withdrawing the saving provision relating to the special or local law. This specific provision to the contrary need not be in the Code itself, but may also be in a special or local law. These words do not refer to any possible contradiction between a specific provision in the Code and a provision in a special statute. In order that one provision can be said to be a specific provision to the contrary to another, the former must completely cover the field of operation of the latter and must altogether nullify it.[81.] The Allahabad High Court has held that "a specific provision to the contrary" means that the particular provision of the Code must, in order to affect the special law, clearly indicate, in itself and not merely by implication to be drawn from the statute generally, that the special law in question is to be affected, without necessarily referring in express terms to that special law or the effect on it intended to be produced.[82.]

The Code lays down procedure for trial of all criminal cases except "any special form of procedure prescribed by any other law for the time being in force". Therefore, the procedure prescribed in the Official Secrets Act, 1923, for holding trial *in camera* will apply in supersession of the provisions of the Code.[83.] Similarly, the Customs Act, 1962, is a special Act which confers special powers on the Customs Officer to confiscate goods and also prescribes a special form of procedure therefor. Therefore, those provisions of the Customs Act prevail over the provisions of the Code.[84.] Even when there is a specific provision as in section 4(1) of the Official Secrets Act, 1923, stating that the special procedure provided therein would not be invalid as being inconsistent with the provisions of the Code, where an enactment provides a special procedure only for some matters, its provisions must apply in regard to those matters only and the provisions of the Code will apply to the matters on which the special law is silent.[85.]

[s 5.2] "Special jurisdiction".—

The power of a High Court to institute proceedings for contempt and punish where necessary is a special jurisdiction which is inherent in all Courts of Record, and this

section expressly excludes special jurisdiction from the scope of the Code. Therefore, the High Court can deal with matters of contempt summarily and adopt its own procedure.[86.]

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80. *Emperor v Biram Sardar*, (1940) 43 Bom LR 157 : (1941) Bom 333 : AIR 1941 Bom 146 .
81. *Naresh Chandra Das v Emperor*, (1942) 1 Cal 436 : AIR 1942 Cal 593 .
82. *Baldeo v Emperor*, (1940) All 396 : AIR 1940 All 263 .
83. *Ramendra Singh v Mohit Choudhary*, 1969 Cr LJ 1361 : AIR 1969 Cal5 35 .
84. *Officer-in-charge Customs, Berhampore v Minali Biswas*, 1982 Cr LJ 1311 (Cal).
85. *Frank Dalton Larkins v State (Delhi Administration)*, 1985 Cr LJ 377 (Del); *Mirza Iqbal Hussain*, 1983 Cr LJ 154 : AIR 1983 SC 60 : 1982 (2) Scale 1081 : (1982) 3 SCC 516 .
86. *Central Talkies Ltd v Dwarka Prasad*, AIR 1961 SC 606 : 1961 (1) Cr LJ 740 ; *SL Bhasin v Rucy Colabawala*, (1973) 76 Bom LR 422 .

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CHAPTER II CONSTITUTION OF CRIMINAL COURTS AND OFFICES

The revised set-up of Criminal Courts and allocation of magisterial functions between the Judicial Magistrates and the Executive Magistrates is intended to bring about the separation of the Judiciary from the Executive. As far as possible, the pattern as provided in this Code has been adopted in most states.

As a consequence of the separation, there are two categories of Magistrates, namely, the Judicial Magistrates and the Executive Magistrates, the former being under the control of the respective High Court and the latter under the control of the State Government. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are "police" or "administrative" in nature are the concern of the Executive Magistrates.

So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 6] Classes of Criminal Courts.—

Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:—

- **(i) Courts of Session;**
- **(ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;**
- **(iii) Judicial Magistrates of the second class; and**
- **(iv) Executive Magistrates..**

Criminal Courts are classified into four groups, but in reality, there are more. The Courts classified above are (i) Courts of Session; (ii) Judicial Magistrates of the first class; (iii) Judicial Magistrates of the second class; (iv) in metropolitan areas Metropolitan Magistrates; and (v) the Executive Magistrates. Besides these, we have also "Courts constituted under any law, other than this Code", eg, the Courts of Coroners in the presidency towns constituted by the Coroners Act, 1871 (IV of 1871) and Courts of Cantonment Magistrates in cantonments, under the Cantonments Act, 1924 (II of 1924). The High Courts also act as a criminal court and have power to conduct a trial [section 474], revisional powers [section 397] and inherent powers to do complete

justice [section 482]. Under the Indian Constitution, the Supreme Court has been empowered to deal with certain criminal matters (cf. Articles 132, 134 and 136). The Supreme Court also has power to set up special court, which has been done in major scams such as Coal Block Allocation Scam, Vyapam Scam, etc.

The class known as Magistrates of the third class in the Code of Criminal Procedure, 1898 has been abolished and, in place of Presidency Magistrates, Metropolitan Magistrates are to function in metropolitan areas (see section 8).

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CHAPTER II CONSTITUTION OF CRIMINAL COURTS AND OFFICES

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[s 7] Territorial divisions.—

(1) Every State shall be a sessions division or shall consist of sessions divisions; and every sessions division shall for the purposes of this Code, be a district or consist of districts:

***Provided* that every metropolitan area shall, for the said purposes, be a separate sessions division and district.**

(2) The State Government may, after consultation with the High Court, alter the limits or the number of such divisions and districts.

(3) The State Government may, after consultation with High Court, divide any district into sub-divisions and may alter the limits or the number of such sub-divisions.

(4) The sessions divisions, districts and sub-divisions existing in a State at the commencement of this Code, shall be deemed to have been formed under this section.

A sessions division shall not consist of half a district or even one and a half district; it shall consist of one district or a plurality of districts. The word "district" means a district for purposes of criminal administration.[1] The limits of districts for purposes of criminal jurisdiction may change as a result of fluctuation in the midstream of a river.[2] The proviso to sub-section (1) corresponds to section 7(4) of the old Code of Criminal Procedure, 1898 and makes provision for the presidency towns which are now called metropolitan areas. The power of the State Government to alter the limits or the number of divisions, districts and sub-divisions is to be exercised in consultation with the High Court.

1. *Armugha Solagan*, AIR 1931 Mad 697 : (1931) 54 Mad 943 (FB).
2. *Narayan Das v Bolta Ram*, 1973 Cr LJ 818 (FB), **overruling** *Ramgobind v Askrit Singh*, 1960 Cr LJ 1128 : AIR 1960 Pat 342 .

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CHAPTER II CONSTITUTION OF CRIMINAL COURTS AND OFFICES

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As a consequence of the separation, there are two categories of Magistrates, namely, the Judicial Magistrates and the Executive Magistrates, the former being under the control of the respective High Court and the latter under the control of the State Government. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are "police" or "administrative" in nature are the concern of the Executive Magistrates.

So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 8] Metropolitan areas.—

(1) **The State Government may, by notification, declare that, as from such date as may be specified in the notification, any area in the State comprising a city or town whose population exceeds one million shall be a metropolitan area for the purposes of this code.**

(2) **As from the commencement of this Code, each of the Presidency towns of Bombay, Calcutta and Madras and the city of Ahmedabad shall be deemed to be declared under sub-section (1) to be a metropolitan area.**

(3) **The State Government may, by notification, extend, reduce or alter the limits of a metropolitan area but the reduction or alteration shall not be so made as to reduce the population of such area to less than one million.**

(4) **Where, after an area has been declared, or deemed to have been declared to be a metropolitan area, the population of such area falls below one million, such area shall, on and from such date as the State Government may, by notification, specify in this behalf, cease to be a metropolitan area; but notwithstanding such cesser, any inquiry, trial or appeal pending immediately before such cesser before any Court or Magistrate in such area shall continue to be dealt with under this Code as if such cesser had not taken place.**

(5) Where the State Government reduces or alters, under sub-section (3), the limits of any metropolitan area, such reduction or alteration shall not affect any inquiry, trial or appeal pending immediately before such reduction or alteration before any Court or Magistrate, and every such inquiry, trial or appeal shall continue to be dealt with under this Code as if such reduction or alteration had not taken place.

Explanation. **—In this section, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.**

This section lays down that (a) the presidency towns of Bombay, Calcutta and Madras and the city of Ahmedabad shall be deemed to be declared as metropolitan areas at the commencement of this Code, and (b) any area comprising a city or town and having a population exceeding one million may be declared by the State Government to be a metropolitan area. It is not obligatory on the State Government to declare such an area as metropolitan area; exercise of power is discretionary. Similarly, if the population of a metropolitan area falls below one million, it is only on the issuance of a notification by the Government that such area shall cease to be a metropolitan area. The State Government has been given power to extend, reduce, *etc*. the limits of a metropolitan area, but such extension, reduction, *etc* should not result in a reduction of the population below one million. The rest of the section deals with consequences of alteration, modification, *etc* on pending disputes. "Last preceding census of which relevant figures have been published" in the Explanation has reference to the census immediately preceding the notification, as population of respective areas will increase or diminish in each decade.

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 9] Court of Session.—

(1) **The State Government shall establish a Court of Session for every sessions division.**

(2) **Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.**

(3) **The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.**

(4) **The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.**

(5) **Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.**

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

***Explanation.*— For the purposes of this Code, "appointment" does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government.**

[s 9.1] State Amendments

Orissa.— *The following amendments were made by Orissa Act 6 of 2004.*

S. 9.—In its application to the State of Orissa, in section 9, to sub-section (3), add the following proviso, namely:—

"*Provided* that notwithstanding anything to the contrary contained in this Code, an Additional Sessions Judge in a district or sub-division, other than the district or sub-division, by whatever name called, wherein the head quarters of the Sessions Judge are situated, exercising jurisdiction in a Court of Session shall have all the powers of the Sessions Judge under this Code, in respect of the cases and the proceedings in the Criminal Courts in that district or sub-division for the purposes of sub-section (7) of section 116, sections 193 and 194, clause (a) of section 209 and sections 409 and 449:

Provided further that the above powers shall not be in derogation of the powers otherwise exercisable by an Additional Sessions Judge or a Sessions Judge under this Code."—*Orissa Act 6 of 2004, section 2.*

Uttar Pradesh.—*The following amendments were made by U.P. Act 1 of 1984, s. 2 (w.e.f. 1-5-1984)*.

S. 9(5-A).—In its application to Uttar Pradesh in section 9 after sub-section (5), insert the following sub-section:—

"(5-A) In the event of the death, resignation, removal or transfer of the Sessions Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held, the senior-most among the Additional Sessions Judges and the Assistant Sessions Judges present at the place, and in their absence the Chief Judicial Magistrate shall without relinquishing his ordinary duties assume charge of the office of the Sessions Judge and continue in charge thereof until the office is resumed by the Sessions Judge or assumed by an officer appointed thereto, and shall subject to the provision of this Code and any rules made by the High Court in this behalf, exercise any of the powers of the Sessions Judge."

The following amendments were made by U.P. Act 16 of 1976, s. 2 (w.e.f. 28-11- 1975).

S. 9(6).—In section 9 in sub-section (6) insert following proviso:—

"*Provided* that the Court of Session may hold or the High Court may direct the Court of Session to hold, its sitting in any particular case at any place in the sessions division, where it appears expedient to do so for considerations of internal security or public order, and in such cases, the consent of the prosecution and the accused shall not be necessary."

West Bengal.— *The following amendments were made by W.B. Act 24 of 1988, section 3.*

S. 9(3).—In sub-section (3) of section 9 of the principal Act, the following proviso shall be added:—

"*Provided* that notwithstanding anything to the contrary contained in this Code, an Additional Sessions Judge in a sub-division, other than the sub-division, by whatever name called, wherein the headquarters of the Sessions Judge are situated, exercising jurisdiction in a Court of Session, shall have all the powers of the Sessions Judge under this Code, in respect of the cases and proceedings in the Criminal Courts in that sub-division, for the purposes of sub-section (7) of section 116, sections 193 and 194, clause (a) of section 209 and sections 409, 439 and 449:

Provided further that the above powers shall not be in derogation of the powers otherwise exercisable by an Additional Sessions Judge or a Sessions Judge under this Code."

The section corresponds to section 9 of the Code of Criminal Procedure, 1898 with a difference that except for the power to establish Court of Session for every sessions division which is vested in the State Government, the power of appointment of Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge, the power of appointing Sessions Judge of one sessions division as Additional Sessions Judge of another division, the power to make arrangement for disposal of urgent applications before a Court of Session when the office of the Sessions Judge is vacant and the power to notify places where Courts of Session will ordinarily hold their sittings are all vested in the High Court. The Explanation is added to set at rest the controversy raised in *State of Assam v Ranga Muhammad*.[3.] Sub-section (2) confers on the High Court the power of appointment of Sessions Judge, whereas the Explanation clarifies that the power does not extend to the making of first appointment to the cadre which under Article 233 of the Constitution vests in the Governor. Judgments pronounced by a Sessions Judge cannot be challenged on the ground that his appointment was subsequently held invalid as having been in violation of Article 233 of the Constitution.[4.]

This section does not provide that there shall be only one place where the court of Sessions Judge should hold its sitting. Rather it provides that it may hold its sittings at such place or places as the High Court may specify.[5.]

In *Kehar Singh*'s case, it was held that a notification by the High Court for holding the sittings of the Sessions Court in Tihar Jail was not illegal as the notification amounted to declaring Tihar Jail as a place in addition to Tis Hazari and the Sessions Court held its sittings.[6.]

A detention order under section 4, Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, can be legally served on a person inside jail as "jail" includes "any place in India" under section 77 CrPC as well as under section 9(6) CrPC.

3. *State of Assam v Ranga Muhammad,* AIR 1967 SC 903 : 1967 SCR 454 : 1968(1) LLJ 282 .
4. *Gokaraju Rangaraju v State of Andhra Pradesh*, 1981 Cr LJ 876 : AIR 1981 SC 1473 : (1981) 3 SCC 132 .
5. *Ranjit Singh v Chief Justice*, 1986 Cr LJ 632 (Del) : ILR 1985 Delhi 388 .
6. *Kehar Singh v The State (Delhi Admn.),* 1989 Cr LJ 1 : AIR 1988 SC 1883 : (1988) 3 SCC 609 .

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 10] Subordination of Assistant Sessions Judges.—

(1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise Jurisdiction.

(2) The Sessions Judge may, from time to time, make rules consistent with the Code, as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application.

Issuance of a general order by the Sessions Judge was held to be permissible.[7.] Where a Sessions Judge has already transferred a sessions trial to an additional Sessions Judge for disposal, he has power to transfer a subsequent bail application pertaining to that sessions trial, although he (Sessions Judge) had rejected the earlier bail application. He also enjoys power of assigning any request application for disposal by an Additional Sessions Judge in the event of his absence or inability to act.[8.]

7. *Sesh N Bajpai v State of MP*, 1990 Cr LJ 1486 (MP).
8. *State of MP v Chandrahas Dewangan*, 1992 Cr LJ 711 (MP).

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[s 11] Courts of Judicial Magistrates.—

(1) In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification, specify:

9. **[*Provided* that the State Government may, after consultation with the High Court, establish, for any local area, one or more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other Court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established.]**

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court.

[s 11.1] State Amendments

Andaman and Nicobar Islands, Dadra and Nagar Haveli and Lakshadweep.— *The following amendments were made by Regn. 1 of 1974 (w.e.f. 30-3-1974).*

S. 11(3).—In its application to the Union territories to which this Regulation extends, in sub-section (3) of section 11 for the words "any member of the Judicial Service of the State, functioning as a Judge in a Civil Court", the words "any person discharging the functions of a Civil Court" shall be *substituted*.

Bihar.— *The following amendments were made by Bihar Act 8 of 1977, s. 2.*

S. 11(4).—After sub-section (3) of section 11 insert the following sub-section and shall be deemed always to have been inserted:—

"(4) The State Government may likewise establish for any local area one or more Courts of Judicial Magistrate of the first class or second class to try any particular cases or particular classes or categories of cases."

Haryana.— *The following amendments were made by Haryana Act 16 of 1976, s. 2 (w.e.f. 24-2-76).*

S. 11(1A).—After sub-section (1) of section 11 insert following sub-section and shall always be deemed to have been inserted:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class and of the second class in respect to particular cases or to particular class or classes of cases, or to cases generally in any local area."

[Refer also provisions on *validation* given with Haryana State amendment under section 13.]

Kerala.—*The following amendments were made by Kerala Act 21 of 1987*, *s. 2 and 3.*

S. 11(1A).—In section 11, after sub-section (1), the following sub-section shall be *inserted* namely:—

"(1A) The State Government may likewise establish as many special courts of Judicial Magistrates of First Class in respect to particular cases or to a particular class or particular classes of cases or in regard to cases generally, in any local area."

(2) The amendments made by sub-section (1) shall be, and shall be deemed to have been, in force for the period commencing from the 2nd day of December, 1974 and ending with the 18th day of December, 1978.

Validation.—Any notification issued by the State Government on or after the 2nd day of December, 1974 and before the commencement of the Code of Criminal Procedure (Amendment) Act, 1978 (Central Act 45 of 1978) purporting to establish any special Court of the Judicial Magistrate of the first class having jurisdiction over more than one district shall be deemed to have been issued under section 11 of the said code as amended by this Act and accordingly such notification issued and any act or proceeding done or taken or purporting to have been done or taken by virtue of it shall be deemed to be and always to have been valid."—Kerala Act 21 of 1987, s. 2 and 3.

Punjab.— *The following amendments were made by Punjab Act 9 of 1978, s. 2 (w.e.f. 14-4-1978).*

S. 11(1A).—In section 11 after sub-section (1) insert the following sub-section and shall always be deemed to have been inserted:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class in respect to particular cases or to particular classes of cases or in regard to cases generally, in any local area."

Rajasthan.—*The following amendments were made by Rajasthan Act 10 of 1977, s. 2 (w.e.f. 13-9- 1977)*.

S. 11(1A).—After sub-section (1) of section 11 insert following new sub-section:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class and of the second class in respect to particular cases, or to a particular class or particular classes of cases, or in regard to cases generally, in any local area."

Uttar Pradesh.— *The following amendments were made by U.P. Act No. 16 of 1976, s. 3 (w.e.f. 1-5- 1976).*

S. 11(1A).—After sub-section (1) of section 11 insert following sub-section and be deemed always to have been inserted:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class and of the second class in respect to particular cases, or to a particular class or particular classes of cases, or in regard to cases generally, in any local area."

[Refer also provision on *validation* given along with U.P. Amendment under section 13].

The conferment of powers of a Judicial Magistrate by the High Court on a member of the Judicial Service of the State, working as a Judge in a Civil Court under sub-section (3), is dependent on necessity or expediency, eg, where it may not be necessary to have a full-time Magistrate.

[s 11.2] Creation of Special Court by State in consultation with High Court.—

A Special Court of Judicial Magistrate, first class, was constituted by the State by notification entrusting to it trial/enquiry of certain crime number. The notification was issued without consultation with the High Court and non-inclusion of the disputed crime number. The Court said that it was a technical mistake on the part of the State Government. The same could be rectified by the State Government by issuing a fresh notification after consultation with the High Court.[10.] The Supreme Court also has power to set up special court, which has been done in major scams such as Coal Block allocation scam, Vyapam Scam, *etc*.

[s 11.3] Jurisdiction of Special Court.—

A Special Court was constituted under the Imports and Exports (Control) Act, 1947 (since repealed), and Special Court (Economic Offences) was created by issuing notification under the proviso to section 11. It was held that it had jurisdiction to try offences under the Indian Penal Code also. Its jurisdiction was not confined only to offences under the Act mentioned in the Schedule. The order discharging the accused on the ground that the Special Court had no jurisdiction was held to be not proper.[11.] Similar special courts have been constituted under various special laws, eg, Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 etc.

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9. Added by Act 45 of 1978, section 3 (w.e.f. 18-12-1978).

10. *Mohd Aslam v State of UP*, AIR 2007 SC 1901 : (2007) 4 SCC 584 .

11. *Dy Chief Controller of Imports & Exports v Roshanlal Agarwal,* 2003 Cr LJ 1698 : AIR 2003 SC 1900 : (2003) 4 SCC 139 .

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 12] *Chief Judicial Magistrate and Additional Chief Judicial Magistrate, etc.—*

(1) In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate.

(2) The High Court may appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate, and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

(3) (a) The High Court may designate any Judicial Magistrate of the first class in any sub-division as the Sub-divisional Judicial Magistrate and relieve him of the responsibilities specified in this section as occasion requires.

(b) Subject to the general control of the Chief Judicial Magistrate, every Sub-divisional Judicial Magistrate shall also have and exercise, such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrates) in the sub-division as the High Court may, by general or special order, specify in this behalf.

[s 12.1] State Amendments

Nagaland.—[Amended by Notification No. Law 170/74 Leg. dated 3-7-1975.]

In section 12, in sub-sections (1), (2) and (3) the words "High Court" shall be substituted by the words "State Government" wherever it occurs.

Uttar Pradesh.— *The following amendments were made by U.P. Act 1 of 1984, s. 3 (w.e.f. 1-5-1984).*

S. 12(4).—In section 12 after sub-section (3) insert following sub-section (4):—

"(4) Where the Office of the Chief Judicial Magistrate is vacant or he is incapacitated by illness, absence or otherwise for the performance of his duties, the senior most among the Additional Chief Judicial Magistrate and other Judicial Magistrates present at the place, and in their absence the District Magistrate and in his absence the senior most Executive Magistrate shall dispose of the urgent work of the Chief Judicial Magistrate."

This section provides for appointment of Chief Judicial Magistrate, Additional Chief Judicial Magistrate and Sub-divisional Judicial Magistrates by the High Court and exercise of powers by them. The Chief Judicial Magistrate seems to correspond to the District Magistrate on the executive side.

Under section 12(2) of the Code, the Additional Chief Judicial Magistrate is conferred the same power as the Chief Judicial Magistrate. Hence, transfer of a case for inquiry by Additional Chief Judicial Magistrate after taking cognizance to transferee magistrate is valid.[12.]

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12. *Vijay Dhanuka v Najima Mamtaj,* 2014 Cr LJ 2295 (SC) : (2014) 14 SCC 638 .

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 13] Special Judicial Magistrates.—

(1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this Code on a Judicial Magistrate [13][of the first class or of the second class, in respect to particular cases or to particular classes of cases, in any local area, not being a metropolitan area:]

Provided **that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.**

(2) Such Magistrates shall be called Special Judicial Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.

[14][**(3) The High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate in relation to any metropolitan area outside his local jurisdiction.]**

[s 13.1] State Amendments

Andhra Pradesh.— *Following Amendments were made by A.P. Act No. 2 of 1992, s. 2 (w.e.f. 10-4-1992).*

In section 13,—

(a) in sub-section (2) for the words "not exceeding one year at a time", substitute the words "not exceeding two years at a time".

(b) in sub-section (2), add the following proviso, namely:—

"*Provided* that any person who is holding the office of Special Judicial Magistrate at the commencement of the Code of Criminal Procedure (Andhra Pradesh Amendment) Act, 1992 and has not completed sixty five years of age shall continue to hold office for a term of two years from the date of his appointment."

Bihar.— *Following amendment made by Bihar Act 8 of 1977, s. 3 (w.e.f. 10-1-1977).*

In section 13 of the said Code for the words "in any district" the words "in any local area" shall be substituted and shall be deemed to have been always substituted.

Haryana.— *The following amendments were made by Haryana Act No. 16 of 1976, ss. 3 and 4 (w.e.f. 24-2-1976).*

S. 13.—In section 13 of the principal Act,—

(a) for the words "second class", the words "first class or second class" shall be substituted and shall always be deemed to have been substituted;

(b) for the words "in any district" the words "in any local area" shall be substituted and shall always be deemed to have been substituted.

Validation.—Notwithstanding anything contained in any judgment, decree or order of any Court, any notification issued by the Government before the commencement of this Act purporting to establish any Court of Judicial Magistrate having jurisdiction over more than one district shall be deemed to have been issued under s. 11 read with s. 13 of the principal Act as amended by this Act and be deemed to be and always to have been valid.

Himachal Pradesh.— *The following amendments were made by Himachal Pradesh Act 40 of 1976, s. 2 (w.e.f. 13-11- 1976).*

S. 13.—In s. 13 for the words "in any district" the words "in any local area" shall be substituted and shall be deemed to have been always substituted.

Punjab.— *The following amendments were made by Punjab Act No. 9 of 1978, s. 3 (w.e.f. 14-4-1978).*

S. 13(1).—In s. 13, sub-section (1), for the words "second class", the words "first class or second class" and for the words "in any district", the words "in any local area" shall be substituted.

Uttar Pradesh.— *The following amendments were made by U.P. Act No. 16 of 1976, ss. 4 and 11.*

S. 13.—In s. 13 for the words "second class" the words "first or second class" shall be substituted and for words, "in any district" words "in any local area" shall be substituted.

Validation.—Notwithstanding any judgment, decree or order of any Court—

(a) any notification of the State Government issued before Nov. 28, 1975, purporting to establish any Court of Judicial Magistrates having jurisdiction over more than one district shall be deemed to have been issued under section 11 read with s. 13 of the said Code as amended by this Act and be deemed to be and always to have been valid.

Sections 13 and 18 should be read together. The criticism levelled against the system of Honorary Magistracy and the expediency of retaining the system in some other form for disposal of petty cases with expedition and also in inaccessible localities with sparse population led to the enactment of these two sections for appointment of Special Judicial Magistrates and Special Metropolitan Magistrates. On request made by the Central or the State Government, the High Court may confer (a) upon any person (i) who holds or has held any post under the Government and (ii) who possesses specified qualifications in relation to legal affairs (b) all or any powers of second class Judicial Magistrates in respect of particular cases, particular classes of cases or cases generally. The appointment shall not exceed a period of one year at a time.

Sections 13(1) and 18(1) in so far as they authorised the conferment of powers on Special Judicial Magistrates or Metropolitan Magistrate were held violative of Article 14 of the Constitution by the Madras High Court but was later reversed by the Supreme Court.[15.]

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13. Subs. by Act 45 of 1978 section 4(i), for certain words (w.e.f. 18-12-1978).

14. Ins. by Act 45 of 1978, section 4(ii) (w.e.f. 18-12-1978).

15. *M Narayanaswamy v State of Tamil Nadu*, 1984 Cr LJ 1583 (Mad); *Kadra Pahadiya v State of Bihar,* AIR 1997 SC 3750 : 1997 Cr LJ 2232 : (1997) 4 SCC 287, sections 13(1) and 18(1) refer to special judicial magistrate, and special metropolitan magistrate is the matter of appointment and then say "a person who holds or has held any post under the Government." The Supreme Court said that these words could not be construed to confine appointments to Government servants, present or past, and to exclude members belonging to subordinate judicial services. The provisions were held to be not violative of Article 14 of the Constitution.

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 14] Local jurisdiction of Judicial Magistrates.—

(1) Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits of the areas within which the Magistrates appointed under s. 11 or under s. 13 may exercise all or any of the powers with which they may respectively be invested under this Code:

16.[*Provided* that the Court of a Special Judicial Magistrate may hold its sitting at any place within the local area for which it is established.]

(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.

17.[**(3) Where the local jurisdiction of a Magistrate, appointed under s. 11 or s. 13 or s. 18, extends to an area beyond the district, or the metropolitan area, as the case may be, in which he ordinarily holds Court, any reference in this Code to the Court of Session, Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall, in relation to such Magistrate, throughout the area within his local jurisdiction, be construed, unless the context otherwise requires, as a reference to the Court of Session, Chief Judicial Magistrate, or Chief Metropolitan Magistrate, as the case may be, exercising jurisdiction in relation to the said district or metropolitan area.]**

[s 14.1] State Amendment

Maharashtra.— *The following amendments were made by Maharashtra Act No. 23 of 1976, s. 2 (w.e.f. 10-6-1976).*

S. 14A.—After Section 14 of the Code of Criminal Procedure, 1973 (2 of 1974), in its application to the State of Maharashtra the following section shall be inserted:—

"14A. Investing Judicial Magistrates with jurisdiction in specified cases of local area.—The High Court may invest any Judicial Magistrate with all or any of the powers conferred or conferrable by or under this Code upon a Judicial Magistrate in respect to particular cases or to a particular class or classes of cases or in regard to cases generally in any local area consisting of all or any of the districts specified by it in this behalf."

An Incharge Magistrate cannot take cognizance of offences arising within the jurisdiction of another Magistrate having such jurisdiction.[18.]

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16. Added by Act 45 of 1978 section 5(a) (w.e.f. 18-12-1978).
17. Ins. by Act 45 of 1978, section 5(b) (w.e.f. 18-12-1978).
18. *Venkangouda v VP Angadi*, 1976 Cr LJ 572 (Kant).

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 15] Subordination of Judicial Magistrates.—

(1) Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.

(2) The Chief Judicial Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Judicial Magistrates subordinate to him.

[s 15.1] State Amendment

Bihar.— *The following amendments were made by Bihar Act No. 8 of 1977, s. 4 (w.e.f. 10-1-1977).*

S. 15(3).—In its application to State of Bihar, in section 15 after sub-section (2) following sub-section inserted and deemed always to have been so inserted:—

"(3) Any Judicial Magistrate exercising powers over any local area extending beyond the district in which he holds his Court, shall be subordinate to the Chief Judicial Magistrate of the said district and references in this Code to the Sessions Judge shall be deemed to be references to the Sessions Judge of that district where he holds his Court."

There is general subordination of the Judicial Magistrate to the Chief Judicial Magistrate who is also empowered to make orders as to the distribution of business among the Judicial Magistrates.[19.]

19. *Prem Narain Singh v Ramraj Singh*, 1991 (1) Crimes 4 (All).

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 16] Courts of Metropolitan Magistrates.—

(1) In every metropolitan area, there shall be established as many Courts of Metropolitan Magistrates, and at such places, as the State Government may, after consultation with the High Court, by notification, specify.

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The jurisdiction and powers of every Metropolitan Magistrate shall extend throughout the metropolitan area.

[s 16.1] State Amendment

Uttar Pradesh.— *The following amendments were made by U.P. Act No. 1 of 1984, s. 4 (w.e.f. 1-5- 1984).*

S. 16(4).—In section 16 after sub-section (3) following sub-section shall be inserted:—

"(4) Where the Office of the Chief Metropolitan Magistrate is vacant or he is incapacitated by illness, absence or otherwise for the performance of his duties, the senior most among the Additional Chief Metropolitan Magistrates and other Metropolitan Magistrates present at the place, shall dispose of the urgent work of the Chief Metropolitan Magistrate."

The jurisdiction of every Metropolitan Magistrate extends to try an offence committed at any place within the metropolitan area.[20.] Allotment of areas in the metropolitan city to different Magistrates is made for administrative convenience.[21.]

The Chief Judicial Magistrate is competent to take cognizance of any offence, committed anywhere in his district, notwithstanding the fact that the area in which the offence was committed happens to fall within the local limits of the area assigned by the Chief Judicial Magistrate to some other Judicial Magistrate, subordinate to him, in accordance with the provisions of sections 14 and 15 CrPC. Of course taking of such cognizance by the Chief Judicial Magistrate would be possible only if the complaint or police report, as the case may be, is presented in his court instead of being presented in the court of the Judicial Magistrate within the local limits of whose jurisdiction the crime might have been committed.[22.]

20. *Jethalal v Khimji*, (1974) 76 Bom LR 270 .
21. *Sevantilal S Shah, v State of Gujarat* 1969 Cr LJ 63 : AIR 1969 Guj 14 .
22. *Mahesh Chand v State of Rajasthan*, 1985 Cr LJ 301 Raj (FB) : AIR 1986 Raj 58 .

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 17] Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrate.—

(1) The High Court shall in relation to every metropolitan area within its local jurisdiction, appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area.

(2) The High Court may appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate, and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

This section empowers the High Court to make the appointments, while under the old Code, the power to make such appointments was given to the State Government.

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 18] Special Metropolitan Magistrates.—

(1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this Code on a Metropolitan Magistrate, in respect to particular cases or to particular classes of cases, [23].[***] in any metropolitan area within its local jurisdiction:

Provided **that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.**

(2) Such Magistrates shall be called Special Metropolitan Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.

[24].[**(3) The High Court or the State Government, as the case may be, may empower any Special Metropolitan Magistrate to exercise, in any local area outside the metropolitan area, the powers of a Judicial Magistrate of the first class.]**

[s 18.1] State Amendment

Andhra Pradesh.— *Following Amendments were made by A.P. Act 2 of 1992, s. 3.*

S. 18(2).—In section 18 in sub-section (2) for the words "not exceeding one year at a time" the words "not exceeding two years at a time" shall be substituted.

Following proviso was added by A.P. Act 2 of 1992, s. 3.

In section 18 in sub-section (2), the following proviso shall be added, namely:—

Provided that a person who is holding the office of Special Metropolitan Magistrate at the commencement of the Code of Criminal Procedure (Andhra Pradesh Amendment) Act, 1992, and has not completed sixty-five years of age shall continue to hold office for a term of two years from the date of his appointment.

Maharashtra.— *The following amendments were made by Maharashtra Act No. 23 of 1976, s. 3 (w.e.f. 10-6-1976).*

S. 18(1).—In section 18 of the said Code, in sub-section (1) for the words "in any Metropolitan area" the words "in one or more Metropolitan areas" shall be substituted.

See Comment on section 13, *supra*.

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23. The words "or to cases generally" omitted by Act 45 of 1978, section 6(i) (w.e.f. 18-12-1978).

24. Subs. by Act 45 of 1978 section 6(ii), for sub-section (3) (w.e.f. 18-12-1978).

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 19] Subordination of Metropolitan Magistrates.—

(1) The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

(2) The High Court may, for the purposes of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.

(3) The Chief Metropolitan Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Metropolitan Magistrates and as to the allocation of business to an Additional Chief Metropolitan Magistrate.

A Chief Metropolitan Magistrate by rule cannot curtail/limit the statutory powers of a Metropolitan Magistrate.[25.]

25. *Raju*, 1975 Cr LJ 1199 (1200) (Mad).

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 20] Executive Magistrates.—

(1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have [26] [such] of the powers of a District Magistrate under this Code or under any other law for the time being in force [27] [, as may be directed by the State Government.]

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub-division shall be called the Sub-divisional Magistrate.

[28] **[(4A) The State Government may, by general or special order and subject to such**

control and directions as it may deem fit to impose, delegate its powers under sub-section (4) to the District Magistrate.]

(5) Nothing in this section shall preclude the State Government from conferring, under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

[s 20.1] State Amendment

Uttar Pradesh.— *The following amendments were made by U.P. Act 1 of 1984, s. 5 (w.e.f. 1-5-1984).*

S. 20(6).—In section 20 of the said Code, after sub-section (5) following sub-section shall be inserted:—

"(6) the State Government may delegate its powers under sub-section (4) to the District Magistrate."

[s 20.2] CrPC (Amendment) Act, 2005 [*Clause (2)*].—

This clause seeks to insert sub-section (4A) in section 20 to enable the State Government to delegate its powers to the District Magistrates for the purposes of placing the Executive Magistrates in charge of a sub-division. (*Notes on Clauses*).

COMMENT

There are five classes of Executive Magistrates: (1) the District Magistrate; (2) the Additional District Magistrate; (3) the Sub-divisional Magistrate; (4) Executive Magistrates and (5) Special Executive Magistrates (see section 21). Besides these, in relation to a metropolitan area, the State Government may confer all or any of the powers of the Executive Magistrate on the Commissioner of Police under any law for the time being in force. Appointment of certain police officers as Executive Magistrates for exercising control over left wing extremists was held violative of Article 21 of the Constitution as no person can be a judge in his own case.[29.]

Section 20(1) CrPC empowers the State Government to appoint as many persons as it thinks fit as Executive Magistrates and appoint one of them as the District Magistrate. The words "as many persons" would include Commissioner of Police also. Section 20(5) CrPC also permits States to confer powers of Executive Magistrates in a Metropolitan area on Police Commissioners. A Police Commissioner thus can be appointed as an Executive Magistrate, and he can be further appointed as ADM in Brihan Bombay having powers of a DM for the purposes of sections 18 and 20 of the Immoral Traffic (Prevention) Act, 1956.[30.]

26. Sub. by Act 45 of 1978 section 7(a), for "all or any" (w.e.f. 18-12-1978).

27. Ins. by Act 45 of 1978 section 7(b) (w.e.f. 18-12-1978).

28. Ins. by Act 25 of 2005, section 2 (w.e.f. 23-6-2006).

29. *S Bharat Kumar v Chief Election Commissioner of India*, 1995 Cr LJ 2608 (AP) : 1995 (1) Andh LT Cri 230 .

30. *AN Roy, Commr of Police v Suresh Sham Singh*, AIR 2006 SC 2677 : (2006) 5 SCC 745 .

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 21] Special Executive Magistrates.—

The State Government may appoint, for such term as it may think fit, Executive Magistrates, to be known as Special Executive Magistrates for particular areas or for the performance of particular functions and confer on such Special Executive Magistrates such of the powers as are conferrable under this Code on Executive Magistrates, as it may deem fit.

The section confers power on the State Government to appoint Special Executive Magistrates (1) for particular areas or (2) for the performance of particular functions. It can confer on them such powers of the Executive Magistrates as it deems fit. Where *Tehsildars* and Deputy-*Tehsildars* were appointed as Special Executive Magistrates and were specially empowered to exercise powers under sections 133, 143 and 144 CrPC by the Tamil Nadu Government, it was held that the State Government was competent to appoint them as such and confer powers on them as the Executive Magistrates, and Special Executive Magistrates are not required to possess legal qualifications because they generally deal with matters pertaining to public peace and maintenance of public order.[31.]

31. *State of Tamil Nadu v R Gandhi*, 1995 Cr LJ 3129 (Mad), the court relied on *State of Maharashtra v Mohd Salim Khan*, (1991) 1 SCC 550 : 1990 (2) Scale 1099 .

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 22] Local Jurisdiction of Executive Magistrates.—

(1) **Subject to the control of the State Government, the District Magistrate may, from time to time, define the local limits of the areas within which the Executive Magistrates may exercise all or any of the powers with which they may be invested under this Code.**

(2) **Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.**

A Magistrate appointed to act as a Magistrate has, unless his powers have been restricted to a certain local area, jurisdiction over the entire district.[32.]

32. *Sarat Chunder Roy v Bepin Chandra Roy*, (1902) ILR 29 Cal 389; *Krishnad as,* (1955) Nag 58; *Parichan Singh v Heman Singh*, AIR 1961 Pat 94 .

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So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 23] Subordination of Executive Magistrates.—

(1) **All Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-divisional Magistrate) exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.**

(2) **The District Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Executive Magistrates subordinate to him and as to the allocation of business to an Additional District Magistrate.**

The District Magistrate has powers to transfer a case from the Court of one Executive Magistrate to that of another.[33.]

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33. *Shiv Narain Pandey v Vindhyachal Pandey*, 1988 (2) Crimes 252 , 254 (All).

The Code of Criminal Procedure, 1973

CHAPTER II CONSTITUTION OF CRIMINAL COURTS AND OFFICES

The revised set-up of Criminal Courts and allocation of magisterial functions between the Judicial Magistrates and the Executive Magistrates is intended to bring about the separation of the Judiciary from the Executive. As far as possible, the pattern as provided in this Code has been adopted in most states.

As a consequence of the separation, there are two categories of Magistrates, namely, the Judicial Magistrates and the Executive Magistrates, the former being under the control of the respective High Court and the latter under the control of the State Government. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are "police" or "administrative" in nature are the concern of the Executive Magistrates.

So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[34] [[s 24] Public Prosecutors.—

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

***Provided* that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.**

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public

Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where, in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided **that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate, under sub-section (4).**

[35]**[*Explanation*.—For the purposes of this sub-section,—**

(a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.]

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

[36][Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section].

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]

[s 24.1] State Amendment

Bihar.— *The following amendments were made by Bihar Act No. 16 of 1984, s. 2 (w.e.f. 24-8-1984).*

S. 24(6).—In section 24 for sub-section (6), substitute the following and deemed always to have been substituted:—

"(6) Notwithstanding anything contained in sub-section (5) where in a State there exists a regular cadre of prosecuting officers, the State Government may also appoint a Public Prosecutor or an Additional Public Prosecutor from among the persons constituting such cadre."

Haryana.— *The following amendments were made by Haryana Act No. 14 of 1985, s. 2 (w.e.f. 29-11-1985).*

S. 24(6).—In its application to the State of Haryana to sub-section (6) of section 24 of the Code of Criminal Procedure, 1973, the following Explanation shall be added:—

"Explanation.—For the purpose of sub-section (6), the persons constituting the Haryana State Prosecution Legal Service (Group A) or Haryana State Prosecution Legal Service (Group B), shall be deemed to be a regular cadre of prosecuting officers."

Karnataka.— *The following amendments were made by Karnataka Act No. 20 of 1982, s. 2 (w.e.f. 3-9-1981).*

S. 24.—In its application to the State of Karnataka, in section 24 in sub-section (1),—

(i) words and punctuation mark "or the State Government shall", omitted.

(ii) for the words "appoint Public Prosecutor," substitute the words "or the State Government shall appoint a Public Prosecutor".

Madhya Pradesh.— *The following amendments were made by M.P. Act, 21 of 1995, section 3 (w.e.f. 24-5-1995)—*

In section 24 of the Principal Act—

(i) **S. 24(6).—**In sub-section (6), for the words, brackets and figure "Notwithstanding anything contained in sub-section (5)", the words, brackets, letter and figures "Notwithstanding anything contained in sub-section (5), but subject to the provisions of sub-section (6A)" shall be substituted and shall be deemed to have been substituted with effect from 18th December, 1978;

(ii) **S. 24(6-A).—**After sub-section (6), the following sub-section shall be inserted and shall be deemed to have been inserted with effect from 18th December, 1978, namely:—

(6A) Notwithstanding anything contained in sub-section (6), the State Government may appoint a person who has been in practice as an advocate for not less than seven years as the Public Prosecutor or Additional Public Prosecutor for the district and it shall not be necessary to appoint the Public Prosecutor or Additional Public Prosecutor for the district from among the persons constituting the Cadre of Prosecuting Officers in the State of Madhya Pradesh and the provisions of sub-sections (4) and (5) shall apply to the appointment of a Public Prosecutor or Additional Public Prosecutor under this sub-section;

(iii) **S. 24(7).—**In sub-section (7), after the words, brackets and figure "sub-section (6)" the words, brackets, figure and letter "or sub-section

(6A)" shall be inserted and shall be deemed to have been inserted with effect from 18th December, 1978; and

(iv) In sub-section (9), for the words, brackets and figure, "sub-section (7)", the words, brackets, figures and letter "sub-section (6A) and sub-section (7)" shall be substituted and shall be deemed to have been substituted with effect from 18th December, 1978.

Maharashtra.—*The following amendments were made by Maharashtra Act No. 34 of 1981*, *section 2 (w.e.f. 20-5-1981).*

S. 24.—In section 24 in its application to the State of Maharashtra—

(a) in sub-section (1), the words "after consultation with the High Court", shall be deleted;

(b) in sub-section (4), for the words "in consultation with the Sessions Judge," the words "with the approval of the State Government," shall be substituted.

Rajasthan.— *The following amendments were made by Rajasthan Act No. 1 of 1981, s. 2 (w.e.f. 10-12- 1980).*

S. 24(6).—Sub-section (6) of section 24 in its application to the State of Rajasthan shall be deemed always to have been substituted by the following:—

"(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular cadre of Prosecuting Officers, the State Government may also appoint a Public Prosecutor or an Additional Public Prosecutor from among the persons constituting such cadre."[37.]

Tamil Nadu.— *The following amendments were made by Tamil Nadu Act No. 42 of 1980, s. 2 (w.e.f. 1-12-1980).*

S. 24(6).—(a) in sub-section (6), after the expression "sub-section (5)", the following shall be inserted, namely:—

"but subject to the provisions of sub-section (6A)";

S. 24(6A).—(b) after sub-section (6), the following sub-section shall be inserted, namely:—

"(6-A) Notwithstanding anything contained in sub-section (6), the State Government may appoint a person who has been in practice as an advocate for not less than seven years, as the Public Prosecutor or Additional Public Prosecutor for the district and it shall not be necessary to appoint the Public Prosecutor or Additional Public Prosecutor for the district from among the persons constituting the cadre of Prosecuting Officers in the State of Tamil Nadu and the provisions of sub-sections (4) and (5) shall apply to the appointment of a Public Prosecutor or Additional Public Prosecutor under this sub-section";

S. 24(7).—(c) in sub-section (7), after the expression "sub-section (6)", the expression "or sub-section (6A)" shall be inserted.

Uttar Pradesh.—(1) *The following amendments were made by U.P. Act No, 33 of 1978, s. 2 (w.e.f. 9- 10-1978).*

S. 24(1).—In its application to the State of Uttar Pradesh in section 24(1),

(i) after the words "Public Prosecutor", words, "and one or more Additional Public Prosecutors" shall be inserted and be deemed always to have been so inserted.

S. **24(7).—**(ii) After sub-section (6), sub-section (7) shall be inserted, and deemed always to been so inserted, as follows:—

"(6) For the purposes of sub-sections (5) and (6), the period during which a person has been in practice as a pleader, or has rendered service as a Public Prosecutor, Additional Public Prosecutor or Assistant Public Prosecutor shall be deemed to be the period during which such person has been in practice as an advocate."

(2) *The following amendments were made by U.P. Act 18 of 1991, s. 2 (w.e.f. 16-2- 1991).*

S. **24.—**In section 24

(a) in sub-section (1), the words "after consultation with the High Court," shall be *omitted*;

(b) sub-sections (4), (5) and (6) shall be *omitted*.

(c) in sub-section (7), the words "or sub-section (6)" shall be *omitted*.

West Bengal.— *The following amendments were made by W.B. Act 26 of 1990, s. 3 (w.e.f. 1-3-1991).*

S. 24(6).—(1) In sub-section (6) of section 24 for the words "shall appoint a Public Prosecutor or an Additional Public Prosecutor only", the words "may also appoint a Public Prosecutor or an Additional Public Prosecutor" shall be *substituted*.

(2) *The following amendments were made by W.B. Act 25 of 1992, s. 3.*

(2) in sub-section (6), the proviso shall be omitted.

[s 24.2] CrPC (Amendment) Act, 2005 [*Clause (3)*].—

This clause seeks to amend sub-section (6) of section 24 to clarify the expressions "regular Cadre of Prosecuting Officers" and "Prosecuting Officer". (*Notes on Clauses*).

COMMENT

Next in importance to the impartiality of the tribunal is the integrity of the person incharge of the prosecution, namely, the Public Prosecutor.[38.] The Public Prosecutor is not a protagonist of any party. In theory, he stands for the State in whose name all prosecutions are conducted. It must be remembered that all offences affect the public as well as the individual injured, and that in all prosecutions, the State is the prosecutor. The State either proceeds itself or lends the sanction of its name. The offence is dealt with as an invasion on the public peace, and not a mere contention between the complainant and the accused.[39.] The ideal Public Prosecutor is not concerned with securing convictions, or with satisfying departments of the State Government with which he has to be in contact. He must consider himself as an agent of justice.[40.] It

has been held that a Public Prosecutor has to act with responsibility. He cannot be totally guided by the instructions of the Government but is required to assist the Court and the Court is duty-bound to see the precedents and pass appropriate orders.[41.] It has been observed by the Supreme Court that a Public Prosecutor has wider duties to perform than to merely ensure that the accused be punished.[42.]

[s 24.3] Classes of Public Prosecutors.—

There are under this section, read with section 2(u), the following classes of Public Prosecutors:

(1) Public Prosecutors appointed by the Central Government,

(2) Public Prosecutors appointed by the State Government, under sub-section (1),

(3) Public Prosecutors,

(4) Additional Public Prosecutors, appointed by the State Government under sub-section (2),

(5) Special Public Prosecutors appointed by the Central Government and

(6) Special Public Prosecutors, appointed by the State Government under sub-section (6).

Besides them, there are Assistant Public Prosecutors appointed by the State Government and, in some cases, by the District Magistrate (see section 25). Under sub-section (u) of section 2, Public Prosecutor includes "any person acting under the directions of a Public Prosecutor." For appointment of a Public Prosecutor or Additional Public Prosecutors to conduct cases in the High Court, the appointment has to be made in consultation with the High Court, and appointment for the districts has to be made on the basis of recommendation of the District Magistrate, who must make his recommendation in consultation with the Sessions Judge. However, for the appointment of a Special Public Prosecutor for the purpose of any case or class of cases, no consultation with any authority is required.[43.]

A Special Public Prosecutor is a Public Prosecutor within the meaning of section 199(2) of this Code.[44.] The Public Prosecutor is expected to be fair. He is not bound to examine every witness whose name is cited in the charge-sheet. The District Magistrate cannot include the name of a person who is not recommended by the Sessions Judge. The Public Prosecutor alone should conduct his case and not the complainant or his counsel. An Advocate General cannot represent the State in an important civil or criminal proceeding unless he is appointed as a Public Prosecutor under section 24(1) of CrPC.[45.] A Legal Remembrancer cannot be made *ex officio* Public Prosecutor.[46.] Panel of a single person cannot be considered to be a panel for the purpose of section 24(4) of CrPC.[47.] The Director of Litigation, Government of Rajasthan, appointed a Special Public Prosecutor for the conduct of a pending sessions trial at the instance of a private party, directing the party concerned to pay his remuneration, it was held that it could not be presumed that this would legalise a corrupt practice or undermine the dignity, impartiality or efficiency of the Special Public Prosecutor or there should be any apprehension that the prosecution and the trial will be biased, partial or unfair.[48.]

When the Bihar Government moved to appoint Public Prosecutors and Additional Public Prosecutors from amongst the cadre of Assistant Public Prosecutors, it was

held that the Assistant Public Prosecutors do not belong to the regular cadre of Prosecuting officers as contemplated in section 24 of CrPC; hence, they cannot claim appointment as Public Prosecutors or Additional Public Prosecutors under section 24(6) of CrPC. However, they can be eligible, if they possess the requisite experience as required under the section.[49.]

In *Deepak Aggarwal v Keshav Kaushik,*[50.] the Supreme Court dealt with the question that whether a District Attorney/Additional District Attorney/Public Prosecutor/Assistant Public Prosecutor/Assistant Advocate General, who is full-time employee of the Government and governed and regulated by the statutory rules of the State and is appointed by direct recruitment through the Public Service Commission, is eligible for appointment to the post of District Judge under Article 233(2) of the Constitution? Answering in affirmative, the three-judge bench held that an advocate, on his appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, does not cease to be "advocate" and since he continues to be an "advocate", he cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2).

All categories are not entitled to equal pay scales.[51.]

[s 24.4] Regular cadet of prosecuting officers [Section 24(6)].—

Persons from the cadre as existed on the date of the coming into force of the 1978 amendment were entitled to appear on behalf of the State to prosecute the sessions cases before the Sessions Court or the Additional Court of Session. However, if any one from the panel is in the opinion of the State Government not suitable for appointment, the Government may appoint from the panel of names prepared by the District Magistrate under sub-section (4). Persons from the existing cadre are entitled for appointment only if they are found competent.[52.]

The Government cannot keep posts vacant on the ground of administrative necessity and financial constraints. The appointment of a Prosecutor is a compelling constitutional necessity, obligatory under the CrPC. Financial constraints cannot absolve the State of its constitutional obligation.[53.]

While preparing a panel for such appointments, the Sessions Judge and the District Magistrate are required to consult and discuss the names of the persons to be included in the panel. In cases of renewal or extension of the term of the person so appointed, the same procedure as provided under section 24(4) of CrPC has to be followed. However, the Courts can examine whether there was any infirmity in the "decision-making process", although they cannot substitute their own judgment. Appeal was allowed and matter was sent back to the District Magistrate for making the panel as directed in terms of section 24(4) of CrPC and UP Legal Remembrancer Manual.[54.]

In the case of the then Tamil Nadu's Chief Minister Jayalalitha, important questions regarding the appointment of Special Public Prosecutor were raised. The State Government appointed the Special Public Prosecutor which continued unobjected for about seven months and the State Government acquiesced in the process of appointment. Thus, it was held that subsequently it is not entitled to raise grievance that there has been no consultation or insufficient consultation with Chief Justice of the High Court.[55.]

In the above case, it was further held by the Supreme Court that the notification for the appointment of respondent as Special Public Prosecutor was issued without demur and the respondent started working on the said post. Evidence, oral and documentary,

was recorded and the trial was almost completed. It was held that withdrawal of appointment of Special Public Prosecutor after six months of his functioning is motivated by *mala fides*. Hence, the notification purporting to revoke the appointment of respondent is liable to be struck down.[56.]

The case took further turn when in *K Anbazhagan v State of Karnataka,*[57.] the appointment of Bhavani Singh as Special Public Prosecutor for the appeal was challenged. It was contended that once the State of Karnataka had appointed Bhavani Singh as the Special Public Prosecutor under sections 24(8) and 301(1) of CrPC to conduct trial after Mr Acharya resigned, his appointment would continue for the purpose of appeal. A two-judge bench comprising of Justices Lokur and Banumathi had divergent views. Justice Lokur held that a Public Prosecutor appointed for the High Court and who is put in charge of a particular case in the High Court can appear and plead in that case only in the High Court without any written authority whether that case is at the stage of inquiry or trial or appeal. On the other hand, Justice Banumathi held that section 24(8) of CrPC says the Central Government or the State Government may appoint a Special Public Prosecutor for the purposes of "any case" or "class of cases" a person who has been in practice as an advocate for not less than ten years. The scheme of the Code thus makes a clear distinction between the appointment of a Public Prosecutor "to a Court" or a "District or local area" and with limited territory and appointment of Special Public Prosecutor "to a case or class of cases". The matter was therefore referred to a three-judge bench.

The three-judge bench in *K Anbazhagan v State of Karnataka*[58.] held that the appointment of Bhavani Singh as the Public Prosecutor for the trial did not make him eligible to prosecute in the appellate proceedings as well on behalf of the prosecuting agency.

[s 24.5] Assignment of sensitive cases.—

Cases like those under the Customs Act, 1962 and Gold (Control) Act, 1968 filed by the Union of India should be assigned only to counsel having experience and ability in that branch of law, so that justice should not suffer and the economy of the country not be put in jeopardy.[59.]

[s 24.6] Transfer of cases.—

The matter of appointment was transferred under section 406 from one State to another State. It was held that the appointment was to be carried out by the Government of the State to which the case was transferred.[60.]

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34. Subs. by Act 45 of 1978 section 8, for section 24 (w.e.f. 18-12-1978).
35. Ins. by Act 25 of 2005, section 3 (w.r.e.f. 18-12-1978).
36. Ins. by Act 5 of 2009, section 3 (w.e.f. 31-12-2009).

37. *State of Rajasthan v Hari Das*, 1996 Cr LJ 4364 (Raj), each accused should be fined separately, an order imposing a joint, held, illegal.

38. *VK Ghodwani v State*, AIR 1965 Cal 79 ; *State of Rajasthan v Pukh Raj*, AIR 1965 Raj 196 : 1965 Cr LJ 677 .

39. *Queen-Empress v Murarji Gokuldas*, (1888) 13 Bom 389, 390-91.

40. Per Anantanarayanan CJ, in *Mohambaram v Jayavelu*, 1970 Cr LJ 241 , 245 : AIR 1970 Mad 63 .

41. *Abdul Wahab K v State of Kerala*, AIR 2018 SC 4265 .

42. *Sidhartha Vashisht v State (NCT) of Delhi*, AIR 2010 SC 2352 : (2010) 6 SCC 1 .

43. *Shankar Sinha v State of Bihar*, 1995 Cr LJ 3143 (Pat).

44. *Ramaniah v Special Public Prosecutor*, AIR 1961 AP 190 : 1961 Cr LJ 601 .

45. *Kerala v Kolarveettil Krishnan*, 1982 Cr LJ 301 (Ker).

46. *Supdt & Remembrancer of Legal Affairs, WB v Prafulla Majhe*, 1977 Cr LJ 853 (Cal) (DB).

47. *V Ramchandra v MC Jagadhodhara*, 1986 Cr LJ 1820 (AP).

48. *Phool Singh v State of Rajasthan*, 1993 Cr LJ 3273 (Raj) : 1993 (2) ALT Cri 22.

49. *Jaidhari Roy v State of Bihar*, 1996 Cr LJ 1498 (Pat); **relied on** *KJ John v The State of Kerala KK John's* case, AIR 1990 SC 1902 : 1990 Cr LJ 1777 : (1990) 4 SCC 191 : 1990(2) Scale 20 ; the judgment of *Sri Nivas Narayan v State of Bihar*, (1992) 2 Pat LJR 118 was held *per incuriam*.

50. *Deepak Aggarwal v Keshav Kaushik,* (2013) 5 SCC 277 : 2013 (1) Scale 564 .

51. *Sita Ramsingh v State of UP,* AIR 2003 All 208 , Assistant Public Prosecutors, Public Prosecutors and Additional Public Prosecutors could not be put on equal pay for equal work.

52. *V Ramchandra v MC Jagadhodhara*, 1986 Cr LJ 1820 (AP).

53. *PM Sunny v State of Kerala*, 1986 Cr LJ 1517 (Ker).

54. *Harpal Singh Chauhan v State of UP*, AIR 1993 SC 2436 : 1993 Cr LJ 3140 : (1993) 3 SCC 552 ; *B Rajeswar Reddy v K Narasimhachari*, 2002 Cr LJ 1 (AP—FB) : 2001 (6) Andh LD 679, mere filing of an application, pursuant to anotification issued by the Metropolitan Sessions Judge, by Advocates for appointment as Public Prosecutors/Additional Public Prosecutors would not by itself amount to solicitation of work within the meaning of Rule 36 of the Bar Council of India Rules, 1975; *Madho Singh v State of Rajasthan*, 2002 Cr LJ 1694 (Raj), appointment of Special Public Prosecutor cannot be made merely on the basis of an application of the complainant without proper application of mind; *Neelima Sadanand Vartak v State of Maharashtra*, AIR 2005 Bom 431 : (2005) 5 Bom CR 750 : (2005) 4 MhLJ 326 DB, provision of section 24(4) not complied with while constituting the panel.

55. *Selvi J Jayalalitha v State of Karnataka,* 2014 Cr LJ 9 : (2014) 2 SCC 401 .

56. *Ibid*, para 21 at p 15 (of Cr LJ).

57. *K Anbazhagan v State of Karnataka,* (2015) 6 SCC 86 : 2015 (5) Scale 125 .

58. *K Anbazhagan v State of Karnataka,* (2015) 6 SCC 158 : 2015 (5) Scale 125 .

59. *KI Pavunny v Asst Collector, Central Excise Collection,* (1997) 1 Ker LJ 489 .

60. *Jayendra Saraswati Swamigal v State of TN*, AIR 2008 SC 2997 : (2008) 10 SCC 180 .

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CHAPTER II CONSTITUTION OF CRIMINAL COURTS AND OFFICES

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As a consequence of the separation, there are two categories of Magistrates, namely, the Judicial Magistrates and the Executive Magistrates, the former being under the control of the respective High Court and the latter under the control of the State Government. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are "police" or "administrative" in nature are the concern of the Executive Magistrates.

So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

[s 25] Assistant Public Prosecutors.—

(1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

[61] **[(1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.]**

(2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

***Provided* that a police officer shall not be so appointed—**

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.

[s 25.1] State Amendment

Orissa.— *The following amendments were made by Orissa Act 6 of 1995, s. 2 (w.e.f. 10-3-1995).*

S. 25(2).—In section 25 of the Code of Criminal Procedure, 1973 (2 of 1974), to sub-section (2) the following proviso shall be inserted namely:—

Provided that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutor through Police Officers.

Uttar Pradesh.— *The following amendments were made by U.P. Act No. 16 of 1976, s. 5 (w.e.f. 1-5-1976).*

S. 25(2).—In its application to the State of Uttar Pradesh to section 25(2) a proviso added and be deemed always to have been so added:—

"*Provided* that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutor through police officers."

West Bengal.— *The following amendments were made by W.B. Act 17 of 1985, s. 3.*

S. 25(3).—In its application to the State of West Bengal, for sub-section (3) of section 25 following sub-section shall be substituted:—

"(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, any advocate may be appointed to be the Assistant Public Prosecutor in charge of that case,—

(a) where the case is before the Court of a Judicial Magistrate in any area in a sub-division wherein the headquarters of the District Magistrate are situated, by the District Magistrate; or

(b) where the case is before the Court of a Judicial Magistrate in any area in a sub-division, other than the sub-division referred to in clause (a), wherein the headquarters of the Sub-divisional Magistrate are situated, by the Sub-divisional Magistrate; or

(c) where the case is before the Court of a Judicial Magistrate in any area, other than the area referred to in clauses (a) and (b), by a local officer (other than a police officer) specially authorised by the District Magistrate in this behalf.

Explanation.—For the purposes of this sub-section,—

(i) "advocate" shall have the same meaning as in the Advocates Act, 1961;

(ii) "local officer" shall mean an officer of the State Government in any area, other than the area referred to in clauses (a) and (b)."

The State Government is obliged to appoint one or more Assistant Public Prosecutors for conducting prosecutions in every district before Courts of Magistrates. A police

officer who (i) is not below the rank of Inspector or (ii) who has not taken any part in the investigation of the offence is also eligible for being appointed as Assistant Public Prosecutor where no Assistant Public Prosecutor is available. The discretion under sub-section (3) should be so exercised by the Magistrate as to see that the State case is properly conducted. Sections 24(8) and 25(1) are not violative of Article 14 of the Constitution. Sections lay down sufficient guidelines for appointment of Special Public Prosecutors and Assistant Public Prosecutor. Accused cannot claim that the prosecution should be conducted by a particular prosecutor only.[62.]

Section 25 does not say like section 24 that the Assistant Public Prosecutor should also be a practising advocate. In fact, under section 25, under certain circumstances even a police officer can be appointed as Assistant Public Prosecutor.[63.]

[s 25.2] "Available".—

The word "available" may mean either not appointed and, therefore, not available, or not available because he is otherwise engaged, eg, before another Magistrate, or is absent on leave, or has resigned. The Calcutta High Court in a case under the old Code where the word used was "absent" held that absence does not include a situation where a Public Prosecutor is appointed but is not available to conduct the case. In such a case, the Additional District Magistrate could not appoint a lawyer on behalf of the State and call him Public Prosecutor.[64.] The situation now seems to be covered by the use of words "available for the purposes of any particular case."

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61. Ins. by Act 45 of 1978, section 9 (w.e.f. 18-12-1978).
62. *Vijay v State of Maharashtra*, 1986 Cr LJ 2093 (Bom).
63. *K Tirupathi v Government of Andhra Pradesh*, 1983 Cr LJ 1243 (AP).
64. *Raj Kishore Rabidas v State*, 1969 Cr LJ 860 : AIR 1969 Cal 321 .

The Code of Criminal Procedure, 1973

CHAPTER II CONSTITUTION OF CRIMINAL COURTS AND OFFICES

The revised set-up of Criminal Courts and allocation of magisterial functions between the Judicial Magistrates and the Executive Magistrates is intended to bring about the separation of the Judiciary from the Executive. As far as possible, the pattern as provided in this Code has been adopted in most states.

As a consequence of the separation, there are two categories of Magistrates, namely, the Judicial Magistrates and the Executive Magistrates, the former being under the control of the respective High Court and the latter under the control of the State Government. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are "police" or "administrative" in nature are the concern of the Executive Magistrates.

So far as the Magistracy is concerned, for performance of magisterial functions allotted to the Executive, there will be in each district the District Magistrate [section 20(1)]; the Additional District Magistrates (where necessary) [section 20(2)]; the Sub-divisional Magistrates [section 20(4)]; and other Subordinate Executive Magistrates [section 20]. The State Government may, if it thinks fit, appoint Special Executive Magistrates [section 21].

On the judicial side for each district (other than metropolitan area—see section 8), there will be a Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Sub-divisional Judicial Magistrates and other Judicial Magistrates [sections 11 and 12]. The High Court may, if requested by the Central or the State Government, appoint "Special Judicial Magistrates" [section 13].

65. [[s 25A] Directorate of Prosecution.—

(1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.

(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.]

[s 25A.1] State Amendments

Karnataka.— *The following amendments were made by Karnataka Act 30 of 2012 s. 2 (w.e.f. 24-10- 2012).*

S. 25A.—In its application to Karnataka in section 25A,—

(a) for sub-section (2), the following shall be substituted, namely:—

"(2) The post of Director of prosecution and Government litigations, or a Deputy Director of Prosecution and other cadres shall be filed in accordance with the Cadre and Recruitment Rules framed under the Karnataka State Civil Services Act, 1978 (Karnataka Act 14 of 1990)."

(b) for sub-section (5), the following shall be substituted, namely:—

"(5) Every Public Prosecutor, Additional Public Prosecutor appointed by the State Government from the cadre of Prosecutors recruited under the recruitment rules framed by the Government under the Karnataka State Civil Services Act, 1978 shall be subordinate to the Director of prosecution and Government litigations and every Public Prosecutor, Additional Prosecutor and Special Prosecutor appointed under sub-section (8) of section 24 shall be subordinate to the Advocate General."

(c) In sub-section (6), for the words "Deputy Director of Prosecution" the words "Director of Prosecution" shall be substituted.

[s 25A.2] CrPC (Amendment) Act, 2005 [*Clause* (4)].—

This clause inserts a provision empowering the State Government to establish the Directorate of Prosecution. The Director of Prosecution shall function under the administrative control of the Head of the Home Department in the State (*Notes on Clauses*).

65. Ins. by Act 25 of 2005, section 4 (w.e.f. 23-6-2006).

The Code of Criminal Procedure, 1973

CHAPTER III POWER OF COURTS

This chapter deals with three topics, *viz*., (1) Courts by which offences are triable; (2) the sentences which these Courts can pass including passing of sentence in case of conviction of several offences at one trial; and (3) modes of conferring of powers on, and withdrawal of powers from, persons or officials by the High Court and the State Government. The last section of the Chapter deals with exercise of powers of Judges and Magistrates by their successors in office.

[s 26] Courts by which offences are triable.—

Subject to the other provisions of this Code,—

(a) any offence under the Indian Penal Code (45 of 1860) may be tried by—

(i) the High Court, or

(ii) the Court of Session, or

(iii) any other Court by which such offence is shown in the First Schedule to be triable:

[1] **[*Provided* that any** [2] **[offence under section 376,** [3] **[section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB] or section 376E of the Indian Penal Code (45 of 1860)] shall be tried as far as practicable by a Court presided over by a woman.]**

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by—

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable.

[s 26.1] State Amendment

Uttar Pradesh.— *The following amendments were made by U.P. Act 1 of 1984, section 6 (w.e.f. 1-5- 1984).*

S. 26.—In section 26 for clause (b) the following clause shall be substituted: —

"(b) any offence under any other law may be tried—

(i) when any Court is mentioned in this behalf in such law, by such court, or by any Court superior in rank to such court, and

(ii) when no Court is so mentioned, by any Court by which such offence is shown in the First Schedule to be triable, or by any Court superior in rank to such Court."

Offences have been divided into two categories, *viz*., offences under the Indian Penal Code (IPC) and offences under any other law. As far as offences under the Penal Code are concerned, they are triable by the High Court, the Court of Session or any other Court shown in the First Schedule to this Code. When no Court is mentioned for any offence under any law other than the IPC to try such offences, the High Court has been empowered. However, reading it with section 4(2) of the Code, it is clear that the legislative intent is not that the High Court can take cognizance of such an offence directly and try the accused itself, without following the procedure laid down in the Code.[4.]

[s 26.2] Hierarchy of Courts.—

The criminal jurisprudence of the country proceeds on the basis that a person is innocent and the burden rests on the prosecution to prove beyond all reasonable doubts as regards the guilt of the accused persons. It is with this background that the Code of Criminal Procedure (CrPC) has conferred on to the hierarchy of the Courts specific powers to deal with the matter as may seem to be just and proper. There is no scope for arbitrary exercise of powers because they are circumscribed and have to be exercised in accordance with the provisions of law and not *dehors* the same. Even discretionary powers have to be exercised in a manner consistent with the known principles of law and not otherwise.[5.]

[s 26.3] Legislative Changes.—

Section 26 of the Code has been amended *vide* the Criminal Law (Amendment) Act, 2018. The 2018 Amendment Act has substituted the words, "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" for the words, "section 376A, section 376B, section 376C, section 376D" in the proviso to section 26(a). The change has been made to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code, within the purview of section 26.

1. Ins. by Act 5 of 2009, section 4 (w.e.f. 31-12-2009).
2. Subs. by Act 13 of 2013, section 11, for "offence under section 376 and sections 376A to 376D of the Indian Penal Code (45 of 1860)" (w.r.e.f. 3-2-2013).
3. Subs. by Act 22 of 2018, section 10, for "section 376A, section 376B, section 376C, section 376D" (w.r.e.f. 21-4-2018).
4. *Harish Chandra v Kavindra Narain*, ILR (1937) All 220 : AIR 1936 All 830 .
5. *Dwarka Dass v State of Haryana*, (2003) 1 SCC 204 : AIR 2003 SC 185 : 2002 (8) Scale 396 : 2003 Cr LJ 414 .

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CHAPTER III POWER OF COURTS

This chapter deals with three topics, *viz*., (1) Courts by which offences are triable; (2) the sentences which these Courts can pass including passing of sentence in case of conviction of several offences at one trial; and (3) modes of conferring of powers on, and withdrawal of powers from, persons or officials by the High Court and the State Government. The last section of the Chapter deals with exercise of powers of Judges and Magistrates by their successors in office.

[s 27] Jurisdiction in the case of juveniles.—

Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the Court is under the age of sixteen years, may be tried by the Court of a Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960 (60 of 1960) or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

[s 27.1] Juvenile Courts.—

Earlier Juvenile Justice Act, 1986 laid that offenders below 16 years if male, and under 18 years if female shall be treated as juveniles in conflict with law. Vide amendment in 2000, Juvenile Justice Act, 2000, was brought which made the age uniform as 18 years irrespective of the gender. In 2015, the Act has been amended further and juveniles between the age bracket of 16 and 18, if alleged to have committed heinous/serious offences shall be treated as adults.

The Code of Criminal Procedure, 1973

CHAPTER III POWER OF COURTS

This chapter deals with three topics, *viz*., (1) Courts by which offences are triable; (2) the sentences which these Courts can pass including passing of sentence in case of conviction of several offences at one trial; and (3) modes of conferring of powers on, and withdrawal of powers from, persons or officials by the High Court and the State Government. The last section of the Chapter deals with exercise of powers of Judges and Magistrates by their successors in office.

[s 28] Sentences which High Courts and Sessions Judges may pass.—

(1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

The Code first enumerates the Courts by which different offences can be tried, and then proceeds to define the limits of sentences which they can pass. These limits show the maximum sentence which a Court can pass; they have nothing to do with the maximum penalty provided for an offence. The High Court can pass any sentence provided by law; so also, can a Sessions Judge or Additional Sessions Judge, but any sentence of death passed by the latter is subject to confirmation by the High Court. An Assistant Sessions Judge can pass any sentence short of a sentence of death, imprisonment for life or imprisonment exceeding ten years.

[s 28.1] "Pass any sentence."—

Power of the appellate Court to pass any sentence must be measured by the power of the Court from whose judgment an appeal has been brought before it.[6.]

[s 28.2] Passing of sentence.—

The question of sentence is always a difficult and complex question. The accused persons may be hardened or professional criminals or they may have taken to crime only recently or may have committed the crime under the influence of bad company or due to provocative wrongful action seriously injuring the feelings and sentiments of the accused. In considering the adequacy of the sentence which should neither be too severe nor too lenient, the Court has to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including antecedents) and station in life of the offender.[7.]

Sentencing is always a matter of judicial discretion subject to any mandatory minimum prescribed by law. In judging the adequacy of a sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals, to society, effect of the punishment on the offender, possibility of correction and reformation are some of the factors which would ordinarily be taken into consideration by Courts.[8.] In awarding punishment need for rehabilitation and deterrence should be kept in view.[9.]

Law should adopt corrective machinery of deterrence based on factual matrix. By means of deft modulation, the sentencing process should be made stern where it ought to be so and tempered with mercy where the circumstances so merit. Undue sympathy should not be shown thereby imposing inadequate sentence. Such approach would do more harm to the justice system than good.[10.]

The object is to protect society and deter crime. Imposing meagre sentence under liberal attitude or too sympathetic a view merely on account of lapse of time would bring about counter-productive results. Punishment should conform to and be consistent with the atrocity and brutality with which the crime was perpetrated, the enormity of crime warranting public abhorrence and should respond to the society's cries for justice against the criminal.[11.]

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6. *Jagat Bahadur v State of Madhya Pradesh*, AIR 1966 SC 945 : 1966 Cr LJ 709 .
7. *Modi Ram v The State of Madhya Pradesh*, AIR 1972 SC 2438 , at p 2439 : (1972) 2 SCC 630 : 1972 Cr LJ 1521 ; *Chacko v State of Kerala*, 1971 Cr LJ 1251 (Ker) : 1971 Ker LT 115 : 1971 KLR 475 .
8. *Ramashraya Chakravarti v State of Madhya Pradesh*, 1976 Cr LJ 334 : AIR 1976 SC 392 : (1976) 1 SCC 281 .
9. *Nadella Venkatakrishna Rao v State of Andhra Pradesh*, AIR 1978 SC 480 : 1978 Cr LJ 641 , (1978) 1 SCC 208 .
10. *State of Karnataka v Raju*, AIR 2007 SC 3225 : (2007) 11 SCC 490 .
11. *State of UP v Kishan,* AIR 2005 SC 1250 : (2005) 10 SCC 420 .

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CHAPTER III POWER OF COURTS

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[s 29] Sentences which Magistrates may pass.—

(1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding [12.] [ten thousand rupees], or of both.

(3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding [13.] [five thousand rupees], or of both.

(4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class.

[s 29.1] State Amendment

Maharashtra.—*The following amendments were made by Maharashtra Act 27 of 2007 (w.e.f. 1-12-2007)*.

S. 29.—In its application to the State of Maharashtra, in Section 29—

(a) in sub-section (2) for the words "ten thousand rupees" the words "fifty thousand rupees" shall be substituted.

(b) in sub-section (3) for the words "five thousand rupees" the words "ten thousand rupees" shall be substituted.

Punjab.— *The following amendments were made by Punjab Amendment Act, 1983 (22 of 1983) (w.e.f. 27-6-1983) vide President's Act No. 1 of 1984.*

S. 29A—In its application to the State of Punjab in relation to the "specified offences" as defined in section 2(b) of Code of Criminal Procedure after section 29 section 29A shall be inserted as under:—

"29A. Sentences which Executive Magistrate may pass.—An Executive Magistrate may pass a sentence of imprisonment for a term not exceeding three years or of fine not exceeding five thousand rupees, or of both."

Union Territory of Chandigarh.—In its application to the Union Territory of Chandigarh, in relation to the "specified offences" under section 2(b) of the Code of Criminal Procedure (Punjab Amendment) Act, 1983 (22 of 1983), the provisions of the Code to apply to that territory subject to modifications undermentioned. These modifications to remain in force for one-year w.e.f. 27-7-1984.

S. 29A.—After section 29, insert as under—

"29A. Sentences which Executive Magistrates may give.—An Executive Magistrate may pass a sentence of imprisonment for a term not exceeding three years or of fine not exceeding five thousand rupees, or of both."

[s 29.2] CrPC (Amendment) Act, 2005 [*Clause (5)*].—

This clause seeks to amend section 29 of the Code to enhance the sentencing power of the Magistrate of the First Class to impose fine from five thousand rupees upto ten thousand rupees and Magistrate of the Second Class from one thousand rupees upto five thousand rupees. This is being proposed keeping in view the depreciation of the value of the rupee since 1973 and to make the provision more deterrent. (*Notes on Clauses*).

COMMENT

This section lays down the quantum of sentence which different categories of Magistrates are empowered to impose. The Magistrate of the first class can pass sentence only up to three years. But he can try such cases and if he feels that the accused deserves more severe punishment than it is within his powers to give, he can take recourse to section 325 of the Code and forward the accused to the Chief Judicial Magistrate.[14.] Power available to the Chief Judicial Magistrate cannot be exercised by such Magistrate when he presides over the Children's Court.[15.]

[s 29.3] Fine under Negotiable Instruments Act, section 138.—

The bar put on the Magistrate under section 29 CrPC is not applicable upon the High Court. The High Court may impose a fine which may extend to twice the amount of the cheque. The award of imprisonment for only one day, though not sufficient, it was not interfered with because of the special circumstances of the case. The career of the accused as a cine artist would have been spoiled affecting also the production of the films in which she was working. The High Court enhanced the fine to twice the amount of the cheque.[16.]

12. Subs. by Act 25 of 2005, section 5(a), for "five thousand rupees" (w.e.f. 23-6-2006).
13. Subs. by Act 25 of 2005, section 5(b), for "one thousand rupees" (w.e.f. 23-6-2006).

14. *Shivarajveerappa Purad v State of Karnataka*, 1977 Cr LJ 1113 (Kant).

15. *Saroop Kumar v State of HP*, 1989 Cr LJ 1884 (HP).

16. *Y Sreelatha v Mukanchand Bohra*, 2003 Cr LJ 1938 (Mad); *Pankajbhai Naggi Bhai Patel v State of Gujarat*, AIR 2001 SC 567 : 2001 Cr LJ 950 : (2001) 2 SCC 595 , Judicial Magistrate first class cannot impose a sentence of fine beyond Rs 5,000. The non-obstante clause contained in section 138 of the Negotiable Instruments Act, 1881, does not have the effect of enlarging the power under section 29. *Selvaraj v P Viswanathan*, 1999 Cr LJ 4766 (Mad—FB) : 1999 (2) CTC 652 , the Metropolitan Magistrate or Judicial Magistrate of first class, while trying the offence under section 138 of the NI Act, can impose a fine of more than Rs 5,000, in view of the express language of sections 142 and 138 of the NI Act.

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[s 30] Sentence of imprisonment in default of fine.—

(1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

***Provided* that the term—**

(a) is not in excess of the powers of the Magistrate under section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 29.

Where a fine is imposed on an accused, and it is not paid, the law provides that he can be imprisoned for a further term in addition to the substantive imprisonment awarded, if any. This section defines the limits of a Magistrate's power to award imprisonment in default of payment of fine.

[s 30.1] "Authorised by law".—

See sections 63 to 67 of the IPC.

[s 30.2] Sub-section (2).—

A Magistrate can pass the maximum sentence of imprisonment under section 29 and add to it the sentence in default of payment of fine.

The Code of Criminal Procedure, 1973

CHAPTER III POWER OF COURTS

This chapter deals with three topics, *viz*., (1) Courts by which offences are triable; (2) the sentences which these Courts can pass including passing of sentence in case of conviction of several offences at one trial; and (3) modes of conferring of powers on, and withdrawal of powers from, persons or officials by the High Court and the State Government. The last section of the Chapter deals with exercise of powers of Judges and Magistrates by their successors in office.

[s 31] Sentence in cases of conviction of several offences at one trial.—

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

***Provided* that—**

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

This section relates to the quantum of the punishment that the Court has jurisdiction to pass where the accused is convicted of two or more offences at *one* trial (sections 218–223). The Court may pass separate sentences, subject to the provisions of section 71 of the IPC, for the several offences of which the Court finds the accused guilty. The aggregate punishment and the length of the period of imprisonment must not exceed the limit fixed by the provisos. Section 71 of the IPC provides (1) that where an offence is made up of parts each of which parts is itself an offence, the offender can be punished only for one of such offences; (2) that where an offence falls under two or more definitions of offences or where several acts, each of which is an offence, constitute when combined a different offence, then the punishment could be awarded only for any one of such offences. These are rules of substantive law. The present section is a rule of procedural law.

Where a person is convicted of several offences at one trial, it is the discretion of the Court to order for the sentences to run con-currently. But this discretion has to be exercised along judicial lines and not mechanically.[17.] Explaining the proposition a three-Judge Bench of the Supreme Court observed as follows:

> 20. Under s. 31, Cr.P.C. it is left to the full discretion of the court to order the sentence to run concurrently in case of conviction for two or more offence. It is difficult to lay down any strait jacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for con-current running of sentence, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case.[18.]

In a case where a person was convicted and sentenced to imprisonment for several offences, including one sentence for life imprisonment, it was held by the Supreme Court that the proviso to section 31(2) would come into play. No consecutive sentence can be imposed. Therefore, the order imposing the sentence to run consecutively was held to be illegal.[19.]

[s 31.1] "At one trial".—

These words are the key-notes to the section. The section applies only when more offences than one are tried at the same trial.

[s 31.2] "May...sentence".—

The passing of separate sentences is not obligatory; it is only optional.

[s 31.3] "Which such Court is competent to inflict".—

These words refer back to section 29 which defines the powers of different grades of Magistrates to award sentences.

[s 31.4] "To commence the one after the expiration of the other",

i.e., consecutively. When nothing is said, one sentence ordinarily operates at the expiration of another.

[s 31.5] "Unless the Court directs that such punishments shall run concurrently."—

It is in the option of a Magistrate who passes different sentences on an accused at the trial to order that they shall run all together, ie, the lesser sentences be merged in the greater. Any sentence of imprisonment in default of fine has to be in excess of, and not concurrent with, any other sentence of imprisonment to which the prisoner may have been sentenced. The Court has no power to make various sentences of imprisonment in default of payment of fine concurrent with each other.[20.] The section authorises the passing of concurrent sentences in cases of substantive sentences of imprisonment,[21.] a *fortiori* in the case of sentence of life imprisonment.[22.] Two consecutive sentences of imprisonment for life cannot be awarded.[23.] In view of

sections 53 and 64 IPC, substantive sentence and sentence in default of fine are two distinct sentences; hence, it was held that they could not be made concurrent.[24.]

In *Nagaraja Rao v CBI,*[25.] the Supreme Court held that it is legally obligatory upon the Court of first instance that while awarding sentence, specify in clear terms in order of conviction as to whether the sentences awarded to the accused would run concurrently or consecutively.

[s 31.6] Cases.—

Direction that punishments should run concurrently is an integral part of the judgment. Therefore, a direction how the sentences in the two cases should run, issued subsequent to the disposal of the cases would amount to alteration of the judgment which is barred by section 362. Hence, such directions cannot be issued after the judgment is pronounced.[26.]

The sentences were ordered to run consecutively on the ground that the accused was previously convicted for committing an identical offence. It was held by the Supreme Court that sentences for offences committed under single transaction must run concurrently and not consecutively. Thus, in view of the settled position of law and the tender age of the accused on the date of offences, the sentences were modified to run concurrently and hence reduced to ten years in total.[27.]

In a conviction for several offences, the Court said that the accused could not be sentenced to imprisonment for a period longer than 14 years. The sentence of 20 years rigorous imprisonment imposed on accused was set aside.[28.]

In *Muthuramalingam v State,* [29.]a three-judge bench of the Supreme Court noted difference of opinion of the Supreme Court in *OM Cherian*[30.] and *Duryodhan Rout*[31.] on the one hand, and *Kamalanantha*[32.] and *Sanaullah Khan*[33.] on the other hand. The three-judge bench noted that while in *OM Cherian's case* (supra), the Supreme Court had held that consecutive life sentences are not permissible, the view taken in *Kamalanantha (supra)* and *Sanaullah Khan (supra)* appeared to strike a discordant note. Also the decision in *Duryodhan Rout's case (supra)* held that consecutive life sentences are not permissible in terms of section 31 on account of the proviso to sub-section (2) to section 31 not permitting any such consecutive life sentences as the cumulative effect of such sentence shall inevitably take the total period of imprisonment to more than 14 years. The following question was referred to a five-judge bench:

> Whether it is legally permissible for a Court to award consecutive life sentences to a convict based on a series of murders for which the convict was tried in a single trial.

This question was referred to a Constitution Bench for authoritative pronouncement. The five-judge bench in *Muthuramalingam v State*[34.] held that while multiple sentences of imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded cannot be directed to run consecutively. The Constitution Bench further held that the power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in section 31. The Court can, therefore, legitimately direct that the prisoners shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence. The bench further held that they were not concerned with

whether or not the direction of the Court below calls for any modification or and posted the matter to the regular bench for disposal. The bench therefore overruled *Kamalanantha*[35.] and *Sanaullah Khan*[36.] on this aspect.

The regular two-judge bench vide judgment and final order dated 9 December 2016[37.] dismissed the appeals finding the appellants guilty of gruesome murder and ordered sentence to run as per the judgment of the Constitution Bench's judgment.

In *Vikas Yadav v State of UP*,[38.] the Supreme Court amended the sentence imposed under section 201 to run concurrently from consecutively in accordance with the law laid by the Constitution Bench.

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17. *OM Cherian v State of Kerala*, AIR 2015 SC 303 [There-Judge Bench] : (2015) 2 SCC 501
18. *Ibid*, para 20 at p 309 (of AIR).
19. *Duryodhan Rout v State of Orissa*, AIR 2014 SC 3345 : 2014 Cr LJ 4172 (SC) : (2015) 2 SCC 783 .
20. *Crown v Chanan Singh*, (1940) 21 Lah 143 : AIR 1940 Lah 388 ; *Kanda Moopan*, (1937) Mad 362; *Mithoo*, (1942) Kar 1 ; *Mritunjoy Bose v State of Bihar*, AIR 1967 Pat 286 : 1967 Cr LJ 1180 .
21. *Venkataswamy*, (1937) Ran 366.
22. *Surja Ram v The State*, AIR 1963 Raj 202 : 1963 Cr LJ 396 .
23. *Johrilal v The State of Madhya Pradesh*, AIR 1971 MP 116 , 118.
24. *Sukumaran v State of Kerala*, 1993 Cr LJ 3228 (Ker).
25. *Nagaraja Rao v CBI*, (2015) 4 SCC 302 .
26. *Bhaskaran v State of Kerala*, 1978 CrLJ 738 (Ker).
27. *Manoj v State of Haryana,* AIR 2014 SC 644 : (2014) 2 SCC 153 .
28. *Chatar Singh v State of MP*, AIR 2007 SC 319 : (2006) 12 SCC 37 .
29. *Muthuramalingam v State*, (2016) 8 SCC 313 : AIR 2016 SC 3340 : 2016 Cr LJ 4165 : 2016 (7) Scale 129 .
30. *OM Cherian v State of Kerala*, (2015) 2 SCC 501 : AIR 2015 SC 303 : 2015 Cr LJ 593 : 2014 (12) Scale 636 .
31. *Duryodhan Rout v State of Orissa*, (2015) 2 SCC 783 : AIR 2014 SC 3345 : 2014 Cr LJ 4172 : 2014 (8) Scale 96 .
32. *Kamalanantha v State of Tamil Nadu*, (2005) 5 SCC 194 : AIR 2005 SC 2132 .
33. *Sanaullah Khan v State of Bihar*, (2013) 3 SCC 52 : 2013 Cr LJ 1527 : 2013 (2) Scale 505 .
34. *Muthuramalingam v State*, (2016) 8 SCC 313 : AIR 2016 SC 3340 : 2016 Cr LJ 4165 : 2016 (7) Scale 129 .
35. *Kamalanantha v State of Tamil Nadu*, (2005) 5 SCC 194 : AIR 2005 SC 2132 .
36. *Sanaullah Khan v State of Bihar*, (2013) 3 SCC 52 : 2013 Cr LJ 1527 : 2013 (2) Scale 505 .
37. Criminal Appeals No. 231-233 of 2009; order dated 9-12-2016.
38. *VikasYadav v State of UP*, (2016) 9 SCC 541 : AIR 2016 SC 4614 : 2016 (9) Scale 549 .

The Code of Criminal Procedure, 1973

CHAPTER III POWER OF COURTS

This chapter deals with three topics, *viz*., (1) Courts by which offences are triable; (2) the sentences which these Courts can pass including passing of sentence in case of conviction of several offences at one trial; and (3) modes of conferring of powers on, and withdrawal of powers from, persons or officials by the High Court and the State Government. The last section of the Chapter deals with exercise of powers of Judges and Magistrates by their successors in office.

[s 32] Mode of conferring powers.—

(1) In conferring powers under this Code, the High Court or the State Government, as the case may be, may, by order, empower persons specially by name or in virtue of their offices or classes of officials generally by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

Where a Magistrate is invested with second class power on the date, he commences the trial of a case, but is invested with first class powers before he finishes it, he is competent to pass sentences on the accused under the first-class powers.[39.]

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39. *Queen-Empress v Pershad*, (1885) 7 All 414 (FB).

The Code of Criminal Procedure, 1973

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[s 33] Powers of officers appointed.—

Whenever any person holding an office in the service of Government who has been invested by the High Court or the State Government with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same State Government, he shall, unless the High Court or the State Government, as the case may be, otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

This section refers to the transfer of a Magistrate from one district or area to another and points to the investing of powers as personal. But when a Magistrate is transferred from one district to another, he ceases to have jurisdiction in his district as soon as he relinquishes charge.[40.] If a Deputy Collector does not exercise the powers of a Magistrate vested in him, it cannot be implied that the said powers are impliedly withdrawn, because the section does not require actual exercise of such power but only the capacity to exercise it.[41.]

40. *Empress of India v Anand Sarup*, (1881) 3 All 563 (FB); *Balwant v Kishen*, (1896) 19 All 114 .

41. *Amulya Chandra v The State*, (1963) 2 Cr LJ 721 .

The Code of Criminal Procedure, 1973

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[s 34] Withdrawal of powers.—

(1) **The High Court or the State Government, as the case may be, may withdraw all or any of the powers conferred by it under this Code on any person or by any officer subordinate to it.**

(2) **Any powers conferred by the Chief Judicial Magistrate or by the District Magistrate may be withdrawn by the respective Magistrate by whom such powers were conferred.**

Reference to the High Court in the present section in addition to the State Government has been considered necessary since in many places the High Court is being made the authority for conferring power in judicial matters.[42.]

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42. See Law Commission's 41st Report, Vol I, p 33, para 3.15.

The Code of Criminal Procedure, 1973

CHAPTER III POWER OF COURTS

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[s 35] Powers of Judges and Magistrates exercisable by their successors-in-office.—

(1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office.

(2) When there is any doubt as to who is the successor-in-office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Additional or Assistant Sessions Judge.

(3) When there is any doubt as to who is the successor-in-office of any Magistrate, the Chief Judicial Magistrate, or the District Magistrate, as the case may be, shall determine by order in writing the Magistrate who shall, for the purpose of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Magistrate.

Sub-sections (2) and (3) do not limit sub-section (1) of the section. It is in cases of doubt that sub-sections (2) and (3) will come into operation. It cannot be said that until a successor is determined under sub-sections (2) and (3), there is no successor for the purpose of sub-section (1). If there is no doubt about who the successor is, then that person can exercise the powers under sub-section (1).[43.]

Irrespective of what the state of records may be or what orders the predecessor may have passed, a responsible Judicial Officer is required to take requisite corrective action even to offset the damage.[44.]

43. *Ajaib Singh v Joginder Singh*, AIR 1968 SC 1422 : 1969 Cr LJ 4 .

44. *State by KR Pet Town Police v Ramegowda*, 2002 Cr LJ 4396 (Kant).

The Code of Criminal Procedure, 1973

CHAPTER IV A.—POWERS OF SUPERIOR OFFICERS OF POLICE

This Chapter is divided into two parts: Part A deals with the powers of superior officers of police. Part B deals with the very initial stage of a criminal case. When an offence is committed, and before the trial begins, the police officer has to find out the accused, to investigate the case and to ascertain the evidence against him. To enable him to do this effectively and speedily, the law casts obligation on every member of the public to give him assistance (sections 37 and 38) or to furnish him with information (section 39). It also lays special obligations on village and revenue officers, and residents of village, to communicate certain information which is likely to be within their particular reach (section 40).

[s 36] Powers of superior officers of police.—

Police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

[s 36.1] "In rank".—It has been held that the words "in rank" as used in section 36 should be given purposive construction.[1.]

[s 36.2] "May".—

The section does not compel but only empowers exercise of powers.[2.] The Inspector General of Police will have jurisdiction extending over the whole of the State.[3.]

In *State of Kerala v PB Sourabhan,*[4.] the question was that whether the State Police Chief/Director General of Police is empowered to appoint a superior police officer to investigate a crime case registered outside the territorial jurisdiction of such officer. Referring to section 36 of CrPC and section 18(1) of the Police Act, 1861 it was held that section 36 does not debar the exercise of powers by the State Police Chief to appoint any superior officer who, in his opinion, would be competent and fit to investigate a particular case keeping in view the circumstances thereof. Section 36 of CrPC does not fetter the jurisdiction of the State Police Chief to pass such an order based on his satisfaction. It is the satisfaction of the State Police Chief, in the light of the facts of a given case, that would be determinative of the appointment to be made in which situation the limits of jurisdiction will not act as fetter or come in the way of exercise of such jurisdiction by the superior officer so appointed. Such an appointment would not be hedged by the limitations imposed by section 36 of CrPC.

1. *Nirmal Singh Kahlon v State of Punjab*, AIR 2009 SC 984 : (2009) 1 SCC 441 .

2. *Chittaranjan* Das *v State of West Bengal*, AIR 1963 Cal 191 : 1963 Cr LJ 424 .
3. *State of Bihar v JAC Saldhanna*, 1980 Cr LJ 98 : AIR 1980 SC 326 : (1980) 1 SCC 554 .
4. *State of Kerala v PB Sourabhan,* (2016) 4 SCC 102 : AIR 2016 SC 1194 : 2016 Cr LJ 1833 : 2016 (3) Scale 118 .

The Code of Criminal Procedure, 1973

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B.—Aid to the Magistrates and the Police

[s 37] Public when to assist Magistrates and police.—

Every person is bound to assist a Magistrate or police officer reasonably demanding his aid—

- **(a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest; or**
- **(b) in the prevention or suppression of a breach of the peace; or**
- **(c) in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.**

A three-fold duty is imposed on members of the public, who are required to assist a Magistrate or police officer, (1) in the taking or preventing the escape of an offender; or (2) in the prevention or suppression of a breach of the peace; or (3) in the prevention of injury to railway, canal, telegraph or public property. Penalty for omission to do so is provided in section 187 of Indian Penal Code. The demand made on the public should be "reasonable." Obviously, the law does not intend that police officers should have a general power of calling upon members of the public to join them in doing the work for which they are paid, such as tracing out the whereabouts of an absconding criminal or collecting evidence to warrant his conviction.[5.]

5. *Emperor v Joti Prasad*, (1920) ILR 42 All 314, 316.

The Code of Criminal Procedure, 1973

CHAPTER IV A.—POWERS OF SUPERIOR OFFICERS OF POLICE

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B.—Aid to the Magistrates and the Police

[s 38] Aid to person, other than police officer, executing warrant.—

When a warrant is directed to a person other than a police officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

This section has been enacted to protect the person who renders aid in the execution of the warrant. The aid must be rendered to a person to whom warrant for arrest has been directed for execution, and such person must be near at hand and acting in the execution of that warrant.

The Code of Criminal Procedure, 1973

CHAPTER IV A.—POWERS OF SUPERIOR OFFICERS OF POLICE

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B.—Aid to the Magistrates and the Police

[s 39] Public to give information of certain offences.—

(1) Every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely:—

(i) sections 121 to 126, both inclusive, and section 130 (that is to say, offences against the State specified in Chapter VI of the said Code);

(ii) sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);

(iii) sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);

(iv) sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, *etc*);

(v) sections 302, 303 and 304 (that is to say, offences affecting life);

[6][(va) section 364A (that is to say, offence relating to kidnapping for ransom, *etc*);]

(vi) section 382 (that is to say, offence of theft after preparation made for causing death, hurt or restraint in order to the committing of the theft);

(vii) sections 392 to 399, both inclusive, and section 402 (that is to say, offences of robbery and dacoity);

(viii) section 409 (that is to say, offence relating to criminal breach of trust by public servant, *etc*);

(ix) sections 431 to 439, both inclusive (that is to say, offences of mischief against property);

(x) sections 449 and 450, (that is to say, offence of house-trespass);

(xi) sections 456 to 460, both inclusive (that is to say, offences of lurking houses-trespass); and

(xii) sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes),

shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention.

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of India which would constitute an offence if committed in India.

This section imposes a duty on every person to give information of certain offences specified in clauses (i) to (xii) of sub-section (1). The duty ceases when the information has reached the police in some other way.[7.] Penalty for breach is provided in sections 176 and 202 of the Indian Penal Code and penalty for furnishing false information under section 177 of the Indian Penal Code. In order that section 39 should be attracted, the person must be aware of the commission of any offence under the enumerated sections of the Indian Penal Code. Future contingencies are not sufficient to attract the section. His duty to inform arises only on his being aware of the commission of an offence.[8.]

The Supreme Court highlighted the importance of this duty in the following words:

> It is the salutary duty of every witness who has the knowledge of the commission of crime, to assist the State in giving evidence; unfortunately for various reasons, in particular deterioration in law and order situation and the principle of self-preservation, many a witness turn hostile and in some instances even direct witnesses are being liquidated before they are examined by the Court. In such circumstances, it is high time that the Law Commission looks into the matter. The Law Commission has recommended to the Central Government to make necessary amendments to the Cr.P.C. and this aspect of the matter should also be looked into and proper principles evolved in this behalf.[9.]

[s 39.1] Constitutional protections not to be overridden.—

The protection against self-incrimination is available against the power of police to investigate an offence and examine any person. Such power cannot override the constitutional protection. The protection ensures reliability of statements made by an accused and that they are made voluntarily. Protection is available at the stage of investigation also. It is also available in administrative and quasi-judicial proceedings. But it applies only when the person in question has been formally accused of an offence.[10.]

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6. Ins. by Act 42 of 1993, section 3 (w.e.f. 22-5-1993).
7. *Sada*, (1893) Unrep CRC 674; *The Queen-Empress v Gopal Singh*, (1892) 20 Cal 316 ; *State of Maharashtra v Dashrath Lahanu Kadu*, (1972) 75 Bom LR 450 .
8. *John TS v State of Kerala*, 1984 CrLJ 753 (Ker).
9. *State of Gujarat v Anirudh Singh,* AIR 1997 SC 2780 at p 2787 : 1997 CrLJ 3397 : (1997) 6 SCC 514 .
10. *Selvi v State of Karnataka*, AIR 2010 SC 1974 : (2010) 7 SCC 263 .

The Code of Criminal Procedure, 1973

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B.—Aid to the Magistrates and the Police

[s 40] Duty of officers employed in connection with the affairs of a village to make certain report.—

(1) Every officer employed in connection with the affairs of a village and every person residing in a village shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station, whichever is nearer, any information which he may possess respecting—

(a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in or near such village;

(b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

(c) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under section 143, section 144, section 145, section 147, or section 148 of the Indian Penal Code (45 of 1860);

(d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person;

(e) the commission of, or intention to commit, at any place out of India near such village any act which, if committed in India, would be an offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, 231 to 238 (both inclusive), 302, 304, 382, 392 to 399 (both inclusive); 402, 435, 436, 449, 450, 457 to 460 (both inclusive); 489A, 489B, 489C and 489D;

(f) any matter likely to affect the maintenance of the order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the State Government, has directed him to communicate information.

(2) In this section,—

(i) "village" includes village-lands;

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority in any territory in India to which this Code does not extend, in respect of any act which if committed in the territories to which this Code extends, would be an offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, 302, 304, 382, 392 to 399 (both inclusive); 402, 435, 436, 449, 450 and 457 to 460 (both inclusive);

(iii) the words "officer employed in connection with the affairs of the village" means a member of the panchayat of the village and includes the headman and every officer or other person appointed to perform any function connected with the administration of the village.

This section casts a duty on village officers and persons resident in villages to immediately give information about certain offences and also about certain state of things to the nearest Magistrate or police officer. The duty cast is absolute and immediate. The offences may otherwise escape even the vigilance of the police. Penalty for breach of the provisions is provided for in section 176 of the Indian Penal Code. It may, however, be noted that the provisions of the section are not intended to be punitive; they are really intended to facilitate receiving of information about offences and consequently taking of steps either for prevention of the same or apprehension of the offender.

[s 40.1] Confession before village administrative officer [*section 40(2)(iii)*].—

Under rule 72 of the Criminal Rules of Practice, an extra-judicial confession made to the Village Administrative Officer by an accused person was held to be admissible.[11.]

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11. *Sivakumar v State*, AIR 2006 SC 653 : (2006) 1 SCC 714 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 41] When police may arrest without warrant.—

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

[1][(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured;

and the police officer shall record while making such arrest, his reasons in writing.

[2] [*Provided* that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.]

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;]

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

[3][**(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.]**

[s 41.1] CrPC (Amendment) Act, 2008 [*Clause (5)].—*

This clause amends section 41 relating to power of police to arrest without warrant. It amends clauses (a) and (b) of sub-section (1) so as to provide that the powers of arrest conferred upon the police officer must be exercised after reasonable care and justification and that such arrest is necessary and required under the section. Amendment is also made in sub-section (2) of section 41 so as to provide that subject to the provisions of section 42 relating to arrest on refusal to give name and residence, no person shall be arrested in a non-cognizable offence except under a warrant or order of a Magistrate (*Notes on Clauses).*

COMMENT

This section enumerates the categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant. General provisions contained in Chapter IV and especially section 41(1)(d) of the Code will have to be read in conjunction with the provisions contained in sections 155 and 156. If section 155(2) prohibits a police officer from investigating a non-cognizable offence without an order of the Magistrate, then in respect of such an offence a police officer cannot exercise the powers contained in section 41(1)(d). Section 41 is a depositary of general powers of the police officer to arrest, but this power is subject to certain other provisions contained in the Code as well as in the special Statute to which the Code is made

applicable.[4.] The powers of the police to arrest a person without a warrant are only confined to such persons who are accused or concerned with the offences or are suspects thereof. A person who is alleged to have been in possession of an illicit arm once upon a time can neither be called presently an accused nor a suspect thereof.[5.]

[s 41.2] Scope.—

The section is not exhaustive. There are various other Acts, eg, Arms Act, 1959, Explosives Act, 1884 *etc*, which also confer such powers on police officers.

The words "police officer" are not defined in the Code. Apart from police officers, Magistrate and private individuals have also been empowered to arrest a person under certain circumstances. Power of arrest has also been conferred upon certain officers of other departments under various laws other than Code of Criminal Procedure (CrPC) such as Custom Officers, Officers of Enforcement Directorate, Narcotic Officers, *etc*. The Supreme Court laid down that taking of a person into judicial custody is followed after the arrest of the person by the Magistrate on appearance or surrender. In every arrest, there is custody but not *vice versa* and "custody'" and arrest are not synonymous terms.[6.]

This section is not controlled by section 55 which requires a written order when the arrest is without a warrant.[7.] It is not incumbent upon a superior officer of the police to comply with the formalities mentioned in section 55.[8.]

[s 41.3] "Credible information" or "a reasonable suspicion" [*clause (b)*].—

Information or suspicion upon which an arrest can be made by a police officer must be based upon definite facts and materials placed before him, which the officer must consider for himself, before he can take any action. It is not enough for arrest of a person under this section that there was likelihood of cognizable offence being committed in the future.[9.] The existence of a warrant is equivalent to credible information,[10.] and it matters little that the warrant is not entrusted to the police officer.[11.]

When an arrest is made under suspicion, the police have to carry out the investigation without unnecessary delay and the Magistrate has to be watchful as the power of arrest without warrant under suspicion is liable to be abused.[12.] The Supreme Court has held that in cases relating to dowry harassment, police officers should not automatically make arrests. The practice of mechanically reproducing in case dairy all or most of the reasons contained in section 41 of the Code for affecting arrest should be discouraged and discontinued.[13.]

[s 41.4] "Any person who has been proclaimed as an offender" [*clause (c)*].—

The expression "proclaimed offender" has been defined in section 42(2)(ii).[14.]

[s 41.5] "Requisition" [*clause (i)*].—

The word "requisition" is quite general and covers a telephonic message. A police officer can order the arrest of a person by means of a telephonic message.[15.] This clause now categorically uses the words "whether written or oral."

[s 41.6] Arrest of female person.—

For the arrest of a female person, the arresting authority should make all possible efforts to assure the presence of a woman constable. But if such presence cannot be assured and delay to investigation cannot be afforded, the arresting officer can himself effect the arrest for lawful reasons at any time of the day or night, even in the absence of a woman constable. Reasons for doing so must be recorded.[16.]

[s 41.7] Medical examination after arrest.—

Directions were issued by the High Court for getting the accused person medically examined at the time of arrest or during his police custody. The Supreme Court modified the directions in view of its own earlier decision.[17.]

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1. Subs. by Act 5 of 2009, section 5(i), for clauses (a) and (b) (w.e.f. 1-11-2010). Clauses (a) and (b) before substitution, stood as under:

> "(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
>
> (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or"

2. Ins. by Act 41 of 2010, section 2 (w.e.f. 1-11-2010).

3. Subs. by Act 5 of 2009, section 5(ii), for sub-section (2) (w.e.f. 1-11-2010). Sub-section (2), before substitution, stood as under:

"(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110.".

4. *Avinash Madhukar Mukhedkar v State of Maharashtra*, 1983 Cr LJ 1833 (Bom).

5. *Sham Lal v Ajit Singh*, 1981 Cr LJ NOC 150 (P&H).

6. *Directorate of Enforcement v Deepak Mahajan*, AIR 1994 SC 1775 : 1994 Cr LJ 2269 : (1994) 3 SCC 440 .

7. *Emperor v Keshavlal Harilal*, (1936) 38 Bom LR 971 : AIR (1937) Bom 127 , dissenting from *Mohamed Ismail*, (1935) 13 Ran 754.

8. *Maharani of Nabha v Province of Madras*, (1942) ILR Mad 696 : AIR 1942 Mad 539 .
9. *Easih Mia v Tripura Administration*, (1962) 1 Cr LJ 673 .
10. *Emperor v Gopal Singh*, (1914) 36 All 6 .
11. *Ratna Mudali v King-Emperor*, (1917) ILR40 Mad 1028.
12. *Shahadat Khan*, AIR 1965 Tripura 27 .
13. *Arnesh Kumar v State of Bihar*, AIR 2014 SC 2756 : (2014) 8 SCC 273 : 2014 Cr LJ 3707 (SC).
14. *Re Mukund Babu Vethe*, (1894) 19 Bom 72, overruled by this clause.
15. *Maharani of Nabha v Province of Madras*, AIR 1942 Mad 539 : (1942) ILR Mad 696.
16. *State of Maharashtra v Christian Community Welfare Council of India*, AIR 2004 SC 7 : (2003) 8 SCC 546 : 2004 Cr LJ 14 .
17. *State of Maharashtra v Christian Community Welfare Council of India*, AIR 2004 SC 7 : (2003) 8 SCC 546 : 2004 Cr LJ 14 . The earlier decision was *Basu v State*, AIR 1997 SC 610 : AIR 1997 SCW 233 : 1997 Cr LJ 743 : (1997) 1 SCC 416 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[18][[s 41A] Notice of appearance before police officer.—

(1) [19][The police officer shall], in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

[20][(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.]

Where the arrest was not made by following the procedure of arrest and section was not followed, the Supreme Court treated it as violation of Article 21 and granted a sum of Rs 5,00,000 (rupees five lakhs only) towards compensation to each of the petitioners to be paid by the State within three months hence.[21]

Arrest of a person even in case of cognizable offences is not mandatory where the offence is punishable with maximum sentence of seven years imprisonment. The provisions of section 41A make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under clause (u) of sub-section (1) of the amended section 41. But unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under section 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty.[22]

18. Ins. by Act 5 of 2009, section 6 (w.e.f. 1-11-2010).

19. Subs. by Act 41 of 2010, section 3(a), for "The police officer may" (w.e.f. 1-11-2010).

20. Subs. by Act 41 of 2010, section 3(b), for sub-section (4) (w.e.f. 1-11-2010). Sub-section (4), before substitution, stood as under:

"(4) Where such person, at any time, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent Court.".

21. *Dr Rini Johar v State of MP,* WP (Crl) No. 30/2015 as decided on 3 June 2016 by the Madhya Pradesh High Court.
22. *Hema Mishra v State of UP*, AIR 2014 SC 1066 : (2014) 4 SCC 453 : 2014 Cr LJ 1107 (SC).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[23][s 41B] Procedure of arrest and duties of officer making arrest.—Every police officer while making an arrest shall—

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be—

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) counter signed by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

23. Ins. by Act 5 of 2009, section 6 (w.e.f. 1-11-2010).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

24.[s 41C] Control room at districts.—

(1) The State Government shall establish a police control room

(a) in every district; and

(b) at State level.

(2) The State Government shall cause to be displayed on the notice board kept outside the control rooms at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrests.

(3) The control room at the Police Headquarters at the State level shall collect from time to time, details about the persons arrested, nature of the offence with which they are charged, and maintain a database for the information of the general public.

24. Ins. by Act 5 of 2009, section 6 (w.e.f. 1-11-2010).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[25][s 41D] Right of arrested person to meet an advocate of his choice during interrogation.—

When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.]

25. Ins. by Act 5 of 2009, section 6 (w.e.f. 1-11-2010).

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CHAPTER V ARREST OF PERSONS

[s 41D.1] CrPC (Amendment) Act, 2008 [*Clause (6)*].—

This clause inserts new sections 41A, 41B, 41C and 41D. Section 41A provides that the police officer may, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence to appear before him. Section 41B lays down the procedure of arrest and duties of officer making arrest. Section 41C requires the State Government to establish a police control room in every district and at the State level, where the names and addresses of the persons arrested, nature of offences with which they are charged, and the name and designation of the police officers who made the arrest are to be displayed. Section 41D makes provisions for right of the arrested persons to meet an advocate of his choice during the interrogation, though not throughout interrogation. (*Notes on Clauses*).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 42] Arrest on refusal to give name and residence.—

(1) When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:

Provided **that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India.**

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

A step little short of arrest is the ascertainment of the name and residence of a person. The section applies only to a person (1) who commits a non-cognizable offence in the presence of a police officer, or (2) who is accused of committing such offence before such officer. If the name and address are ascertained or are otherwise known to the police officer,[26.] the person is to be released on his executing a bond to appear before a Magistrate. If the person does not give his name or residence[27.] or gives a name and residence which the police officer believes to be false, he may be taken into custody pending the ascertainment. He can on no account be detained beyond 24 hours,but should be placed before a Magistrate.

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26. *Gopal Naidu v King-Emperor*, (1923) ILR 46 Mad 605 : AIR 1923 Mad 523 FB.
27. *Goolab Rasul*, (1903) 5 Bom LR 597 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 43] Arrest by private person and procedure on such arrest.—

(1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 41, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

A private person is entitled to arrest or cause to be arrested any person (1) who in his view[28.] commits a non-bailable and cognizable offence, or (2) who is a proclaimed offender. He must without unnecessary delay make over such person to a police officer, or either take him or cause him to be taken[29.] to the nearest police station. If such person is liable to be arrested under section 41, he shall be rearrested by the police officer. If he is believed to have committed a non-cognizable offence, his name and residence are to be ascertained. If he is believed to have committed no offence, he is to be set at liberty.

[s 43.1] "In his presence".—

These words cannot be extended to mean "in his opinion" or "in his suspicion". Where, therefore, an individual seeing a person fleeing with a knife in his hand pursued by others, tries to arrest him, his exercise of power of arrest cannot be brought under this section.[30.]

28. *Bolai De*, (1907) 35 Cal 361 ; *Venkayya*, (1955) Andhra 718; *Durga Singh v Md. Isa*, (1963) 1 Cr LJ 827 .

29. *Queen-Empress v Potadu*, (1888) ILR 11 Mad 480; *King-Emperor v Johri* (1901) 23 All 266 ; *Emperor v Parsiddhan Singh*, (1907) ILR 29 All 575.

30. *Abdul Habib v The State*, 1974 Cr LJ 248 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 44] Arrest by Magistrate.—

(1) When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

(2) Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

There is a subtle difference between clause (1) and clause (2) of section 44. Under clause (1), the Magistrate has been given the power to arrest a person who has committed an offence in his presence, as well as to commit him to custody. Under clause (2), the Magistrate has power to arrest a person who is suspected of having committed an offence but has not been given any power to commit him to custody. The omission of this power to commit such suspect to custody is not accidental but deliberate.[31.] In the latter case, committing to custody will have to be done in accordance with sections 57 and 167 of the Code.

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31. *Ram Chandra v State UP*, 1977 Cr LJ 1783 (All).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 45] Protection of members of the Armed Forces from arrest.—

(1) Notwithstanding anything contained in sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

(2) The State Government may, by notification, direct that the provisions of sub-section (1) shall apply to such class or category of the members of the Force charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[s 45.1] State Amendment

Assam.— *The following amendments were made by Assam (President's) Act 3 of 1980, section 2 (w.e.f. 5-6-1980).*

S. 45(2).—In its application to State of Assam for section 45(2) substitute the following:—

"(2) The State Government may, by notification, direct that the provisions of sub-section (1) shall apply—

(a) to such class or category of the members of the Forces charged with the maintenance of public order, or

(b) to such class or category of other public servants (not being persons to whom the provisions of sub-section (1) apply) charged with the maintenance of public order.

as may be specified in the notification wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression 'Central Government' occurring therein, the expression 'State Government' were substituted."

This provision seeks to protect members of the Armed Forces from arrest where they do or purport to do something in the discharge of their official duties. They can, of course, be proceeded against after obtaining consent of the Central Government. The State Government is also similarly empowered under sub-section (2) to extend the protection afforded in sub-section (1) to specified class of members of the Force maintaining public order.

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 46] Arrest how made.—

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action:

[32. *Provided* that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.]

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

[33.[(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.]

[s 46.1] CrPC (Amendment) Act, 2005 [*Clause (6)*].—

A new sub-section (4) is being added to section 46 to prohibit arrest of a woman after sunset and before sunrise except in unavoidable circumstances. (*Notes on Clauses*).

COMMENT

This section describes the mode in which arrests are to be made. The word "arrest" when used in its ordinary and natural sense means the apprehension or restraint or the deprivation of one's personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists of taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence. The words "custody" and "arrest" are not synonymous. It is true that in every arrest, there is custody but *vice versa* is not true. Mere utterance of words or gesture or flickering of eyes does not amount to arrest. Actual seizure or touch of a person's body with a view to arresting is necessary. If the method of arrest is not performed as prescribed by section 46, the arrest would be nugatory.[34.] The word "arrest" as used in section 46 means a formal arrest whereas under section 27 of the

Evidence Act, this word would mean a person in custody for the purposes of disclosure statements.[35.]

[s 46.2] "Other Person".—

In a case under Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, the accused was arrested by an Intelligence Officer of the Narcotic Bureau, it was held that arrest could be made by a person other than a police officer also.[36.]

[s 46.3] "All means".—

The words "all means" are very wide and include the taking of assistance from others in effecting the arrest.[37.]

[s 46.4] "No right to cause death [*Clause (3)*].—

Where fire was opened to disperse an unlawful assembly and death of an innocent person was caused, section 46 could not be invoked for the protection of the police officers.[38.]

When an arrest is made under a warrant, the police officer must notify the substance thereof to the person to be arrested, or if so required, must show him the warrant (section 75), else the arrest is not legal.[39.]

Where a person not in custody approaches a police officer investigating an offence and offers to give information leading to discovery of fact having a bearing on the charge which may be made against him, he may appropriately be deemed to have submitted to the custody within the meaning of this section.[40.] A Court would not issue a general *mandamus* asking the police to enter a place of worship whenever a criminal is suspected to have taken shelter in such a place regardless of the overall situation of law and order.[41.] Section 47 is an enabling provision and is required by the police to be used with regard to exigencies of a situation. It is not bound to use it.

[s 46.5] "Arrest of woman after sunset and before sunrise [*Clause (4)*].—

When it is intended to arrest a woman after sunset and before sunrise, the woman police officer shall obtain the prior permission in writing of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or arrest is to be made.

[s 46.6] "Custody.—

A person whose control is taken over by law whether by an officer with coercive powers or on voluntary surrender before the Court, he is in custody as regards criminal proceedings.[42.]

32. Ins. by Act 5 of 2009, section 7 (w.e.f. 31-12-2009).
33. Ins. by Act 25 of 2005, section 6 (w.e.f. 23-6-2006).
34. *Roshan Beebi v Joint Secretary to Government of Tamil Nadu*, 1984 Cr LJ 134 Mad (FB) : AIR 1984 NOC 103 (Mad); *Kutlej Singh v Circle Inspector of Police*, 1992 Cr LJ 1173 (Kant).
35. *Vikram Singh v State of Punjab*, AIR 2010 SC 2007 : (2010) 3 SCC 56 .
36. *Birendra Kumar Rai v UOI*, 1992 Cr LJ 3866 (All).
37. *Nazir v Rex*, (1952) 1 All 445 : AIR 1951 All 3 FB.
38. *Karam Singh v Haradayal Singh*, 1979 Cr LJ 1211 (Punj).
39. *Empress of India v Amar Nath*, (1883) ILR 5 All 318.
40. *State of UP v Deoman Upadhya*, AIR 1960 SC 1125 : 1960 Cr LJ 1504 .
41. *Hindustani Andolan v State of Punjab*, AIR 1984 SC 582 : 1984 Cr LJ 299 : (1984) 1 SCC 204 .
42. *State of Haryana v Dinesh Kumar*, AIR 2008 SC 1083 : (2008) 3 SCC 222 : (2008) 1 Crimes 217 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 47] Search of place entered by person sought to be arrested.—

(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress there to, and afford all reasonable facilities for a search therein.

(2) If ingress to such place cannot be obtained under sub-section (1), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance:

Provided **that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.**

(3) Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

It is impossible and undesirable for any Court to issue a general *mandamus* to the effect that whenever a criminal is suspected to have taken shelter in a place of worship, the police must enter that place regardless of the overall situation of law and order.[43.]

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43. *Hindustani Andolan v State of Punjab*, AIR 1984 SC 582 : (1984) 1 SCC 204 : 1984 Cr LJ 299 (300).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 48] Pursuit of offenders into other jurisdictions.—

A police officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest, pursue such person into any place in India.

Ordinarily a police officer is not at liberty to go outside India and to arrest there an offender without a warrant. If he is pursuing an offender whom he can arrest without warrant, and such offender escapes into any place in India, he can be pursued and arrested by a police officer without warrant. See also, section 60.

Under this section, a police officer is authorised to pursue the offender to any place in the Indian Union for purposes of effecting his arrest. Hence, the arrest of a person by the police officer investigating an offence in pursuit of an offender is legal though it is made outside his circle.[44.]

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44. *Manbodh v The State*, (1955) Nag 23 : 1955 Cr LJ 728.

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 49] No unnecessary restraint.—

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

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CHAPTER V ARREST OF PERSONS

[s 50] Person arrested to be informed of grounds of arrest and of right to bail.—

(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

This provision provides that (1) the person arrested without any warrant should immediately be intimated the full particulars of the offence and the grounds for his arrest; and (2) where the offence is a bailable one, of his right to be released on bail.[45.] The police officer cannot keep the reasons to himself; a citizen is entitled to know them. A person is entitled to know the grounds of his arrest. This is a constitutional right guaranteed under Article 22(1) of the Constitution. Section 50 of the Code is in conformity with Article 22(1) of the Constitution. The section confers a valuable right, and non-compliance with it amounts to disregard of the procedure established by law.[46.] The allegation that the grounds of arrest or its particulars, as would be enough to enable him to file an application for a writ of *habeas corpus*, were not given has to be proved by the person making such allegation.[47.]

Where a competent Court having jurisdiction has taken cognizance of an offence on the basis of a charge-sheet or otherwise or where a case is pending for trial in a Court having jurisdiction, the writ of *habeas corpus* cannot be issued for release of an accused under detention on the ground of defects or illegality in the arrest or committal order or the orders of remove at any stage of the proceedings.[48.] A person who has been arrested must be informed of the grounds of his arrest with greatest dispatch as soon as possible however, it may not be immediately.[49.]

Where bail was sought on the ground that the accused was not informed of the grounds of his arrest, but the police controverted the fact through affidavit and an entry in the General Diary, a Full Bench of the Allahabad High Court held that the arrested person must be informed of the bare necessary facts leading to his arrest including the facts that in respect of whom and by whom the offence is said to be committed, date, time and place of offence and it is the burden of prosecution to establish that the requirements of section 50 (1) CrPC and Article 22(1) of the Constitution have been fully complied with. The Court said that all the available evidence including counter affidavit, General Diary entry, recovery memo or any other documents may be given by the police in support of its version and that denial by the accused need not be on affidavit.[50.]

A Full Bench of five judges of the Allahabad High Court[51.] held through Polak Basu J that on disclosure of a cognizable offence, the arrest of the offender is a "must" as laid down in *Vinod Narain (Dr) v State of UP*.[52.] However, another five-judge bench of the

same High Court differed with this ruling,[53] and was of the opinion that arrest is not a "must" in a cognizable offence following the Supreme Court decision in *Joginder Kumar's* case[54] and held that the decision in *Dr Vinod Narain v State of UP* (supra) is incorrect and is substituted accordingly by their judgment.

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45. **See**, *Re Madhu Limaye*, AIR 1969 SC 1014 : 1969 Cr LJ 1440 : (1969) 1 SCC 292 . **Also see** *Christie v Leachinsky*, (1947) 1 All ER 567 .
46. *Govind Prasad v State of WB*, 1975 Cr LJ 1249 (Cal).
47. *Ajit Kumar Sannah v State of Assam*, 1976 Cr LJ 1303 (Gauhati); *Mushtaq Ahmad v State of UP*, 1984 Cr LJ (NOC) 37 (All).
48. *Vimal Kumar Sharma v State of UP*, 1995 Cr LJ 2335 (All).
49. *Ibid*. p 2336 (All).
50. *Vikram v State of UP*, 1996 Cr LJ 1536 (All).
51. *Amravati v State of UP*, 1996 Cr LJ 1347 (All—FB).
52. *Vinod Narain (Dr) v State of UP*, 1996 Cr LJ 1309 (All).
53. *Amrawati v State of Uttar Pradesh*, 2005 (1) AWC 416 : 2005 Cr LJ 755 : (2005) 1 UPLBEC 155 .
54. *Joginder Kumar's*, AIR 1994 SC 1349 : LNINDORD 1994 SC 51 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

55.[[s 50A] Obligation of person making arrest to inform about the arrest, etc., to a nominated person.—

Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under subsection (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person.]

[s 50A.1] CrPC (Amendment) Act, 2005 [*Clause (7)*].—

This clause seeks to insert a new section 50-A to require the police to give information about the arrest of the person as well as the place where he is being held to any one of his friends, relatives or such other persons who may be nominated by him for giving such information, *etc*. (*Notes on Clauses*).

Sections 41B, 50A and 54 taken together lay down the procedure to regulate the arrest of a person and his legal rights at the time of arrest and thereafter. Section 41B lays down the procedure of arrest of a person and the duties of officer making the arrest. Apart from preparing a memorandum of arrest, which shall be attested either by a member of the family of the arrested person or a respectable member of the locality, it is the duty of the police officer to inform the arrested person that he has a right to have a relative or a friend named by him to be informed of his arrest. Section 50 further confers the right to the arrested to have full particulars of the offence and other grounds of arrest. Further section 50A casts an obligation on the person making the arrest to inform about the arrest, the place where the arrested person is being held and the right of the arrested person to be brought to police station, to the person so nominated by the arrested person. Under section 54, it is obligatory for the arresting authority to ensure that the arrested person is examined by a government doctor or a registered medical practitioner.

Thus, in a case, where a juvenile was tried as an adult and in course of the pendency of his appeal in the Supreme Court his juvenility could be detected, it was held that if the above-mentioned provisions are followed, the probability of a juvenile being tried as an adult would be greatly minimised.[56.]

In *DK Basu v State of West Bengal*,[57] the Supreme Court held that "custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality.

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55. Ins. by Act 25 of 2005, section 7 (w.e.f. 23-6-2006).
56. *Jitendra Singh v State of UP*, 2013 (9) Scale 18 .
57. *DK Basu v State of West Bengal,* AIR 1997 SC 610 : (1997) 1 SCC 416 : 1997 SCC (Cri) 92 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 51] Search of arrested person.—

(1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant, or by a private person under a warrant and cannot legally be admitted to bail or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

(2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

Before making a personal search of the accused, the searching officer and others assisting him should give their personal search to the accused before searching the person of the accused. This rule is meant to avoid the possibility of implanting an object to be shown in the search. The grounds of such arrest must be given to the accused. Where no such grounds are given, the search becomes illegal.[58.] It is the duty of the officer making a search to obtain independent and respectable witnesses.[59.] This section does not require that the signature of the person searched shall be taken on the memo of the recovery list. If recovery memo is not signed by the accused, the search is not illegal.[60.]

If sections 51 and 102 CrPC are read together, the position will be that if the seized property is alleged or suspected to be stolen one, or which creates suspicion of any offence, the seizure must be reported to the Magistrate as required under section 102(3) CrPC.[61.]

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58. *Rabindranath Prusty v State of Orissa*, 1984 Cr LJ 1392 (Ori).
59. *Raghbir Singh v State of Punjab*, AIR 1976 SC 91 : 1976 Cr LJ 172 : 1976(1) SCC 145 .
60. *Mahadeo v State of UP*, 1990 Cr LJ 858 (All).
61. *Superintendent of Customs and Central Excise Nagercoil v R Sunder*, 1993 Cr LJ 956 (Mad).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 52] Power to seize offensive weapons.—

The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that the seizure witnesses do not support the prosecution version.[62.]

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62. *Modan Singh v State of Rajasthan*, AIR 1978 SC 1511 : (1978) 4 SCC 435 : 1978 Cr LJ 1531 (1533).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 53] Examination of accused by medical practitioner at the request of police officer.—

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

[63.][*Explanation.*—In this section and in sections 53A and 54,—

(a) "examination" shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) registered medical practitioner means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.]

[s 53.1] CrPC (Amendment) Act, 2005 [*Clause (8)*].—

This clause seeks to insert an *Explanation* to section 53 to explain the meaning of the expressions "examination" and "registered medical practitioner" appearing in sections 53, 53-A and 54. (*Notes on Clauses*).

COMMENT

The section comes into effect only when (1) a request is made by a police officer not below the rank of sub-inspector, (2) upon reasonable grounds which such officer *bona fide* entertains, (3) that an examination of the arrested person by a medical practitioner will afford evidence as to the commission of the offence.

This provision has been made to facilitate effective investigation.[64.] Special protection is afforded to females under sub-section (2). Section 53 only lays down a condition that medical examination will have to be done at the instance of a police officer not below the rank of sub-inspector. It does not debar other superior officers, or the Court

concerned from exercising the said power if it is necessary for doing justice in a criminal case.[65.] A Magistrate has no authority under section 53 to pass an order allowing a medical practitioner to extract blood of the accused. Investigation is a task of the police and such functions must be performed by them alone.[66.] In a murder case, the Magistrate ordered taking of sample of hair of the accused for comparison of hair found in the hands of the deceased. Allahabad High Court held that taking of hair falls within the ambit of "medical examination" of the accused and a Magistrate or a Court trying an offence has full powers to direct such examination or sample of hairs, nail, *etc*, to be taken where there are reasonable grounds that such an examination will afford evidence as to the commission of an offence. It was further held that such an order does not offend Article 20(3) of the Constitution of India.[67.] Examination of a person cannot be confined only to external examination of the body of the person. Many-a-times it may become necessary to make examination of some organs inside the body for the purpose of collecting evidence.[68.] It includes taking of blood from the accused.[69.] Medical examination must logically take in examination of blood, sputum, semen, urine, *etc*.[70.] The obtaining of such evidence, it has been held, is not violative of Article 20(3) of the Constitution which grants protection against self-incrimination.[71.]

Test results of polygraph and brain fingerprinting tests have been held to be testimonial compulsions, and therefore barred by Article 21(3) of the Constitution. Narco tests do not fall within the scope of the expression "such other tests" in section 53, *Explanation*, CrPC. Conducting of DNA profiling of an accused person which has been expressly permitted by sections 53–54 has also been held to be a testimonial act. The bar under Article 20(3) does not apply.[72.] Subjecting a person to polygraph and brain fingerprinting tests involuntarily has been held as amounting to forcible interference with his mental processes. The right of privacy as enshrined in Article 20(3) is violated.[73.] It has also been held that subjecting a person to polygraph or brain fingerprinting tests, voluntarily or involuntarily, violates the right against cruel, inhuman or degrading treatment. A person undergoing such tests is effectively in police custody.[74.] International conventions, though not ratified by the Parliament, hold significant persuasive value. They represent an evolving international consensus on the issue of such tests. Subjecting an accused person compulsory to Narco test affects the right to fair trial. The accused has no access to legal advice. Such tests also impede the fact-finding role of the judge and dilute standards of proof required in a criminal trial.[75.]

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63. Subs. by Act 25 of 2005, section 8, for *Explanation* (w.e.f. 23-6-2006). *Explanation*, before substitution, stood as under:

"*Explanation*.—In this section and in section 54, "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register".

64. See Gazette of India Extraordinary Part II, section 2, dated10-12-1970, p 1315.

65. *Anil A Lokhande v State of Maharashtra*, 1981 Cr LJ 125 (SC).

66. *Maharashtra v Dyanoba Bhikoba Dagade*, 1979 Cr LJ 277 (Bom).
67. *Neeraj Sharma v State of UP*, 1993 Cr LJ 2266 (All).
68. *Anil Lokhande, supra*.
69. *Jamshed v State of UP*, 1976 Cr LJ 1680 (All).
70. *Ananth Kumar v State of AP*, 1977 Cr LJ 1797 (AP).
71. *Bombay v Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 . **See further** *Selvi v State of Karnataka*, AIR 2010 SC 1974 : (2010) 7 SCC 263 : (2010) 2 Crimes 241 , explaining the significance of medical examination in the nature of polygraph test, narco analysis tests and brain electrical activation profile test and brain fingerprinting test.
72. *Selvi v State of Karnataka*, AIR 2010 SC 1974 : (2010) 7 SCC 263 : (2010) 2 Crimes 241 .
73. *Ibid*.
74. *Ibid*.
75. *Ibid*.

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

76.[[s 53A] Examination of person accused of rape by medical practitioner.—

(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—

- **(i) the name and address of the accused and of the person by whom he was brought;**
- **(ii) the age of the accused;**
- **(iii) marks of injury, if any, on the person of the accused;**
- **(iv) the description of material taken from the person of the accused for DNA profiling; and**
- **(v) other material particulars in reasonable detail.**

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.]

[s 53A.1] CrPC (Amendment) Act, 2005 [*Clause (9)*].—

This clause seeks to insert a new section 53-A to provide for a detailed medical examination of a person accused of an offence of rape or an attempt to commit rape by the registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of

sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner. (*Notes on Clauses*).

This section brought in the Code through the amendment of 2005, seeks to provide statutory sanction to the medical examination of a person accused of sexual offence. Often due to lack of foresight on the part of the Investigating Officer, conclusive scientific evidence, which could be obtained through forensic examination of the accused or the victim's clothes, is lost.

It is the prime duty of the accused to cooperate with the investigating agency. Where the accused was already medically examined under section 53A, he cannot take a plea that he cannot be submitted to a re-examination. Accused must submit to medical examination.[77.]

Under this provision, it has become necessary for the prosecution to go in for DNA test in cases of sexual offences, facilitating the prosecution to prove its case. Thus, in a case where the prosecution failed to follow the dictates of law and resorted to DNA testing, the Supreme Court held that the conviction of the accused was liable to be set aside.[78.]

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76. Ins. by Act 25 of 2005, section 9 (w.e.f. 23-6-2006).

77. *Siva Vallabhaneni v State of Karnataka*, (2015) 2 SCC 90 : 2014 (10) Scale 75 .

78. *Kishan Kumar Malik v State of Haryana*, AIR 2011 SC 2877 : (2011)7 SCC 130 : (2011)3 SCC (cri) 61 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[79][[s 54] Examination of arrested person by medical officer.—

(1) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

***Provided* that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.**

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.]

[s 54.1] CrPC (Amendment) Act, 2008 [*Clause (9)*].—

This clause substitutes section 54 relating to examination of the arrested person by medical officer. The proposed amendment makes it obligatory on the part of the State to have the arrested person examined by a medical officer in the service of Central or State Governments and in case the medical officer is not available by a registered medical practitioner soon after the arrest is made. It also provides that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer; and in case the female medical officer is not available, by a female registered medical practitioner. (*Notes on Clauses*).

COMMENT

This section has been completely substituted by the CrPC (Amendment) Act, 2008. Section 54 as substituted by the Amendment Act of 2008 (5 of 2009) now makes it mandatory for the State to make medical examination of the arrested person, soon after his arrest, by a medical officer in the service of Central or State Government and in the absence of such medical officer, by a registered medical practitioner. Earlier, it was the duty of the Magistrate to inform the arrested person of his right to get himself medically examined, in case the arrested person complained of physical torture or maltreatment in police custody and the Magistrate was empowered to refuse the medical examination where he considered the request to be vexatious or defeating the ends of justice.[80] The substituted section makes the medical examination of the arrested person mandatory whether he desires it or not and there is now no question of the Magistrate being satisfied with the genuineness of the request. The substituted

section also lays down that where the arrested person is a female, the examination shall be made only by or under the supervision of a female medical officer, and in the absence of female medical officer, by a female registered medical practitioner.

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79. Subs. by Act 5 of 2009, section 8, for section 54 (w.e.f. 31-12-2009). Earlier section 54 was amended by Act 25 of 2005 sec. 10 (w.e.f. 23-6-2006). Section 54, before substitution by Act 5 of 2009, stood as under:

"54. Examination of arrested person by medical practitioner at the request of the arrested person.—(1) When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice. (2) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the registered medical practitioner to the arrested person or the person nominated by such arrested person."

STATE AMENDMENTS

Uttar Pradesh.—*The following amendments were made by U.P. Act 1 of 1984, s. 7 (w.e.f. 1-5-1984).* **S. 54.**—In section 54 the following sentence inserted at end namely—

"The registered medical practitioner shall forthwith furnish to the arrested person a copy of the report of such examination free of cost."

Uttar Pradesh.—*The following amendments were made by U.P. Act 1 of 1984, s. 8 (w.e.f. 1-5-1984).* **S. 54-A.**—After Sec. 54 insert the following section:—

"54-A. Test identification of the accused.—When a person is arrested on a charge of committing an offence and his test identification by any witness is considered necessary by any Court having jurisdiction, it shall be lawful for an Executive Magistrate acting at the instance of such Court, to hold test identification of the person arrested."

† Section 54 re-numbered as sub-section (1) of that section by the Cr.P.C (Amendment) Act, 2005 (25 of 2005), s. 10. Enforced w.e.f. 23-6-2006 *vide* Notfn No. S.O. 923(E), dt. 21-6-2006.

‡ Sub-section (2) inserted by the Cr.P.C (Amendment) Act, 2005 (25 of 2005), s. 10. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

80. **See** *DJ Vaghela v Kantibhai Jethabhai,* 1985 Cr LJ 974 (Guj).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[81][[s 54A] Identification of person arrested.—

Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit:]

[82] **[*Provided* that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with:**

***Provided further* that if the person arrested is mentally or physically disabled, the identification process shall be videographed.]**

[s 54A.1] CrPC (Amendment) Act, 2005 [*Clause (11)*].—

This clause seeks to insert a new section 54-A to empower the Court to direct specifically the holding of the identification of the arrested person at the request of the prosecution. (*Notes on Clauses*).

The failure to hold test identification report would not make inadmissible the evidence of identification in the Court.[83]

The weight to be attached to such identification should be a matter of fact for the courts. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.[84]

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81. Ins. by Act 25 of 2005, section 11 (w.e.f. 23-6-2006).

82. Ins. by Act 13 of 2013, section 12 (w.r.e.f. 3-2-2013).

83. *Mahabir v State of Delhi*, AIR 2008 SC 2343 : (2008) 16 SCC 481 : 2008 Cr LJ 3036 : (2008) 2 Crimes 180 .

84. *Raju Manjhi v State of Bihar*, AIR 2018 SC 3592 : 2018 (9) Scale 360 : LNIND 2018 SC 394 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 55] Procedure when police officer deputes subordinate to arrest without warrant.—

(1) When any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) Nothing in sub-section (1) shall affect the power of a police officer to arrest a person under section 41.

This section points out that where any officer in charge of a police station requires an officer subordinate to him to arrest without a warrant any person, he may deliver to the officer required to make the arrest an order in writing.[85.] It may be compared with section 75 on the one hand, and section 41 on the other hand. The power which a police officer has under section 41 to act on his own initiative and arrest without a warrant a person concerned in a cognizable offence is quite unaffected by this section.[86.]

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85. *Nepal*, (1913) 35 All 407 , 408.

86. *Kishun Mandar v King-Emperor*, (1926) ILR 5 Pat 533 : AIR 1926 Pat 424 ; *Gandhari Rai v Aparti Samal*, AIR 1960 Ori 33 : 1960 Cr LJ 381 ; *Sulaiman v The State of Kerala*, AIR 1964 Ker 185 : 1964 Cr LJ 34 .

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

87.[[s 55A] Health and safety of arrested person.—

It shall be the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused.]

87. Ins. by Act 5 of 2009, section 9 (w.e.f. 31-12-2009).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 56] Person arrested to be taken before Magistrate or officer in charge of police station.—

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

The Constitution of India, Article 22(2) also provides for producing the arrested person before Magistrate within 24 hours. Concept of being in custody for enquiry cannot be equated with concept of actual arrest.[88.]

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88. *Munsamy Shunmugam v Collector of Customs*, 1995 Cr LJ 1740 (Bom).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 57] Person arrested not to be detained more than twenty-four hours.—

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

When a person is arrested under a warrant, section 76 becomes applicable. When he is arrested without a warrant, the police officer can keep him in custody for a period not exceeding 24 hours. Before the expiration of such period, the arrested person has to be produced before the nearest Magistrate, who can, under section 167, order his detention for a term not exceeding a total of 15 days on the whole. Or he can be taken to a Magistrate who has jurisdiction to try the case, and such Magistrate can remand the person into custody for a term which may exceed 15 days but not more than 60 days. The intention of the Legislature is that an accused person should be brought before a Magistrate competent to try or commit with as little delay as possible.

Article 22 of the Indian Constitution, *inter alia*, provides:

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

  (a) to any person who for the time being is an enemy alien; or

  (b) to any person who is arrested or detained under any law providing for preventive detention.

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 58] Police to report apprehensions.—

Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

When an arrest is made under the provisions of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, the officer making the arrest is not bound to send any report to the District Magistrate as provided under section 58 of the CrPC. No statutory duty is cast on the officer effecting arrest or seizure to send any report to the District Magistrate and failure to send report will not make the search and seizure illegal or vitiate the trial.[89.]

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89. *Swarnaki v State of Kerala*, 2006 Cr LJ 65 (79) (DB) : 2006 (3) Crimes 339 (Ker) (Overruling 2004 (2) Ker LT 1072 (Ker)).

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 59] Discharge of person apprehended.—

No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

This section lays down that no person who has been arrested by a police officer shall be discharged except—(i) on his own bond, or (ii) on bail, or (iii) under the special order of the Magistrate.

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

[s 60] Power, on escape, to pursue and retake.—

(1) **If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India.**

(2) **The provisions of section 47 shall apply to arrest under sub-section (1) although the person making any such arrest is not acting under a warrant and is not a police officer having authority to arrest.**

This section provides that if a person escapes or is rescued from lawful custody, the person from whose lawful custody he escaped or was rescued may immediately pursue and arrest him in any place in India. Sub-section 2 further provides that such person shall have all the powers conferred by section 47 to search any place where the escaped person may have taken shelter.

The Code of Criminal Procedure, 1973

CHAPTER V ARREST OF PERSONS

90.[[s 60A] Arrest to be made strictly according to the Code.—

No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.]

Section 60A has been added with a view to prohibiting arrest except in accordance with the Code or any other law for the time being in force providing for arrest.

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90. Ins. by Act 5 of 2009, section 10 (w.e.f. 31-12-2009).

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

A.—Summons

The processes to compel appearance are dealt with here: (1) Summons (section 61) and (2) Warrant (section 70). Whether a summons or warrant should be issued in the first instance is determined by columns 4 and 5 of Schedule I. Where a summons has failed to secure attendance, it is open to the Court or Magistrate to issue a warrant (section 87). In cases where a warrant fails to take effect, the procedure of (3) proclamation as absconder (section 82) is taken; and if the absconder is not forthcoming, (4) his property is attached and sold (sections 83 and 85). One more method of securing attendance is (5) the taking of bond with or without sureties (section 88).

[s 61] Forms of summons.—

Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court.

The summons is a milder form of process. It is either (a) for appearance or (b) for producing a document or a thing. A summons for appearance may be issued to an accused person or a witness.

A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and the time of the day when, the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned.[1.] For the forms of summons to an accused person, see Schedule II, Forms 1 and 30.

[s 61.1] "Issued".—

The mere making of an order for issue of summons is quite different from issuance of summons.[2.]

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1. *Empress v Ram Saran*, (1882) 5 All 7 .
2. *State v Driver Mohamed Valli*, (1961) 2 Guj LR 222.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

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[s 62] Summons how served.—

(1) Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

(2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(3) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt there for on the back of the other duplicate.

This section deals with personal service. The mere showing to a witness of a summons is not sufficient service. The summons either should be left with the witness or should be exhibited to him and a copy of it delivered or tendered.[3.] The tender of the copy is sufficient service.[4.]

Where summonses issued by a Court for examination of witnesses are sent by post instead of sending them out as provided in this section, no inference can be legitimately drawn against the accused from the fact that there was no response from any of the witnesses to whom the summonses had been sent. The section ensures a two-fold safeguard for proper service: firstly, by providing that the service should be effected by a police officer or an officer of the Court who should see that the summons is served in the manner provided in the Code and who should be able to report to the Court as to the manner in which the summons was actually served, and, secondly, by authorising the serving officer to obtain a signed acknowledgement of the service which should ordinarily be treated as very cogent evidence of service.[5.] Sections 61 and 62 do not contemplate service of summons through registered post only in the case of service of summons on witnesses, service by post is contemplated, and no such service is provided for in case of maintenance proceedings. An order of maintenance passed *ex parte* without following the correct procedure for service of summons was liable to be set aside.[6.]

The procedure of issuing process to accused by post is not permissible.[7]

3. *Karsanlal Danatram*, (1868) 5 BHCR (CRC) 20.
4. *The Queen v Punamalai*, (1882) ILR 5 Mad 199; *Sahdeo Rai v Emperor*, (1918) ILR 40 All 577.
5. *Sudhir Kumar Dutt v The King*, (1949) 51 Bom LR 21 FC : AIR 1949 FC 6 : 1949 Cr LJ 625 (FC).
6. *Guthikonda Sri Hari Prasad Rao v Guthikonda Lakshmi Rajyama*, 1992 Cr LJ 1594 (AP) : 1991 (2) Andh LT 658 .
7. *Nav Maharashtra Chakan Oil Mill Ltd v Shivashakti Poultry Farm*, 2002 Cr LJ 4446 (Kant).

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CHAPTER VI PROCESSES TO COMPEL APPEARANCE

A.—Summons

The processes to compel appearance are dealt with here: (1) Summons (section 61) and (2) Warrant (section 70). Whether a summons or warrant should be issued in the first instance is determined by columns 4 and 5 of Schedule I. Where a summons has failed to secure attendance, it is open to the Court or Magistrate to issue a warrant (section 87). In cases where a warrant fails to take effect, the procedure of (3) proclamation as absconder (section 82) is taken; and if the absconder is not forthcoming, (4) his property is attached and sold (sections 83 and 85). One more method of securing attendance is (5) the taking of bond with or without sureties (section 88).

[s 63] Service of summons on corporate bodies and societies.—

Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the chief officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

***Explanation.*—In this section, "corporation" means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).**

Though societies registered under the Societies Registration Act, 1860, may not be formally incorporated, yet the Explanation by its inclusive definition brings them under the present section.

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[s 64] Service when persons summoned cannot be found.—

Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt there for on the back of the other duplicate.

***Explanation.*— A servant is not a member of the family within the meaning of this section.**

Where personal service as provided for in section 62 cannot be effected, the law allows service on some adult member of the family, but not on a servant. To justify such service, it should be shown that proper efforts were made to find the person summoned.[8.]

When police were either unable to or did not serve summons on the witnesses whom the accused wanted to examine, the accused was given the right to seek assistance of the Court to enforce the attendance of those witnesses. Closing the evidence without permitting him to take steps to enforce the attendance of those witnesses amounted to denial of fair opportunity to put forth his case.[9.]

8. *Hemendra Nath v Archana*, 1971 Cr LJ 817 : AIR 1971 Cal 244 .
9. *GV Reddy v OTS Advertising Pvt Ltd*, 2002 Cr LJ 3515 (AP) : 2002 (1) Andh LT Cri 468 .

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CHAPTER VI PROCESSES TO COMPEL APPEARANCE

A.—Summons

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[s 65] Procedure when service cannot be effected as before provided.—

If service cannot by the exercise of due diligence be effected as provided in section 62, section 63 or section 64, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper.

Where personal service cannot be effected under section 62 and extended service under section 64 cannot be secured, the law permits a substituted service.[10.] The procedure provided in this section cannot be made use of, unless service in the manner mentioned in sections 62, 63 and 64 cannot be effected by the exercise of due diligence.[11.] The Court may, in such a case, either declare the summons to have been duly served or direct fresh service. The summons can be served by affixing its copy to the outer door of the house in which the person summoned ordinarily resides.

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10. *The State v Bhimrao*, AIR 1963 Kant 239 : 1963 Cr LJ 293 .

11. *Beni Madhab v Jadu Nath*, (1925) 31 Cal WN 148, 149 : AIR 1926 Cal 1208 : 27 Cr LJ 715; *Hemendra Nath v Archana*, 1971 Cr LJ 817 : AIR 1971 Cal 244 .

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CHAPTER VI PROCESSES TO COMPEL APPEARANCE

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[s 66] Service on Government servant.—

(1) **Where the person summoned is in the active service of the Government, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in the manner provided by section 62, and shall return it to the Court under his signature with the endorsement required by that section.**

(2) **Such signature shall be evidence of due service.**

This section applies to all Government servants, including the police, but summons must be issued by a Court. It would not apply where summons is issued by a police officer in exercise of his powers of investigation.

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CHAPTER VI PROCESSES TO COMPEL APPEARANCE

A.—Summons

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[s 67] Service of summons outside local limits.—

When a Court desires that a summons issued by it shall be served at any place outside its local jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within whose local jurisdiction the person summoned resides, or is, to be there served.

By no norms of interpretation can it be suggested that a Court has no way to reach a person living outside its jurisdiction limits, other than the one prescribed in the section.[12.]

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12. *Ghulam Mohd. v Rasoolan*, 1991 Cr LJ 2937 (J&K).

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CHAPTER VI PROCESSES TO COMPEL APPEARANCE

A.—Summons

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[s 68] Proof of service in such cases and when serving officer not present.—

(1) **When a summons issued by a Court is served outside its local jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in the manner provided by section 62 or section 64) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.**

(2) **The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.**

When summons was received by witness, omission of signature by the presiding officer was held not to be a defect in procedure.[13.]

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13. *State of Sikkim v M K O Nair*, 1986 Cr LJ 415 .

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CHAPTER VI PROCESSES TO COMPEL APPEARANCE

A.—Summons

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[s 69] Service of summons on witness by post.—

(1) Notwithstanding anything contained in the preceding sections of this Chapter, a Court issuing a summons to a witness may, in addition to and simultaneously with the issue of such summons, direct a copy of the summons to be served by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain.

(2) When an acknowledgment purporting to be signed by the witness or an endorsement purporting to be made by a postal employee that the witness refused to take delivery of the summons has been received, the Court issuing the summons may declare that the summons has been duly served.

[s 69.1] State Amendment

Andaman and Nicobar and Lakshadweep Islands.—The following amendments were made by Regulation 6 of 1977, section 2 (w.e.f. 17-11-1977).

S. 69.—In its application to the Union Territories of Andaman and Nicobar and Lakshadweep Islands.—

(i) in sub-section (1) after the words "to be served by registered post", insert the words "or of the substance thereof to be served by wireless message".

(ii) in sub-section (2) for the word "that the witness refused to take delivery of the summons," substitute the words "or a wireless messenger that the witness refused to take delivery of the summons or the message, as the case may be".

This provision intends to avoid delay in the service of summons on witnesses by providing for service of such summons by post in addition to, or simultaneously with,

the issue of summons in the usual way.[14] The section is confined to service on witnesses only.

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14. See the Statement of Objects and Reasons, Gazette of India Extraordinary, Ptt II, section 2, p 1315.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 70] Form of warrant of arrest and duration.—

(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

The requisites of a valid warrant can be gathered from this section and the form of warrant of arrest in Form No. 2 of the Second Schedule. They are as follows:

1. The warrant must be in writing.
2. It must bear the name and designation of the person who is to execute it.[15.]
3. It must give full name and description of the person to be arrested.[16.]
4. It must state the offence charged.
5. It must be signed by the presiding officer.
6. It must be sealed.[17.]

A warrant once issued remains in force until it is cancelled or executed even though it bears a returnable date.[18.]

A Magistrate is, however, only competent to issue a warrant of arrest for production of a person before his own Court, and not before a police officer.[19.]

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15. *Emperor v Sheikh Nasur*, (1909) ILR 37 Cal 122.
16. *Re James Hastings*, (1872) 9 BHCR 154; *Alter Caufman v Govt of Bombay*, (1894) 18 Bom 636; *Debi Singh*, (1901) 28 Cal 399 .
17. *James Hastings*, (1872) 9 BHCR 154; *Mahajan Sheikh v Emperor,* (1915) 42 Cal 708 : AIR 1915 Cal 787 ; *Pangir v State,* (1960) Raj 1689 : 1962 Cr LJ 91 .
18. *Emperor v Binda Ahir*, AIR (1928) 7 Pat 478 ; *Indar Mandal v The State of Bihar,* AIR 1967 Pat 141 : 1967 Cr LJ 574 .
19. *Queen-Empress v Jogendra Nath Mukerjee*, (1897) ILR 24 Cal 320.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 71] Power to direct security to be taken.—

(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

- **(a) the number of sureties;**
- **(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;**
- **(c) the time at which he is to attend before the Court.**

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

After the accused has been taken into custody, the liability of sureties comes to an end. If, subsequently, he absconds from the custody of the Court, the sureties cannot be held liable.[20.]

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20. *Karim Shah v State of UP*, 2008 Cr LJ 2974 (2975) (All).

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 72] Warrants to whom directed.—

(1) **A warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same.**

(2) **When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.**

Section 78 overrides the provisions of this section. The Court may forward a warrant, which is to be executed outside the local limits of its jurisdiction, by post or otherwise to any Executive Magistrate or District Superintendent of Police or the Commissioner of Police within whose jurisdiction it is to be executed.[21.] But this cannot be extended beyond India.[22.]

Magistrate's order directing that the accused be served through his counsel was held to be not a proper procedure.[23.]

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21. *Re Sagarmal Khemraj*, (1940) 42 Bom LR 904 : (1941) Bom 16 : AIR 1940 Bom 397 .
22. *Jugal Kishore v CPM Calcutta*, AIR 1968 Cal 220 : 1968 Cr LJ 604 .
23. *Satya Securities v Uma Erry*, 2002 Cr LJ 3714 (HP).

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 73] Warrant may be directed, to any person.—

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

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

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 71.

The warrant may be addressed to any person within the local jurisdiction for the arrest of (i) any escaped convict; (ii) proclaimed offender or (iii) any person accused of a non-bailable offence who is avoiding arrest. Intentional omission by such person who is bound by law to give assistance is punishable under section 187 of the Indian Penal Code, 1860.

The Supreme Court stated that the Magistrate has the power to issue a warrant under section 73 during an investigation also. This power can be exercised by him for bringing about the appearance of the accused person before the Court only and not before the police in the aid of investigation.[24.]

Where a person has been residing in Dubai for the last many years and he is neither an escaped convict, nor proclaimed offender nor is evading arrest (though named in FIR) but is required only for interrogation, issuance of warrant for his arrest by a Delhi Court, for being produced, so that investigating officer may join him in investigation, was held to be without jurisdiction and could not be issued.[25.]

The Constitution, on one hand, guarantees the right to life and liberty to its citizens under Article 21 and, on the other hand, imposes a duty and obligation on the judge while discharging their judicial function to protect and promote the liberty of the citizens. The issuance of non-bailable warrant in the first instance without using the other tools of summons and bailable warrant to secure attendance of such person would impair the personal liberty guaranteed to every citizen under the Constitution. The issuance of non-bailable warrant involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, this demands that the courts have to be extremely careful before issuing non-bailable warrants.[26.]

[s 73.1] Non-bailable warrants.—

Non-bailable warrants deprive a person of his liberty which is protected by Article 21 of the Constitution. The Supreme Court therefore observed that such warrants must be issued with due care. The Court enumerated the circumstances in which non-bailable warrant should be issued as follows:

> Non-bailable warrants should be issued to bring a person to the court when summons of bailable warrants would be unlikely to have the desired result. This should be (a) when it is reasonable to believe that the person will not voluntarily appear in the court, or (b) police authorities are unable to find the person to serve him with a summon, or (c) it is considered that the person could harm someone if not placed into custody immediately.[27.]

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24. *State (CBI) v Dawood Ibrahim Kaskar,* AIR 1997 SC 2494 : (2000) 10 SCC 438 .
25. *Washeshwor Nath Chadha v State*, 1993 Cr LJ 3214 (Del) : 1992 (2) Crimes 86 .
26. *Vikas v State of Rajasthan*, 2014 Cr LJ 183 : (2014) 3 SCC 321 ; *Inder Mohan Goswami v State of Uttaranchal*, AIR 2008 SC 251 : (2007) 12 SCC 1 ; *Raghuvansh Dewanchand Bhasin v State of Maharashtra*, AIR 2011 SC 3393 : (2012) 9 SCC 791 —Rel. on.
27. *Inder Mohan Goswami v State of Uttaranchal*, AIR 2008 SC 251 at p 261 : (2007) 12 SCC 1 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 74] Warrant directed to police officer.—

A warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

The terms of this section are express, and no other person except a police officer is competent to execute a warrant of arrest under an endorsement from another police officer.[28.] Where there is no such endorsement, the arrest is not a legal arrest.[29.] An endorsement by designation will not make the warrant strictly legal.[30.]

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28. *Durga Charan Jemadar v Queen-Empress,* (1900) ILR 27 Cal 457, 460.
29. *K Kunju Kunju v State of Kerala*, (1962) 2 Cr LJ 437 .
30. *Ouseph Varkey v State of Kerala*, (1964) 1 Cr LJ 592 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 75] Notification of substance of warrant.—

The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

The section presupposes that the officer executing the warrant should have it in his possession.[31.] It requires that the substance of the warrant should be notified to the person to be arrested,[32.] or that an opportunity should be given to him by showing him the warrant so that he may read it.[33.]

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31. *Empress of India v Amar Nath*, (1883) ILR 5 All 318; *Emperor v Ganeshi Lal*, (1905) ILR 27 All 258.
32. *Abdul Gafur v Queen-Empress*, (1896) ILR 23 Cal 896.
33. *Satish Chandra Rai v Jodu Nandan*, (1899) ILR 26 Cal 748.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 76] Person arrested to be brought before Court without delay.—

The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person:

***Provided* that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.**

The outer limit laid down is twenty-four hours plus the time necessary for the journey from the place of arrest to the Magistrate's Court.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 77] Where warrant may be executed.—

A warrant of arrest may be executed at any place in India.

This section provides that a warrant of arrest may be executed at any place in India. This provision does not impose any restriction upon the power of the police officer. The section only declares, in that, every warrant issued by any Magistrate in India may be executed at any place in India; execution of the warrant is not restricted to the local limits of the jurisdiction of the Magistrate issuing the warrant or of the Court to which he is subordinate.[34.]

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34. *State of West Bengal v Jugal Kishore*, AIR 1969 SC 1171 , 1180 : 1969 Cr LJ 1559 : (1969) 1 SCC 440 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 78] Warrant forwarded for execution outside jurisdiction.—

(1) When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction it is to be executed; and the Executive Magistrate or District Superintendent or Commissioner shall endorse his name thereon, and if practicable, cause it to be executed in the manner hereinbefore provided.

(2) The Court issuing a warrant under sub-section (1) shall forward, along with the warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Court acting under section 81 to decide whether bail should or should not be granted to the person.

The specific provisions in sections 78 to 81 prescribing in detail the procedure to be adopted for execution of warrant outside the local limits of the jurisdiction of the Court issuing the same must be deemed to limit and control section 74 of the Code. Such warrant is forwarded to the authorities within the local limits of whose jurisdiction it is to be executed instead of directing the warrant to a police officer.[35.]

Sub-section (2) is for the purpose of enabling the Court before whom such person is 79 produced to exercise its discretion and release the person on bail.

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35. *Devi Singh v State of Rajasthan,* AIR 1964 Raj 36 : 964 Cr LJ 359; *Kunhunny Nair v State of Kerala*, (1962) 1 Cr LJ 645 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 79] Warrant directed to police officer for Execution outside jurisdiction.—

(1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer-in-charge of a police station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within whose local jurisdiction the warrant is to be executed will prevent such execution, the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local jurisdiction of the Court which issued it.

The sub-section (3) of section 79 authorises the police officer executing a warrant to give a go by to the procedure contemplated under sub-section (1) of section 79, if such an officer has a reason to believe that obtaining such an endorsement would prevent the execution of the warrant by virtue of the delay which is likely to be occasioned in obtaining the endorsement.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 80] Procedure on arrest of person against whom warrant issued.—

When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometres of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 71, be taken before such Magistrate or District Superintendent or Commissioner.

This section lays down the procedure for the production of the arrested person in cases where the execution of warrant takes place outside the jurisdiction of the Court which issued the warrant.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

B.—Warrant of arrest

[s 81] Procedure by Magistrate before whom such person arrested is brought.—

(1) **The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:**

***Provided* that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:**

***Provided further* that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made on consideration of the information and the documents referred to in sub-section (2) of section 78, to release such person on bail.**

(2) **Nothing in this section shall be deemed to prevent a police officer from taking security under section 71.**

[s 81.1] State Amendment

Uttar Pradesh.—The following amendments were made by U.P. Act 1 of 1984, section 9 (w.e.f. 1-5-1984).

S. 81.—In section 81, sub-section (1) insert the following third proviso:—

"*Provided* also that where such person is not released on bail or where he fails to give such security as aforesaid, the Chief Judicial Magistrate in the case of a non-bailable offence, or any Judicial Magistrate in the case of a bailable offence may pass such orders as he thinks fit for his custody till such time as may be necessary for his removal to the Court which issued the warrant."

[s 81.2] "Appears to be".—

This section does not contemplate an elaborate enquiry as to the identity of the person arrested; the Magistrate is to be satisfied *prima facie* that the person arrested is the person mentioned in the warrant.[36.] The word "shall" in sub-section (1) is mandatory and not directory. Therefore, if to the Executive Magistrate, or the District

Superintendent of Police or the Commissioner of Police, the person "appears to be" the person intended by the Court, then he must direct his removal in custody to such Court, subject, of course, to the provisos.[37.]

The second proviso is new and is intended to mitigate the hardship of taking the person to the Court which issued the warrant against him.

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36. *Kunhunny Nair v State of Kerala*, (1962) 1 Cr LJ 465 .
37. *Khan Chand Tarachand Samtani v State*, 1971 Cr LJ 149 (Cal).

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

C.—Proclamation and Attachment

[s 82] Proclamation for person absconding.—

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

(2) The proclamation shall be published as follows:—

(i)(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

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

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

[39][(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).]

[s 82.1] CrPC (Amendment) Act, 2005 [*Clause (12)*].—

This clause seeks to insert new sub-sections (4) and (5) in section 82, empowering the Court to make the declaration that the person is a proclaimed offender where he fails to appear at the specified place and time mentioned in the proclamation issued under sub-section (1) of section 82 in relation to offences under sections 302, 304, 364, *etc.*, of the Indian Penal Code. (*Notes on Clauses*).

COMMENT

The Code has provided ample powers to execute a warrant. But if it remains unexecuted, there are two more remedies: (1) issuing a proclamation (section 82) and (2) attachment and sale of property (section 83). Simultaneous issue of both processes, *viz.*, warrant of arrest and also proclamation, is *ex facie* contradictory because it is only *after* the warrant has been issued that the Court can, if it has reason to believe that the person has absconded or is hiding, issue proclamation.[40.] While these remedies are being pursued, the Court may, if the absconder is an accused person, proceed under section 299. See Forms 4 and 5 of Schedule II.

Under section 82, the Magistrate issuing proclamation must record his satisfaction that the accused had absconded or concealed himself.[41.] A person who had gone abroad before the issue of the warrant of arrest cannot be said to be absconding or concealing.[42.]

A proclamation which omits to mention the time within which and the place at which the absconder should present himself to save the sale of his property, is a nullity.[43.] Mention of lesser period than that required under the section will make the proclamation ineffective, and the defect is not one curable under section 465.[44.]

To issue notice through post is not a procedure warranted by this Code for compelling appearance of parties in Court. The ordinary process for compelling appearance is in the first instance to issue summons under section 61; and when summons so issued cannot be served, it is the duty of the Court to issue a warrant. When the warrant also cannot be executed, the Court has to proceed under sections 82 and 83 and issue a proclamation and attach the property of the person who is evading service of process.[45.]

The three sub-clauses (a), (b) and (c) of sub-section (2) clause (i) are conjunctive and not disjunctive. The factum of valid publication depends on the satisfaction of each of these clauses.[46.] Clause (ii) of sub-section (2) is optional; it is not an alternative to clause (1). The latter clause is mandatory.

Sub-section (3) does not override the requirements of the Evidence Act, nor does it make the proclamation evidence that the warrant had been issued. The method of proving the warrant is not a requirement of the section, which merely deals with the proclamation itself and the mode of publishing it and the like. This section does not make the proclamation equivalent to notice to the public of its contents, even to the inhabitants of the town or village where it is published.[47.]

[s 82.2] "Absconded".—

The term is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense is to hide oneself; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment. If a person, having concealed himself before process issues, continues to do so, after it has issued, he absconds.[48.]

[s 82.3] Attachment of property.—

The property of an absconding accused can be attached, but it cannot be sold. The attachment has no effect on the rights of the tenant.[49.]

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38. Ins. by Act 25 of 2005, section 12 (w.e.f. 23-6-2006).
39. Ins. by Act 25 of 2005, section 12 (w.e.f. 23-6-2006).
40. *PK Gupta v The State of West Bengal*, 1973 Cr LJ 1368 .
41. ILR (1977) 1 Kant 780 .
42. *MSR Gundappa v State of Karnataka*, 1977 Cr LJ (NOC) 187 ; *KTMS. Abdul Kader v UOI*, 1977 Cr LJ 1708 : AIR 1977 Mad 386 .
43. *Main Jan v Abdul*, (1905) 27 All 572 ; *Queen-Empress v Subbarayar*, (1896) ILR 19 Mad 3.
44. *Pritam Kaur v State of Punjab*, 1967 Cr LJ 1120 .
45. *George v Joseph*, (1953) Tra 607.
46. *PK Gupta v State of West Bengal*, 1973 Cr LJ 1368 .
47. *Easwaramurthi Goundan v Emperor*, (1944) 71 IA 83 , 92 : 46 Bom LR 844 : (1945) Mad 237.
48. *Srinivasa Ayyangar*, (1881) 4 Mad 393, 397.
49. *Vimlaben Ajitbhai Patel v Vaishlaben Ashokbhai Patel*, AIR 2008 SC 2675 : (2008) 4 SCC 649 : (2008) 2 Crimes 45 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

C.—Proclamation and Attachment

[s 83] Attachment of property of person absconding.—

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

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

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

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

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

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

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

(a) by seizure; or

(b) by the appointment of a receiver; or

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

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

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

(a) by taking possession; or

(b) by the appointment of a receiver; or

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

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

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

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

This section penalises a person who seeks to avoid his arrest under a warrant and against whom a proclamation is issued under the previous section. For disobedience of the proclamation, he incurs liability to be punished under section 174 of the Indian Penal Code. This provision is devised to put additional pressure upon the absconder by depriving him of his property with a view to compel him to obedience. However, the provisions of the Code not being applicable to contempt proceedings, these sections cannot be availed of for securing the presence of the alleged contemnor or, in default, to attach his property.[50.] The object of attaching property of an absconder is not to punish him but to compel his appearance. If the property has not been confiscated or disposed of, the title thereof continues to vest in the owner and thereafter in his heirs.[51.]

An order of attachment in the absence of the material to show that the accused was absconding was illegal.[52.]

In order to attract the penal consequences mentioned in this section, the proclamation under the previous section should be a valid proclamation satisfying all the three clauses with regard to its publication.

[s 83.1] "At any time after the issue of proclamation".—

The proclamation issued under section 82 requires appearance of the person, against whom warrant has been issued, at a specified time, at a specified place. The date fixed should not be less than thirty days from the date of publication of the proclamation. If that be so, simultaneous attachment of property cannot be effected. However, even if such an attachment is made under the proviso, the Court, on such proclaimed offender appearing before it within the time specified in the $_{84}$ proclamation, shall release the property under section 85(1).

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50. *Mrs VG Peterson v Forbes*, AIR 1963 SC 692 : (1963) 1 Supp SCR 40 : 1963 (1) Cr LJ 633.
51. *Dayanand Kalu v State of Haryana*, AIR 1976 Punj 190 .
52. *Ratish Roy v Mohesh Singh*, 1985 Cr LJ 94 (Gau).

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

C.—Proclamation and Attachment

[s 84] Claims and objections to attachment.—

(1) If any claim is preferred to, or objection made to the attachment of, any property attached under section 83, within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under section 83, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:

Provided **that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.**

(2) Claims or objections under sub-section (1) may be preferred or made in the Court by which the order of attachment is issued, or, if the claim or objection is in respect of property attached under an order endorsed under sub-section (2) of section 83, in the Court of the Chief Judicial Magistrate of the district in which the attachment is made.

(3) Every such claim or objection shall be inquired into by the Court in which it is preferred or made:

Provided that, if it is preferred or made in the Court of a Chief Judicial Magistrate, he may make it over for disposal to any Magistrate subordinate to him.

(4) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (1) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive.

This section deals with rights of persons other than the proclaimed person in the property attached. In case of non-conformance with section 82, which must be regarded as procedure established by law, the order which follows, including an order under the present section, becomes illegal.[53.]

The words "to establish the right which he claims in respect of the property in dispute" in sub-section (4) cover a case where money is claimed as value of the property seized by the criminal Court.[54.]

The right of the person to institute a suit in the civil Court is not barred under this section.[55.] Application by third party after actual release of the property from

attachment, under section 84, is not maintainable. He can file a civil suit for that purpose.[56.]

The rejection of an objection to an order of attachment of property was held to be proper where the objection was based on a gift, but no evidence was adduced to show actual transfer of possession after the gift.[57.]

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53. *PK Gupta v St*, 1973 Cr LJ 1368 .
54. *Jamshed Bute*, (1956) Nag 866.
55. *Secretary of State v Ahalyabai*, (1937) 40 Bom LR 422 : AIR 1938 Bom 321 .
56. *Chandrashekhar Shastri v State of UP*, 1978 Cr LJ 540 (All).
57. *Mohammad Zarif v UOI,* 2000 Cr LJ 3224 (MP).

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

C.—Proclamation and Attachment

[s 85] Release, sale and restoration of attached property. —

(1) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.

(2) If the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under section 84 has been disposed of under that section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner; in either of which cases the Court may cause it to be sold whenever it thinks fit.

(3) If, within two years from the date of the attachment, any person whose property is or has been at the disposal of the State Government, under sub-section (2), appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying therefrom all costs incurred in consequence of the attachment, be delivered to him.

If the proclaimed person appears within the time specified in the proclamation, his property is released. If he does not do so within time, then his property will be at the disposal of the State Government. The expression "shall be at the disposal of the State Government" is also used in section 458. It means that the property passes under the absolute control of Government to dispose of, or deal with it, in whatever manner might seem most appropriate and convenient.[58.] Property declared to be at the disposal of Government can only be restored by Government.[59.] The property, unless it is perishable, is to remain under attachment for six months. At the end of the period, the property is to be sold, and the sale proceeds to wait for two years. If within two years, the person satisfies the Court as to the reason for his absence, he can recover the money; otherwise, it stands forfeited to Government.[60.] But a person having a claim to such property can enforce it by an independent action in a civil Court so long as the property is not sold and remains in the hands of the Government.[61.]

Sub-section (3) prescribes a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation.[62.] It

contemplates and requires proof that the offender did not abscond or conceal himself for the purpose of avoiding arrest and that he had no such notice of the proclamation as to enable him to attend within the time specified. The proof that the accused person has not absconded should be offered or given within two years of the date of the attachment. It is not enough to show that within that period, the accused person appeared voluntarily or was apprehended or brought before the Court.[63] Where property of an absconder is attached under this section, the minor children of the absconder entitled to maintenance from him cannot apply for the release of the property.[64]

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58. Per Princep J, in *Toolseeram Bera v Golam Abed*, (1883) ILR 9 Cal 861, 863.
59. *Govt of Bengal v Meer Surwar*, (1872) 18 WR 33 ; *Re Gurunath Narayan*, (1924) 26 Bom LR 719 : AIR 1924 Bom 485 .
60. *Dattaji v Narayanarao*, (1922) 25 Bom LR 288 : AIR 1923 Bom 198 .
61. *Secretary of State v Ahalyabai*, AIR 1938 Bom 321 : (1937) 40 Bom LR 422 ; *Reemah Ezzekiel v Province of Bengal*, (1939) 2 Cal 52 : AIR 1939 Cal 746 .
62. *Abdullah v Jitu*, (1900) 22 All 216 , 219.
63. *Re Nilkanth Ramchandra*, (1913) 15 Bom LR 175 : 19 Ind Cas 333.
64. *ND Gaddireddi v State*, 1979 Cr LJ 1107 (Del) : ILR (1979) 2 Del 229 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

C.—Proclamation and Attachment

[s 86] Appeal from order rejecting application for restoration of attached property.—

Any person referred to in sub-section (3) of section 85, who is aggrieved by any refusal to deliver property or the proceeds of the sale thereof may appeal to the Court to which appeals ordinarily lie from the sentences of the first-mentioned Court.

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

D.—Other rules regarding processes

[s 87] Issue of warrant in lieu of, or in addition to, summons.—

A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest—

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

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

This section gives power to issue a warrant in lieu of, or in addition to, a summons. It can be exercised only in two cases: (1) where the Court believes that the person summoned (which includes an accused or a witness) has absconded or will fail to turn up; and (2) where he has without reasonable cause failed to appear. In a proceeding under section 125 Code of Criminal Procedure (CrPC), the Magistrate closed the evidence of a party, one of whose witnesses did not turn up in spite of sufficient service, the High Court set aside the order directing the Magistrate to consider the exercise of his powers under section 87 CrPC in order to secure attendance of the witness.[65.]

[s 87.1] "After recording its reasons in writing".—

The recording of reasons in writing is a condition precedent to the exercise of the power. The omission to do so is an irregularity not cured by section 464.[66.] The adoption of a stereotyped printed form is not a sufficient compliance with the imperative language of the section.[67.]

Where a Magistrate issued notice to the husband by registered post, and subsequently issued warrant of attachment of his salary for releasing the amount of maintenance awarded to his wife under section 125 CrPC, it was held that notice by registered post was illegal as it ought to have been served as provided in section 125(3) CrPC, and warrant of attachment was also invalid as the order for issuing warrant did not even remotely indicate the circumstances reflected under section 87 CrPC to justify the warrant.[68.]

65. *Prodyot Kumar Baidya v Chaya Rani Baidya*, 1995 Cr LJ 3155 (Cal).
66. *Karuthan Ambalam*, (1914) ILR 38 Mad 1088; *Subol Mondal v The State*, 1974 Cr LJ 176 .
67. *Sukheswar Phukan v Emperor*, (1911) ILR 38 Cal 789.
68. *VP Shivanna v Bhadramma*, 1993 Cr LJ 418 (Kant) : 1992 (2) Kar LJ 291 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

D.—Other rules regarding processes

[s 88] Power to take bond for appearance.—

When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.

The person who is to be bound over must be (1) present in the Court and (2) a free agent. If the person is already under arrest and in custody, his appearance does not depend upon his own volition.[69.] However, a Magistrate has no power to commit a person to custody if he refuses to execute a bond.[70.] Discretion given under section 88 to the Court, does not confer any right on a person, who is present in the Court, it rather is the power given to the Court to facilitate his appearance, and it is for the Court to exercise its discretion when a situation so demands.[71.]

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69. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.

70. *Ramachandra v State of UP*, 1977 Cr LJ 1783 (All).

71. *Pankaj Jain v UOI*, AIR 2018 SC 1155 : 2018 (5) SCC 743 : LNIND 2018 SC 92 .

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

D.—Other rules regarding processes

[s 89] Arrest on breach of bond for appearance.—

When any person who is bound by any bond taken under this Code to appear before a Court, does not appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

Where a non-bailable warrant of arrest, against an accused for his non-appearance, was issued by a Magistrate other than the actual presiding officer of that Court in which the case was pending, it was held that Judicial Officer remaining in-charge of another Court is incompetent to pass order for issuance of warrant of arrest in a pending case, as he can never be said to be the presiding officer of that Court in view of section 89 CrPC.[72.]

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72. *Pramod Kumar Patnaik v State of Orissa*, 1995 Cr LJ 3573 (Ori).

The Code of Criminal Procedure, 1973

CHAPTER VI PROCESSES TO COMPEL APPEARANCE

D.—Other rules regarding processes

[s 90] Provisions of this Chapter generally applicable to summonses and warrants of arrest.—

The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

The Court is empowered to issue summons when required and could also exercise powers under section 311 in the ends of justice.[73.]

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73. *State v Nand Kishore*, 1967 Cr LJ 1369 : AIR 1967 Raj 228 .

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

A.—Summons to produce

[s 91] Summons to produce document or other thing.—

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

- **(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or**
- **(b) to apply to a letter, post card, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.**

The Code has so far dealt with the procuring of personal attendance of a person: it may be secured either by a summons (sections 61–69), or a warrant (sections 70–81). It also becomes frequently necessary to require a person to produce a document or thing which may be in his possession or power and which may have a bearing on a case. This can be secured either by a summons (sections 91 and 92), or a warrant (sections 93–98).

The *sine qua non* of an order under this section is a consideration by the Court that the production of the documents concerned is desirable and necessary for the purposes of the trial.[1.]

Section 91, on its true construction, does not apply to an accused person on trial. No specific words indicate its application to accused persons on trial. A limitation should be put on the wide words used; otherwise calling upon an accused person to produce documents which are incriminating as against him will negate the safeguard of Article 20(3) of the Constitution of India. It may be that this construction of section 91 would render section 93 useless. But to a search by the police officer under section 165, Article 20(3) has no application.[2.]

The Court must be informed of the name of the person in whose possession or power the document is; otherwise as application for issue of summons cannot be

entertained[3.]:

This section may be contrasted with section 165. Section 165 authorises a police officer to search the house of the accused for specific documents and things necessary to the conduct of an investigation into an offence.

[s 91.1] Scope of power to issue summons.—

The circumstances in which this power can be exercised depends upon facts of each case. The Court has a wide discretion in the manner. It is only when the discretion is exercised neither judiciously nor judicially and there is gross or improper failure to exercise the discretion which is demonstrably unreasonable, that the superior Court would interfere. On the facts of the case, it was held that the Supreme Court's interference with the rejection of the accused's application under section 91 for summoning certain documents for CBI was not called for.[4.]

[s 91.2] "Document or other thing"—Thing.—

The word refers to a physical object or material and does not refer to an abstract thing. Issuing a summons to a person for the purpose of taking his specimen signature or handwriting cannot be said to be for the production of document or a thing contemplated under this section.[5.]

This section deals with documents forming the subject of a criminal offence as also with documents which are or can be used only as evidence in support of a prosecution.[6.] The thing called for must have some relation to, or connection with, the subject matter of the investigation or inquiry, or throw some light on the proceeding, or supply some link in the chain of evidence.[7.] When an application is made to a Court, or to a police officer under this section, the Court is bound to consider whether there is a *prima facie* case for supposing that the documents are relevant, i.e., whether books of a particular type are likely to have a bearing on the case. If the Court thinks they are, then it can order production. The Court may also consider whether the document *etc*. is being suppressed or may be tampered with or destroyed by the party in whose possession it is or may be entirely lost.[8.] But, an order for production does not involve an obligation on the Court to give inspection of all books produced to the complainant, though the Court has power to order such inspection. The Court should consider that question at a later stage of the proceeding, either at the trial or inquiry or on a special application at which it could hear the accused as well as the complainant, and it should order inspection of only those books which the complainant satisfies it are really relevant.[9.]

Whether a particular document should be summoned or not is essentially in the discretion of the trial Court. Except for very good reasons, High Court should not interfere with that discretion.[10.]

This section does not refer to stolen articles or to any incriminating document or thing in the possession of an accused person.[11.]

The powers of the Court under section 91 of the Code could not be enlarged even if the accused person consented to such an order because the powers of the Magistrate are limited by the provisions of the Code.[12.] When the matter is in the investigation stage either on a private complaint referred by a Court or on a case registered on a police complaint, the Court is not entitled to pass any order by issuing summons or warrant

against the accused for the production of a document or a thing that is in his custody which is incriminatory against him.[13.]

[s 91.3] "Person".—

The term "person" does not include an accused person on trial.[14.]

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1. *Ajay Mukherji v State*, 1971 Cr LJ 1329 .
2. *Shyamlal v State of Gujarat*, AIR 1965 SC 1251 : (1965) 2 Cr LJ 256 .
3. *Lotan Bhoji v The State of Maharashtra*, (1974) 77 Bom LR 70 : 1975 Cr LJ 1577 .
4. *Om Prakash Sharma v CBI,* AIR 2000 SC 2335 : 2000 Cr LJ 3478 : (2000) 5 SCC 679 ; *Narender Kumar Jain v State of Gujarat*, (2000) 10 SCC 322 complaint against the appellant and three others, two of them challenged the summoning order, the same was dismissed by the Supreme Court and the High Court. The Supreme Court, on appeal, refused to look into facts so as to see whether a *prima facie* case was made out under section 406 IPC.
5. *T Subbiah v Ramaswamy*, 1970 Cr LJ 254 : AIR 1970 Mad 85 .
6. *Re Lakhmidas*, (1903) 5 Bom LR 980 .
7. *HH The Nizam of Hyderabad v AM Jacob*, (1891) ILR 19 Cal 52, 64; *Pratt*, (1920) 47 Cal 647 ; *Re Lloyds Bank*, AIR 1934 Bom 74 : (1933) 36 Bom LR 88 ; *Bashir Hussein v Gulam Mohomed Ismail Peshimam*, (1965) 67 Bom LR 748 : AIR 1966 Bom 253 .
8. *Bashir Hussein v Gulam Mohomed Ismail Peshimam,* (1965) 67 Bom LR 748 : AIR 1966 Bom 253 , *ibid*.
9. *Hussenbhoy Lalji v Rashid Versi*, (1941) 43 Bom LR 523 : (1941) Bom 492 FB, **overruling** *Central Bank of India v Shamdasani*, AIR 1938 Bom 33 : 39 Cr LJ 207 : (1937) 39 Bom LR 1187 SB; *Graves v Pitoomal*, (1942) Kar 292 .
10. *Asst. Customs Collector, Bombay v LR. Melwani*, AIR 1970 SC 962 : 1970 Cr LJ 885 : (1969) 2 SCR 438 .
11. *Bajrangi Gope v Emperor*, (1911) ILR 38 Cal 304, 306; *Sheonandan Prasad v Bihar*, 1979 Cr LJ (NOC) 26 (Pat); *Vinayak Purushottam Kalantre v VB Deshmukh*, 1979 Cr LJ 71 (Bom— DB).
12. *Jagadish Prasad Sharma v State of Bihar*, 1988 Cr LJ 287 (Pat).
13. *D Veeraih v K Veeraih*, 1988 Cr LJ 274 (AP).V
14. *Shyamlal v State of Gujarat*, AIR 1965 SC 1251 : (1965) 2 Cr LJ 256 .

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

A.—Summons to produce

[s 92] Procedure as to letters and telegrams.—

(1) If any document, parcel or thing in the custody of a postal or telegraph authority is, in the opinion of the District Magistrate, Chief Judicial Magistrate, Court of Session or High Court wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the postal or telegraph authority, as the case may be, to deliver the document, parcel or thing to such person as the Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, whether Executive or Judicial, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the postal or telegraph authority, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the order of a District Magistrate, Chief Judicial Magistrate or Court under sub-section (1).

Section 94 and this section must be read and interpreted together. The documents can be in custody only if they are in existence.[15.] An omnibus order by the District Superintendent of Police under this section directing detention of entire mail of the petitioner by the Postal and Telegraph department is not illegal.[16.] As the words "document or thing" are of general import, they would cover a postal or money order also.[17.]

15. *Textile Traders Syndicate Ltd v The State of UP*, AIR 1960 All 405 : 1960 Cr LJ 871 ; *Amar Singh v State*, AIR 1965 Raj 160 : 1965 Cr LJ 408 .

16. *Kailash Chandra v Superintendent of Post Offices*, AIR 1960 Punj 412 : 1960 Cr LJ 1134 .

17. *Ibid.*

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

[s 93] When search warrant may be issued.—

(1) (a) Where any Court has reason to believe that a person to whom a summons or order under section 91 or a requisition under sub-section (1) of section 92 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

(b) where such document or thing is not known to the Court to be in the possession of any person, or

(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.

[s 93.1] Scope.—

Search and seizure pursuant to a warrant under section 93 obtained during an investigation is nothing but an integral step in an investigation.[18.] Section 93(1)(c) comprehends a situation where a search warrant can be issued as the Court is unaware not only of the person but even the place where the documents may be found and a general search is necessary. One cannot cut down the power of the Court under section 93(1)(c) by importing into it some of the requirements of section 93(1)(b). Search of the premises occupied by the accused does not amount to compulsion on him to give evidence against himself and therefore is not violative of Article 20(3) of the Constitution.[19.] The Magistrate is required to record reasons before the issue of a search warrant. An illegal order of search and seizure vitiates the seizure of the article.[20.] This section contemplates the production of some specified or distinct thing or object which may be deemed essential to the conduct of any inquiry, and to the conviction of the accused person such, for instance, as a bloody knife, a vessel containing poison, a forged document, a piece of stolen property and so on. It provides

for an efficacious procedure for the production of a document or thing, when the summons to produce it has failed or in other cases. A summons or order under section 91 or a requisition under section 92(1) is addressed to the person who has the document or thing; but the warrant under section 93 is directed to a police officer. Under section 91, any court or any officer in charge of a police station can take action; whereas under this section, only the Court can proceed.

It is desirable, though not obligatory under section 93(1) to record reasons in writing. As a search warrant is not a mere formality but a drastic act, necessary precaution should be taken to see that powers vested are not abused.[21.]

A search warrant under this section can be issued only in three cases:—

(1) where the Court has reason to believe that the person summoned to produce a document or thing will not produce it;

(2) where the document or thing is not known to be in the possession of any person;

(3) where a general inspection or search is necessary.

This section applies not only when there is an enquiry pending but also when an inquiry is about to be made.[22.] The search warrant may be general or restricted in its scope as to any place or part thereof.

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18. *VS Kuttar Pillai v Ramakrishna*, AIR 1980 SC 185 : 1980 Cr LJ 196 : (1980) 1 SCC 264 .
19. *Ibid.*
20. *Shyam M Sachdev v State*, 1991 Cr LJ 300 (Del).
21. *Fernandes v Mohan Nair*, AIR 1966 *Goa, Daman & Diu* 23 SB; *Shiv Dayal v Sohan Lal*, AIR 1970 Punj 468 , 471 : 1970 Cr LJ 1517 .
22. *Clarke v Brojendra Kishore Roy Chowdhury*, (1912) 39 IA 163 : 39 Cal 953 : 14 Bom LR 717.

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CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

[s 94] Search of place suspected to contain stolen property, forged documents, *etc*.—

(1) If a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place,

(b) to search the same in the manner specified in the warrant,

(c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies,

(d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safety,

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.

(2) The objectionable articles to which this section applies are—

(a) counterfeit coin;

(b) pieces of metal made in contravention of the Metal Tokens Act, 1889 (1 of 1889), or brought into India in contravention of any notification for the time being in force under section 11 of the Customs Act, 1962 (52 of 1962);

(c) counterfeit currency note; counterfeit stamps;

(d) forged documents;

(e) false seals;

(f) obscene objects referred to in section 292 of the Indian Penal Code (45 of 1860);

(g) instruments or materials used for the production of any of the articles mentioned in clauses (a) to (f).

If the Magistrate—

(1) upon information and after inquiry

(2) has reason to believe that any place is used—

  (a) for the deposit or sale of any stolen article; or

  (b) for the deposit, sale or production of any objectionable article mentioned in sub-section (2); or

  (c) such objectionable article is deposited in any place;

(3) then he may by warrant authorise a police officer (above the rank of a constable) to—

  (i) enter, if necessary with assistance, such place;

  (ii) search the same as provided in the warrant;

  (iii) take possession of the stolen or the objectionable article;

  (iv) convey the same to the Magistrate or otherwise keep the article safely; and

  (v) take into custody every person found in the place who appears to be suspect and produce them before the Magistrate.

The words used in this section like "stolen property", "counterfeit currency notes", "forged documents", *etc.* are defined in the IPC, 1860.

In cases of improper search and seizure, consequence is only that the evidence should be examined with caution.[23.]

23. *T Sarojini Ammal v UOI*, 1992 Cr LJ 3110 (Ker); *Md. Asghar v Reshma*, 1996 Cr LJ 3602 (Cal), criminal breach of trust, warrant issued without assigning reasons or making preliminary inquiry, held improper, but search already completed and things recovered, no interference.

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CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

[s 95] Power to declare certain publications forfeited and to issue search-warrants for the same.—

(1) Where—

(a) any newspaper, or book, or

(b) any document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of Sub-Inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In this section and in section 96,—

(a) "newspaper" and "book" have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867);

(b) "document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of section 96.

This and the following section should be read together. The grounds of opinion should be clearly stated in the notification; they are a vital and essential part of the notification revealing as they do the justification for issuance of the notification.[24.] Where the Government does not state the ground in the notification, the High Court will set aside the order of forfeiture.[25.] Where instead of stating the grounds of its opinion, the State Government reproduced certain words of section 124A IPC after making reference to certain pages of the book, which had been forfeited, it was held that the order failed to state the grounds of opinion of the State Government and was liable to be set aside.[26.] An order for the forfeiture of publications under section 95 would be bad if there is total absence of the grounds for Government's opinion. It is not necessary to prove the intention to commit an offence. But the High Court must be satisfied that the offending material is punishable under the relevant sections of the IPC.[27.] The daily "Ajit" of

Punjab challenged the validity of the guidelines issued in this regard to the District Magistrates by the State Government. They were held valid. It was further held that publishing news items extolling virtues of Khalistan, publishing directives and obituary notices of Khalistan terrorists do fall within the ambit of sections 124A, 153A and 153B of the IPC and seizure of such issues of the paper was justified under this section.[28.] It is the pernicious tendency of the words which is enough to bring the publication within the four corners of sections 95(1) and 96(4) IPC. If a news item has the requisite pernicious tendency, which would *prima facie* constitute an offence under section 153B IPC, forfeiture is justified.[29.]

The order of forfeiture can be valid only (a) if the Government has formed an opinion that the concerned document contains matter publication of which is punishable by the sections mentioned; and (b) the order states the grounds on which the opinion was based. Failure to comply with either of the conditions will invalidate the order.[30.] A specific remedy has been provided for in section 96; it is not necessary that prior to the issue of the order the State Government should issue notice to the party or parties and give them an opportunity of being heard.[31.]

The section does not violate the guarantees contained in Articles 19(1)(a), 19(1)(b) and 19(1)(g) of the Constitution of India and is, therefore, valid.[32.]

In terrorist infested Punjab, while it was under President's rule, many restrictions were imposed on various publications. Many issues of a Punjabi daily "Ajit" were forfeited for violation of such restrictions under section 95 CrPC constitutional validity of section 95 CrPC was challenged. Full Bench of Punjab and Haryana High Court held,—

(1) Restrictions under section 95 CrPC are reasonable and do not violate Articles 14, 19(1)(g) or 21 of the Constitution though they place limited restriction on the right to trade of the publisher but not total prohibition.

(2) It is neither possible nor practicable to afford opportunity of being heard to the person concerned before passing orders of forfeiture under section 95 CrPC.

(3) But there are inbuilt safeguards under sections 95 and 96 CrPC *viz*—

(i) Government is required to state the grounds of its opinion.

(ii) Power of forfeiture can be exercised where the publication contains any matter punishable under specific sections of the IPC.

(iii) Effective remedy is provided in section 96 CrPC.[33.]

If the notification does not spell out the facts on the basis of which the opinion was arrived at by the State Government regarding forfeiture of a play ("Me Nathuram Godse Boltoy"), mere reference to the statutory provisions of sections 153A and 295A IPC could not save the notification against the consequence of invalidity.

The power of forfeiture which has been conferred by section 95 upon the State Government is a drastic power, the exercise of which has to be strictly conditioned by due observance of the requirements of the section. The section does not empower the State Government to issue an order of forfeiture merely because it apprehends "that a law and order situation" may arise due to the opposition of a segment of the society to the message which is sought to be conveyed in the offending material (a play entitled "Me Nathuram Godse Boltoy" in this case).[34.]

A book named "Jinnah-India, Partition, Independence," was forfeited. The notification ordering forfeiture only said that the contents of the book were highly objectionable but

without explaining in what manner the contents were objectionable and against national interest. There was no explanation how the contents of the book would have affected and disturbed public peace or the interest of the State, or how they were going to promote enmity between different groups on grounds of religion, caste, place of birth, residence, language, *etc.* and result in generation of ill-feelings amongst them. The notification was quashed because it fell short of statutory requirements.[35.]

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24. *Mohammad Khalid v Chief Commissioner, Delhi*, AIR 1968 Del 13 (FB) : 1968 Cr LJ 50 .
25. *Harnam Das v State of Uttar Pradesh*, AIR 1961 SC 1662 : 1961 (2) Cr LJ 815 .
26. *Barjinder Singh v State of Punjab*, 1993 Cr LJ 2040 (P&H-FB).
27. *Nand Kishore Singh v State of Bihar*, 1985 Cr LJ 797 (Pat).
28. *Sadhu Singh Hamdard Trust Jalandhar v State* of Punjab, 1992 Cr LJ 1002 (P&H).
29. *Barjindar Singh v State of Punjab*, 1993 Cr LJ 2040 (P&H-FB).
30. *Lalai Singh Yadav v State of U P*, 1971 Cr LJ 1519 SB
31. *Ibid.*
32. *Gopal Vinayak Godse v The UOI*, (1970) 72 Bom LR 871 SB : AIR 1971 Bom 56 : 1971 Cr LJ 324 ; *Lalai Singh v State of U P*, 1971 Cr LJ 1519 SB.
33. *Barjinder Singh v State of Punjab*, 1993 Cr LJ 2040 (P&H).
34. *Anand Chintamani Dighe v State of Maharashtra*, 2002 Cr LJ 8 (Bom—FB) : 2002 (1) Bom CR 57 : (2002) 1 Bom LR 671 .
35. *Manishi Jani v State of Gujarat*, AIR 2010 Guj 30 : (2010) 1 GLR 437 FB.

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CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

[s 96] Application to High Court to set aside declaration of forfeiture.—

(1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (1) of section 95.

(2) Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench of the High Court composed of three Judges and where the High Court consists of less than three Judges, such Special Bench shall be composed of all the Judges of that High Court.

(3) On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in sub-section (1) of section 95, set aside the declaration of forfeiture.

(5) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

An order passed by the State Government under section 95 can be challenged in that High Court only which has jurisdiction in relation to the territories of that State.[36.] The inquiry by the Special Bench is confined to only one issue, namely, whether the publication in question contains matter of the nature referred to in the previous section.[37.] Sub-section (4) of section 96 of the Code requires the High Court to examine whether the book or document in question "contained any such matter" as is referred to in sub-section (1) of section 95, and whether the matter objected to by the State Government is *prima facie* punishable under any or more of the offences specified in section 95. The High Court has inherent powers under section 482 CrPC to award compensation to the victim, where order of forfeiture has been set aside.[38.] As the order of forfeiture can be issued only if the State Government forms an opinion that the concerned document contains matter, publication of which is punishable under

sections mentioned in section 95(1) and as the order should state the grounds on which such opinion was based, on failure of the State to comply with either of the conditions, the High Court will invalidate such an order.[39.] Where the Government does not state the ground in the notification or the Court is not satisfied that the opinion could have been arrived at on the grounds stated in the notification, the High Court should set aside the order of forfeiture.[40.]

Where the accused was prosecuted for an offence under section 295A IPC for being in possession of certain prescribed books, and the Magistrate acquitted him of that offence, but directed that the said books should be confiscated and destroyed, it was held that the Court had no power to order the confiscation and destruction of the books under this section but could only direct the restoration of the books to the authorities who had seized them.[41.] A notification issued under section 95 is quashed if the publication of the book complained against was not punishable by any of the sections of the IPC mentioned above.[42.] It is necessary to give the grounds for forfeiture of a book in the notification. Mere reproduction of statutory provision is not enough.[43.] Where some of the grounds in the notification are valid, it cannot be set aside on the ground that some grounds are not valid.[44.]

COMMENT

[s 96.1] Bar of limitation.—

A petition challenging a notification forfeiting a book was filed after the lapse of 45 years. This was held to be barred by limitation. A petition of this nature cannot be entertained by considering the bar of limitation as an objection of technical nature.[45.]

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36. *Gopal Vinayak Godse v The UOI*, (1970) 72 Bom LR 871 SB : AIR 1971 Bom 56 : 1971 Cr LJ 324 ; *MT Patel. v State of Gujarat*, 1972 Cr LJ 388 SB : (1971) GLR 968 .
37. *Baba Khalil Ahmad v State*, AIR 1960 All 715 : 1960 Cr LJ 1528 .
38. *Barjinder Singh v State of Punjab*, 1993 Cr LJ 2040 (P&H-FB).
39. *Lalai Singh Yadav v State of U P*, 1971 Cr LJ 1519 SB
40. *Harnam Das v State of Uttar Pradesh*, AIR 1961 SC 1662 : 1961(2) Cr LJ 815 .
41. *Kapur*, (1955) Mad 1307.
42. *Azizul Haq Karusar v State of Uttar Pradesh*, AIR 1980 All 448 : 1980 Cr LJ 448 .
43. *Virendra Bandhu v State of Rajasthan*, AIR 1980 Raj 241 (FB) : 1980 Cr LJ (NOC) 171 ; *P Hemlatha v State of AP*, AIR 1976 AP 375 .
44. *Ibid*
45. *Ishwar Lal Khatri v State of Rajasthan*, AIR 2010 NOC 630 Raj : 2010 Cr LJ 1876 , section 3, Limitation Act, 1963.

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CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

[s 97] Search for persons wrongfully confined.—

If any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

This section comes into operation when a person is wrongfully confined (section 340, IPC). The Magistrate has jurisdiction to issue a search warrant to search for a person wrongfully confined beyond the local limits of his jurisdiction. Whenever a Magistrate receives a complaint that a person has been arrested within his jurisdiction but has not been produced before him within 24 hours of his arrest, and is being detained beyond 24 hours of arrest, he can always issue a search warrant under section 97 CrPC This power is independent of and distinct from power flowing from clauses (1) and (2) of Article 22 of the Constitution.[46.] All that has to be done to make it effective is to follow the procedure prescribed in section 78 or 79 of the Code.[47.] An order made in exercise of the discretion vested in the Magistrate is subject to an implied proviso that the order should be otherwise legal. Therefore, if a person who has neither committed nor is likely to commit an offence is produced before the Magistrate, he cannot order his detention.[48.]

The words "reason to believe" mean that the belief must have been arrived at judicially after considering all the relevant materials with a sense of responsibility.[49.] Where a child was in the lawful custody of the mother and the father of the child removed it from such custody by using physical force, a warrant under section 97 could be issued.[50.] A Magistrate issued search warrant for a child below five years at the instance of his mother. The child was recovered from his father's place. The Magistrate passed an order delivering the custody of the child to the mother, with a direction to have custody till the child attained majority. It was held that the Magistrate was not justified to direct that child shall be in custody of mother till he attained majority as such a direction is not contemplated in terms of section 97 of the Code, and the order was not tenable.[51.]

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46. *Poovan v Sub-Inspector of Police, Aroor*, 1993 Cr LJ 2183 (Ker).
47. *State v Kochukochu Bhaskaran*, AIR 1954 Ker 157 : 1954 Cr LJ 289 : (1954) TC 296 .

48. *Lokumal Kishinchand v Vivek*, (1971) 74 Bom LR 290 .
49. *Ashok Thadani v Ramesh K Advani*, 1982 Cr LJ 1446 .
50. *K Pareekutty v Ayyikkal Ayissakutty*, 1978 Cr LJ NOC 98 ; *Purushottam Wamanrao Thakur v Warsha*, 1992 Cr LJ 1688 (Bom) : 1993 (3) Bom CR 587 .
51. *Duryodhana Mohanta v Saraswati Mohanta*, 1992 Cr LJ 2231 (Ori).

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CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

[s 98] Power to compel restoration of abducted females.—

Upon complaint made on oath of the abduction or unlawful detention of a woman, or a female child under the age of eighteen years, for any unlawful purpose, a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

Where a woman or a female child under 18 years has been abducted or unlawfully detained for an unlawful purpose, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may restore the woman to her liberty or the female child to her proper custody. Necessary force may be used in carrying out the order. Both the detention and the purpose must be unlawful. The exclusion of male children goes to show not only that some definite purpose, unlawful in itself, was contemplated but also that the purpose had some special reference to the sex of the person against whom it was entertained.[52.] Sections 97 and 98 cannot be used by one parent even if he is a legal guardian to obtain the custody of his minor children from the other parent. The proper remedy in such a case is to proceed under the Guardians and Wards Act. The summary jurisdiction under section 98 can be used only in a clear case of wrongful confinement.[53.]

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52. *Abraham v Mahtabo*, (1889) 16 Cal 487 , 502; *Thakoredas v Bhagvandas*, (1902) 4 Bom LR 609 .

53. *Md. Idris v State of Bihar*, 1980 Cr LJ 764 ; Sabastian v Moideen, 1983 Cr LJ 407 (Ker).

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CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

C.—General provisions relating to searches

[s 99] Directions, etc., of search-warrants.—

The provisions of sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search-warrants issued under section 93, section 94, section 95 or section 97.

This section applies only to search warrants issued under sections 93, 94, 95 and 97 of this Code. This section would not apply to a special Act, where there is no specific provision in the special Act, invoking the present section.

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CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

C.—General provisions relating to searches

[s 100] Persons in charge of closed place to allow search.—

(1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section; when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860).

The object of the section is two-fold: firstly, it provides for the right of free ingress in case of closed premises on demand and on production of the warrant of search by the police officer and, secondly, it seeks to ensure that searches are conducted fairly and squarely and that there is no "planting" of articles by the police. In order to achieve that object, the law makes it obligatory, firstly, that at least two independent and respectable witnesses of the locality should be present. Only if no such persons are available or willing to be a witness to the search, then two such persons of another locality may attend and witness the search. The word "independent and respectable" will equally govern the latter case. Secondly, the search should be made in their presence; and the list of things seized in the search should be signed by them. Thirdly, the occupant of the place searched, or his representative should be permitted to attend during the search, and to have a copy of the list prepared. When provisions of this section and section 165 of the Code are contravened, the search can be resisted by the persons whose premises are sought to be searched.[54.]

When a search has been conducted under this section, evidence can be given regarding the things seized in the course of the search and regarding the place in which they were found, in addition to the evidence of the list which the law directs to be drawn up relating to the particulars of the property found.[55.]

[s 100.1] Witnesses of search [*Sub-section (4)*].—

The witnesses are to be selected by the officer conducting the search.[56.] The witnesses so selected should be unprejudiced and uninterested as the object of the section is to ensure fair dealing and a feeling of confidence and security amongst public.[57.] Where no independent witness is available, the evidence requires greater scrutiny by the Court.[58.] If the provisions of section 100(4) are not applied, the accused is entitled to the benefit of doubt.[59.]

[s 100.2] WSignature and attendance of witnesses [*Sub-section (5)*].—

The search should be made in the presence of *panchas*. It is not a sufficient compliance with the provisions of this clause that the *panchas* should be summoned and kept present outside a building while the search is being carried on within it.[60.] *Panchas* may be summoned by Court to appear as witnesses.

[s 100.3 "Occupant of the place" [*Sub-section (6)*].—

The right of presence given by the section applies only to the "occupant of the place searched or some person in his behalf." The words "occupant of the place" are not intended to cover every person who may happen to be in the place at the time, but they refer back to the person mentioned as "a person residing in, or being in charge of the place" in sub-section (1).[61.] This sub-section applies when a search is to be made of a place. It does not apply to the search of a person.[62.]

54. *Radhakishan v State of UP*, AIR 1963 SC 822 : 1963 (1) Cr LJ 809 .

55. *Solai Naik*, (1911) ILR 34 Mad 349 (FB).

56. *Raman*, (1897) 21 Mad 83, 89. *Ronny v State of Maharashtra,* AIR 1998 SC 1251 : 1999 Cr LJ 1638 : (1998) 3 SCC 625 , recovery of articles in search and seizure, the evidence of the witness was not to be rejected for the reason that he was not from the locality of the search. According to *State of UP v Zakullah,* AIR 1998 SC 1474 : 1998 Cr LJ 863 : 1998 All LJ 290 : (1998) 1 SCC 557 , a person does not cease to be an independent witness merely because he has acquaintance with the police; every citizen is presumed to be independent unless the contrary is shown; the fact that the witness was a complainant in a robbery case or was a witness in two other cases also would not render him to be not an independent person; the fact that one of the witnesses was the driver of vehicle on which the police party went to the place of search did not destroy his status of being an independent person.

57. *AP Kuttan Panicker v State of Kerala*, (1963) 1 Cr LJ 669 ; *Kaur Sain v The State of Punjab*, AIR 1974 SC 329 : 1974 Cr LJ 358 : (1974) 3 SCC 649 .

58. *Premchand v State of Punjab*, 1984 Cr LJ 1131 (Punj).

59. *Prem Lata v State of HP*, 1987 Cr LJ 1539 (HP).

60. *Emperor v Rustam Lam*, (1931) 34 Bom LR 267 .

61. *Ramesh Chandra Banerjee v Emperor,* (1914) 41 Cal 350 , 377.

62. *Sunder Singh v State of UP*, AIR 1956 SC 411 : 1956 Cr LJ 301 .

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

C.—General provisions relating to searches

[s 101] Disposal of things found in search beyond jurisdiction.—

When, in the execution of a search-warrant at any place beyond the local jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.

The intention of the Parliament in enacting this section appears to be that if certain things have been recovered in a different district than the district from which the search warrants were issued, the things recovered in pursuance of the search warrants have to be taken to the Court which issued the search warrant so that details of the case as given in the FIR might be ascertained and further investigation can be made, if so necessary.[63.]

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63. *Mahesh Pal Singh v Pooran Singh Tewari*, 1987 (3) Crimes 828 , 830 (All).

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

[s 102] Power of police officer to seize certain property.—

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

64.**[(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court,** 65.**[or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation] he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.]**

66. **[*Provided* that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.]**

[s 102.1] CrPC (Amendment) Act, 2005 [*Clause (13)*].—

The proposed amendment to sub-section (3) of section 102 is intended to give greater discretion to the police for releasing seized property, where there is difficulty in securing proper accommodation for the custody of property or where the continued retention of the property in police custody is not considered necessary for the purposes of investigation.

It is also proposed that if the seized property is of perishable nature and value of such property is less than five hundred rupees and if the person entitled to the possession of such property is unknown or absent, the police be empowered to sell such property by auction under the orders of the Superintendent of Police. For this purpose, a proviso is being inserted to sub-section (3) of section 102 of the Code. (*Notes on Clauses*).

COMMENT

Where the petitioners were suspected to have entered into a conspiracy to defraud the Government of India by claiming subsidy, the CBI froze their Bank account either in their own name or in the names of their relatives, the Delhi High Court held that issuance of directions by the CBI to various Bankers/Financial Institutions freezing the accounts of the petitioners was based on sound footing and legal.[67.]

[s 102.2] Bank account.—

The bank accounts of an accused person and that of his relatives have been held to constitute "property" for the purposes of this section. Where there are circumstances creating suspicion about an offence relating to the account, the provisions of section 102(1) would be attracted. This would empower the police officer to seize the bank account and issue orders prohibiting its operation.[68.] Where the accused persons did not offer any explanation for the discrepancies in their bank accounts and the Investigating Officer was in possession of materials pointing out circumstances which create suspicion of the commission of an alleged offence, the Investigating Officer in law can legitimately seize the bank accounts of the accused persons after following the procedure prescribed in sub-sections (2) and (3) of section 102.[69.] Where the inspector of police was only authorised to inspect the banker's books, it was held that freezing of the accounts operated by the petitioners and his family members by the police was illegal. Allegations of disproportionate wealth are to be proved by looking at the sources of income and not be freezing accounts.[70.]

In the "Adarsh Housing Society Scam", the allegation was that the accused persons by abusing their official positions got land allotted to the society and obtained clearances from various authorities and obtained flats at low cost in benami names and the bank account of the society created suspicion about the commission of offence. It was held by the Bombay High Court that since the said account cannot be allowed to be depleted as the amount has great relevance at the conclusion of the trial the seizure of the bank account was permissible even though the society was not cited as an accused.[71.]

[s 102.3] Passport.—

The offence alleged against the petitioner was forgery and misappropriation of funds. The investigating officer conducted the raid and seized certain properties including the passport of the petitioner and his wife. The passport was neither the subject of theft, nor it had created any suspicion about commission of any offence. The seizure of the passports was held to be illegal.[72.]

The Supreme Court has pointed out that the police power to seize property does not extend to impounding of passport. The provisions of the Passports Act, 1967, prevail over the CrPC. "Seize" and "impounding" convey different meaning.[73.]

[s 102.4] Letters.—

It was alleged that letters purported to be written by the deceased to the accused and seized by the police were not mentioned in the seizure list. Such letters were sought by the witness for proving that there was cordial relationship between the deceased and the accused. The Court said that the testimony of such witness was rightly held to be

wholly unnatural. An investigating officer would not seize anything, including such letters, without mentioning the same in the seizure list.[74.]

[s 102.5] Vehicles.—

Vehicles carrying sand in violation of the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001, could be seized under the Act as well as under section 102 CrPC.[75.]

The power of a police officer to seize property during investigation is limited to property suspected of commission of offence. In the case involving Italian Marines in the murder of two Indian fishermen, an Italian ship on voyage was carrying on board Naval Military Protection Squad and during the course of voyage, two Marines of the squad caused death of two Indian fishermen. In course of investigation of the crime, the police restrained the Italian ship from continuing its voyage. Investigation revealed that the vessel was neither object of crime nor was suspected of commission of offence. Refusing permission to the ship to continue its voyage on the ground that it could be seized by police under section 102, CrPC was held by the Supreme Court to be improper. The court allowed the ship to sail out after safeguarding presence of ship, crew members and Marines as and when required by the court.[76.]

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64. Ins. by Act 45 of 1978, section 10 (w.e.f. 18-12-1978).
65. Ins. by Act 25 of 2005, section 13(a) (w.e.f. 23-6-2006).
66. Added by Act 25 of 2005, section 13(b) (w.e.f. 23-6-2006).
67. *PK Parmar v UOI*, 1992 Cr LJ 2499 (Del).
68. *State of Maharashtra v Tapas Das Neogy,* (1999) 98 Comp Cas 626 : 1999 Cr LJ 4305 : (1999) 7 SCC 685 ; *Rajamani v Inspector of Police,* 2002 Cr LJ 2902 (Mad), freezing of the bank account of a third party was held to be illegal. The party was not the accused person in the case, connection of the accused with it was also not shown.
69. *Teesta Atul Setalvad v State of Gujarat*, AIR 2018 SC 27 : 2018 CrLJ 1610 (SC).
70. *B Ranganathan v State,* 2003 Cr LJ 2779 (Mad); *R. Chandrasekar v Inspector of Police,* 2003 Cr LJ 294 (Mad), mere allegation of the prosecution that the freezing of the bank account was a equal to the discovery of the crime was not sufficient.
71. *Adarsh Co-op Housing Society Ltd v UOI*, 2012 Cr LJ 520 (Bom) (DB).
72. *S Sathyanarayana v State of Karnataka*, 2003 Cr LJ 1983 (Kant).
73. *Suresh Nanda v CBI*, AIR 2008 SC 1414 : (2008) 3 SCC 674 .
74. *Rameshwar Dass v State of Punjab*, AIR 2008 SC 890 : (2007) 14 SCC 696 : 2008 Cr LJ 1400 .
75. *PK Usman v District Collector Malapuram*, AIR 2008 NOC 532 Ker DB
76. *MT Enrica Lexie v Dorramma*, AIR 2012 SC 2134 : (2012) 6 SCC 760 : (2012)3 SCC (Cri) 309 .

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

[s 103] Magistrate may direct search in his presence.—

Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant.

Where the provisions of this section and section 165 are contravened, the search can be resisted by the person whose premises are sought to be searched. Because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences, no other consequences ensue, and the seizure of the articles is not vitiated.[77.]

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77. *Zubeda Khatoon v Assistant Collector of Customs Bangalore*, 1963 Supp (1) SCR 408 : 1991 Cr LJ 1392 , 1397 (Kant-DB); *Radha Kishan v State of UP*, AIR 1963 SC 822 : 1963 (1) Cr LJ 809 .

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

[s 104] Power to impound document, *etc.*, produced.—

Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

The word "impound" means to take legal possession; a document is impounded when it is ordered by the Court to be kept in the custody of its officer.

The Code of Criminal Procedure, 1973

CHAPTER VII PROCESS TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

[s 105] Reciprocal arrangements regarding processes.—

(1) Where a Court in the territories to which this Code extends (hereafter in this section referred to as the said territories) desires that—

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or

(d) a search-warrant,

78. [issued by it shall be served or executed at any place,—

(i) within the local jurisdiction of a Court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that Court to be served or executed; and where any summons referred to in clause (a) or clause (c) has been so served, the provisions of section 68 shall apply in relation to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories;

(ii) in any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such Court, Judge or Magistrate, and sent to such authority for transmission, as the Central Government may, by notification, specify in this behalf;]

(2) Where a Court in the said territories has received for service or execution—

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing or to produce it, or

(d) a search-warrant,

79. [issued by—

(i) a Court in any State or area in India outside the said territories;

(ii) a Court, Judge or Magistrate in a contracting State,

it shall cause the same to be served or executed;] as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its local jurisdiction; and where—

(i) a warrant of arrest has been executed, the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by sections 80 and 81.

(ii) a search-warrant has been executed, the things found in the search shall, so far as possible, be dealt with in accordance with the procedure prescribed by section 101.

80. **[*Provided* that in a case where a summons or search warrant received from a contracting State has been executed, the documents or things produced or things found in the search shall be forwarded to the Court issuing the summons or search warrant through such authority as the Central Government may, by notification, specify in this behalf.]**

In the Statement of Objects and Reasons appended to the Bill which introduced these provisions as section 105A in the old Code of 1898, it was stated:—"Section 93A of the Code of Criminal Procedure, 1898, provides for summons to, and warrants for, the arrest of accused persons issued by Courts in Jammu and Kashmir being served or executed by Courts in the rest of India. As there was no similar provision in regard to the execution or service in the rest of India of search warrants, or summonses to produce a document or thing, issued by Courts in Jammu and Kashmir, an Ordinance was promulgated on the 5 June 1958, to amend the Code of Criminal Procedure to provide for the execution or service of such warrants and summonses. The present Bill seeks to replace the Ordinance and opportunity is taken to combine the provisions of section 93A and the provisions contained in the Ordinance and insert them as a new Chapter in the Code." See section 1(2) of this Code for the extent of application of the present Code which shows even areas other than the State of Jammu and Kashmir as excluded from its operation.

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78. Subs. by Act 32 of 1988, section 2(a), for certain words (w.e.f. 25-5-1988).

79. Subs. by Act 32 of 1988, section 2(b)(i), for certain words (w.e.f. 25-5-1988).

80. Ins. by Act 32 of 1988, section 2(b)(ii) (w.e.f. 25-5-1988).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105A] Definitions.—In this Chapter, unless the context otherwise requires,—

(a) "***contracting State***" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;

(b) "***identifying***" includes establishment of a proof that the property was derived from, or used in the commission of an offence;

(c) "***proceeds of crime***" means any property derived or obtained directly or indirectly, by any person as a result of criminal activity (including crime involving currency transfers) or the value of any such property;

(d) "***property***" means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assets derived or used in the commission of an offence and includes property obtained through proceeds of crime;

(e) "***>tracing***" means determining the nature, source, disposition, movement, title or ownership of property.

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105B] Assistance in securing transfer of persons.—

(1) **Where a Court in India, in relation to a criminal matter, desires that a warrant for arrest of any person to attend or produce a document or other thing issued by it shall be executed in any place in a contracting State, it shall send such warrant in duplicate in such form to such Court, Judge or Magistrate through such authority, as the Central Government may, by notification, specify in this behalf and that Court, Judge or Magistrate, as the case may be, shall cause the same to be executed.**

(2) **Notwithstanding anything contained in this Code, if, in the course of an investigation or any inquiry into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that the attendance of a person who is in any place in a contracting State is required in connection with such investigation of inquiry and the Court is satisfied that such attendance is so required, it shall issue a summons or warrant, in duplicate, against the said person to such Court, Judge or Magistrate, in such form as the Central Government may, by notification, specify in this behalf, to cause the same to be served or executed.**

(3) **Where a Court in India, in relation to a criminal matter, has received a warrant for arrest of any person requiring him to attend or attend and produce a document or other thing in that Court or before any other investigating agency, issued by a Court, Judge or Magistrate in a contracting State, the same shall be executed as if it is the warrant received by it from another Court in India for execution within its local limits.**

(4) **Where a person transferred to a contracting State pursuant to sub-section (3) is a prisoner in India, the Court in India or the Central Government may impose such conditions as that Court or Government deems fit.**

(5) **Where the person transferred to India pursuant to sub-section (1) or sub-section (2) is a prisoner in a contracting State, the Court in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.**

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105C] Assistance in relation to orders of attachment or forfeiture of property.—

(1) **Where a Court in India has reasonable grounds to believe that any property obtained by any person is derived or obtained, directly or indirectly, by such person from the commission of an offence, it may make an order of attachment or forfeiture of such property, as it may deem fit under the provisions of sections 105D to 105J (both inclusive).**

(2) **Where the Court has made an order for attachment or forfeiture of any property under sub-section (1), and such property is suspected to be in a contracting State, the Court may issue a letter of request to a Court or an authority in the contracting State for execution of such order.**

(3) **Where a letter of request is received by the Central Government from a Court or an authority in a contracting State requesting attachment or forfeiture of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the Court, as it thinks fit, for execution in accordance with the provisions of sections 105D to 105J (both inclusive) or, as the case may be, any other law for the time being in force.**

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105D] Identifying unlawfully acquired property.—

(1) **The Court shall, under sub-section (1), or on receipt of a letter of request under sub-section (3) of section 105C, direct any police officer not below the rank of Sub-Inspector of Police to take all steps necessary for tracing and identifying such property.**

(2) **The steps referred to in sub-section (1) may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.**

(3) **Any inquiry, investigation or survey referred to in sub-section (2) shall be carried out by an officer mentioned in sub-section (1) in accordance with such directions issued by the said Court in this behalf.**

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105E] Seizure or attachment of property.—

(1) **Where any officer conducting an inquiry or investigation under section 105D has a reason to believe that any property in relation to which such inquiry or investigation is being conducted is likely to be concealed, transferred or dealt with in any manner which will result in disposal of such property, he may make an order for seizing such property and where it is not practicable to seize such property, he may make an order of attachment directing that such property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned.**

(2) **Any order made under sub-section (1) shall have no effect unless the said order is confirmed by an order of the said Court, within a period of thirty days of its being made.**

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105F] Management of properties seized or forfeited under this Chapter.—

(1) **The Court may appoint the District Magistrate of the area where the property is situated, or any other officer that may be nominated by the District Magistrate, to perform the functions of an Administrator of such property.**

(2) **The Administrator appointed under sub-section (1) shall receive and manage the property in relation to which the order has been made under sub-section (1) of section 105-E or under section 105H in such manner and subject to such conditions as may be specified by the Central Government.**

(3) **The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is forfeiture to the Central Government.**

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105G] Notice of forfeiture of property.—

(1) **If as a result of the inquiry, investigation or survey under section 105D, the Court has reason to believe that all or any of such properties are proceeds of crime, it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within a period of thirty days specified in the notice to indicate the source of income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be should not be declared to be proceeds of crime and forfeited to the Central Government.**

(2) **Where a notice under sub-section (1) to any person specifies any property as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.**

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105H] Forfeiture of property in certain cases.—

(1) The Court may, after considering the explanation, if any, to the show-cause notice issued under section 105G and the material available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are proceeds of crime:

Provided that if the person affected (and in a case where the person affected holds any property specified in the notice through any other persons such other person also) does not appear before the Court or represent his case before it within a period of thirty days specified in the show-cause notice, the Court may proceed to record a finding under this sub-section *ex parte* on the basis of evidence available before it.

(2) Where the Court is satisfied that some of the properties referred to in the show-cause notice are proceeds of crime but it is not possible to identify specifically such properties, then, it shall be lawful for the Court to specify the properties which, to the best of its judgment, are proceeds of crime and record a finding accordingly under sub-section (1).

(3) Where the Court records a finding under this section to the effect that any property is proceeds of crime, such property shall stand forfeited to the Central Government free from all encumbrances.

(4) Where any shares in a company stand forfeited to the Central Government under this section, then, the company shall notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or the articles of association of the company, forthwith register the Central Government as the transferee of such shares.

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105I] Fine in lieu of forfeiture.—

(1) **Where the Court makes a declaration that any property stands forfeited to the Central Government under section 105H and it is a case where the source of only a part of such property has not been proved to the satisfaction of the Court, it shall make an order giving an option to the person affected to pay, in lieu of forfeiture, a fine equal to the market value of such part.**

(2) **Before making an order imposing a fine under sub-section (1), the person affected shall be given a reasonable opportunity of being heard.**

(3) **Where the person affected pays the fine due under sub-section (1), within such time as may be allowed in that behalf, the Court may, by order, revoke the declaration of forfeiture under section 105H and there upon such property shall stand released.**

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105J] Certain transfers to be null and void.—

Where after the making of an order under subsection (1) of section 105E or the issue of a notice under section 105G, any property referred to in the said order or notice is transferred by any mode what so ever such transfers shall, for the purposes of the proceedings under this Chapter, be ignored and if such property is subsequently forfeited to the Central Government under section 105H, then, the transfer of such property shall be deemed to be null and void.

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105K] Procedure in respect of letter of request.—

Every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a contracting State under this Chapter shall be transmitted to a contracting State or, as the case may be, send to the concerned Court in India in such form and in such manner as the Central Government may, by notification, specify in this behalf.

1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).

The Code of Criminal Procedure, 1973

[1][CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

[s 105L] Application of this Chapter.—

The Central Government may, by notification in the Official Gazette, direct that the application of this Chapter in relation to a contracting State with which reciprocal arrangements have been made, shall be subject to such conditions, exceptions or qualifications as are specified in the said notification.]

Chapter VII-A, containing sections 105-A–105-L was inserted by the CrPC (Amendment) Act, 1993, in order to achieve the following objects:

(a) the transfer of persons between the contracting States including persons in custody for the purpose of assisting in investigation or giving evidence in proceedings;

(b) attachment and forfeiture of properties obtained or derived from the commission of an offence that may have been committed in the other country; and

(c) enforcement of attachment and forfeiture orders issued by a Court in the other country.

In the Statements of Objects and Reasons to the Amending Act 40 of 1993, there is a clear reference that:

> The Government of India had signed an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds of crime (including crimes involving currency transfers) and terrorist funds, with a view to check the terrorist activities in India and the United Kingdom.

In a case where the offences alleged were local offences like gambling and offences under the IPC. The police filed an application for proceeding under Chapter VII-A of the Code and for attachment and forfeiture of property. The Trial Court allowed the application. Against the order of forfeiture the accused moved the High Court where the order passed invoking the provisions of Chapter VII-A of the Code was quashed. The State of Madhya Pradesh moved the Supreme Court against the order of the High Court.

Confirming the order of the High Court in *State of MP v Balram Mihani*,[2] the Supreme Court held that the said provisions are not ordinary law of the land, and are applicable only to offences which have international ramifications. The provisions impose stringent measures for attachment and forfeiture of properties earned by offences, by way of reciprocal arrangement in contracting countries. The provisions thereunder are supplemental to special provisions contained in sections 166A and 166B, and have nothing to do with investigation into offences in general. It was further held that the alleged offences were local, and even the properties were not shown to be connected

with crimes mentioned in the Object and Reasons of the Amending Act. In the result, it was held that the orders of the High Court quashing the forfeiture proceedings did not call for any interference.

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1. Chapter VII-A, containing sections 105A to 105L inserted by the Code of Criminal Procedure (Amendment) Act, 1993 (Act 40 of 1993), section 2 (w.e.f. 20-7-1994).
2. *State of MP v Balram Mihani,* (2010) 2 SCC 602 : (2010) 2 SCC (cri) 1070 ; *J Jayalalitha v State,* 2002 CrLJ 3026 (Mad); *UOI v WN Chadha,* 1993 Supp (4) SCC 260 : 1993 SCC (cri) 1171 ; *Bhinka v Charan Singh,* AIR 1959 SC 960 : 1959 CrLJ 1223 —Ref.

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CHAPTER VIII SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

The provisions of this Chapter are preventive in their scope and object, and are aimed at persons who are a danger to the public by reason of the commission by them of certain offences.[1.] The preventive magisterial jurisdiction provided for in this Chapter constitutes a powerful adjunct to executive authority, salutary if used in moderation and over a sufficiently extended period, though harmful if resorted to immoderately and simultaneously in a large number of local areas.

The gist of this Chapter is prevention of crimes and disturbances of public tranquillity and breaches of the peace. The action being preventive is not based on any overt act but on the potential danger to be averted. The provisions are essentially in the public order and in the interest of the general public and, therefore, well within clauses (2), (3), (4) and (5) of Article 19 of the Constitution of India.[2.] Although an order to execute a bond before an offence is committed has the appearance of an administrative order, it is really judicial in character. Detention really results only on default of execution of the bond.[3.]

[s 106] Security for keeping the peace on conviction.—

(1) When a Court of Session or Court of a Magistrate of the first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

(2) The offences referred to in sub-section (1) are—

- **(a) any offence punishable under Chapter VIII of the Indian Penal Code (45 of 1860), other than an offence punishable under section 153A or section 153B or section 154 thereof;**
- **(b) any offence which consists of, or includes, assault or using criminal force or committing mischief;**
- **(c) any offence of criminal intimidation;**
- **(d) any other offence which caused, or was intended or known to be likely to cause, a breach of the peace.**

(3) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(4) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.

Security can be demanded under this section only when a person is convicted of any one of the offences mentioned in sub-section (2).

The object of the section is to prevent breaches of the peace taking place and not merely to follow up breaches of peace which have already taken place.[4.] To bring sub-section (2)(d) into operation, there must be a finding that the acts of the accused involved a breach of the peace or were done with the evident intention of committing the same, or it was known to be likely to cause breach of the peace, or at all events the evidence must be so clear that, without an express finding, a superior Court is satisfied that such was the case.[5.] Sub-section (2)(b) is aimed at current violent demonstrations.

[s 106.1] "Convicts a person of any of the offences specified in sub-section (2)".—

This section comes into operation when a person is "convicted" of the offence. The next section (section 107) deals with the case where there is likelihood of a breach of the peace. Both are counterparts of the same policy: the first, *i.e.*, this section applies when by reason of the conviction of the person, his past conduct leads to an apprehension for the future, and the second (i.e., section 107) applies when the Magistrate on information is of opinion that unless prevented from so acting, a person is likely to act to the detriment of public peace and tranquillity.[6.]

[s 106.2] "Court...at the time of passing sentence".—

The order must be passed at the same time when there is a conviction and passing of sentence. If this stage has once passed, then proceedings can be set on foot under section 107.[7.]

[s 106.3] "Execute a bond... with or without sureties."—The Court may order the bond to be executed with or without sureties. On a security bond for Rs 500, the petitioner stood surety and himself expressly agreed that he would forfeit Rs 500 if the principal broke the peace. The principal having defaulted, the Magistrate ordered the forfeiture of the amount of the bond against the principal as well as the surety. It was held that the surety was liable to pay the amount specified in the bond in addition to any amount that might be recovered from the principal.[8.]

The sureties, by their bond, guarantee that the person bound over will keep the peace or be of good behaviour and, in the event of his failure to do so, they will pay the penalty stipulated for by them. In other words, the surety undertakes a contractual liability not only for the payment of the amount of bond executed by the person bound over but also for the performance of the promise by him to keep the peace or to be of good behaviour and stipulates himself to pay a determined amount on the breach of that promise.[9.]

[s 106.4] "Any other offence involving breach of peace" [*Clause (2)(d)*].—

The clause is not necessarily confined to offences which cause breach of the peace but extends to offences provoking or likely to lead to a breach of the peace, *viz*., an offence as in common knowledge is ordinarily or very probably the occasion of a breach of the peace. A "breach of the peace" does not necessarily mean a breach of the public peace, and the offence of causing hurt to a person involves a breach of the peace, whether it takes place in a private room or in the open street.[10.]

[s 106.5] of appellate court to pass orders [*Sub-section (4)*].—

Power The jurisdiction of the appellate Court to act is not dependent on conviction having been by a Magistrate competent to act under the section. An appellate Court can pass an order under this sub-section although the person convicted has been sentenced by a Court inferior to that of a first-class Magistrate.

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
4. *Emperor v Manik Rai*, (1911) ILR 33 All 771.
5. *Abdul Ali Chowdhury*, (1915) 43 Cal 671 ; *Jib Lal Gir v Jogmohan Gir*, (1899) 26 Cal 576 .
6. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739; *Brij Gopal Chaturvedi v State of MP,* 1997 SCC Cr LJ 569 : 1995 Cr LJ 2117 , order of executing a bond was suspended by the Supreme Court. Six years passed since then in the disposal of appeal. The accused remained to be a person of good conduct. The Supreme Court said that the bond was no longer necessary.
7. *Emperor v Ram Adhin*, (1923) 21 ALJR 839 : AIR 1924 All 230 .
8. *Sardar Khan*, (1935) 17 Lah 523.
9. *Narain Sahai*, (1946) All 801 (FB).
10. *Naziruddin*, (1933) 55 All 850 ; *Emperor v Atma Ram*, (1927) 49 All 131 : AIR 1927 All 194 , dissented from.

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CHAPTER VIII SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

The provisions of this Chapter are preventive in their scope and object, and are aimed at persons who are a danger to the public by reason of the commission by them of certain offences.[1.] The preventive magisterial jurisdiction provided for in this Chapter constitutes a powerful adjunct to executive authority, salutary if used in moderation and over a sufficiently extended period, though harmful if resorted to immoderately and simultaneously in a large number of local areas.

The gist of this Chapter is prevention of crimes and disturbances of public tranquillity and breaches of the peace. The action being preventive is not based on any overt act but on the potential danger to be averted. The provisions are essentially in the public order and in the interest of the general public and, therefore, well within clauses (2), (3), (4) and (5) of Article 19 of the Constitution of India.[2.] Although an order to execute a bond before an offence is committed has the appearance of an administrative order, it is really judicial in character. Detention really results only on default of execution of the bond.[3.]

[s 107] Security for keeping the peace in other cases.—

(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond [11.][with or without sureties;] for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

[s 107.1] Object.—

The nature of the proceedings under section 107 is of preventive justice.[12.] Where a substantive offence is committed by a person the proper procedure is to institute regular prosecution against him and not to start proceedings under section 107.[13.] Before initiating an action under section 107, the concerned Magistrate should be satisfied that such action is necessary to be taken to prevent persons from committing breach of the peace and he should record reasons for his satisfaction.[14.] Proceedings can be taken under this section against a person if he is likely (a) to commit a breach of the peace or disturb the public tranquillity; or (b) to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. If the breach

of the peace has already occurred, then the offending person should be tried and dealt with under the preceding section. It may also be noted that power under the previous section is vested in a Court of Session or Magistrate of the first class (Metropolitan Magistrates have the same power); the power under the present section is vested in Executive Magistrate. Two things are necessary to warrant an action under this section: (1) information should be laid before a Magistrate; and (2) the Magistrate should be satisfied that there was sufficient ground for proceeding. The information may be received from any source, not necessarily from the police only.[15.] The Executive Magistrate derives jurisdiction, if either the person or the place is within his jurisdiction. The section contemplates execution of bond for "keeping the peace". A Magistrate has no jurisdiction to ask execution of bond for maintaining good behaviour; in so acting, he proceeds in contravention of the section.[16.] A person who ordinarily resides within jurisdiction can be taken to be within jurisdiction even though he is temporarily absent.[17.] Two opposing parties of hostile groups cannot be proceeded against and bound over in one and the same proceeding under section 107. Such an order will vitiate the proceeding rendering it liable to be quashed.[18.] Where proceedings under sections 107-116 CrPC were already pending against a person, a second set of proceedings were sought to be initiated against him, the Allahabad High Court quashed the second proceedings holding that successive proceedings during pendency of earlier ones would only amount to harassment.[19.]

The maximum period for which security for keeping the peace can be asked is one year. This period of one year starts from the date on which the Magistrate takes cognizance and commences the proceeding under section 107.[20.] The enquiry under this section has to be completed within six months from the date of commencement. The period may be extended after recording special reasons for extension before the expiry of the original period, otherwise the proceedings would stand terminated after completion of six months. However, if any person has been kept in detention pending such enquiry, the proceedings against him would stand terminated on the expiry of six months of such detention.[21.]

A Magistrate has power to drop proceedings initiated under this section at any stage, even after a formal order under section 111 has been drawn up and before an inquiry under section 116[22.] if there be fresh materials, as soon as he is satisfied that there is no danger of a breach of peace. Although sections 107, 111 and 116 do not specifically empower the Magistrate to drop the proceedings once they have been started, such power may legitimately be inferred.[23.] If the material on record discloses that though there was a danger of breach of the peace at one time, because of the happening of subsequent event the danger has disappeared, the Court can drop the proceedings and discharge the person proceeded against.[24.] But where he has dropped the proceedings under this section on basis of old materials which were already on record when an order under section 111 was drawn up and also on some assumption which appeared to be unjustified, the order will be an arbitrary one and not maintainable.[25.] Where there has been no inquiry and failure of the Magistrate to test the correctness of the allegations made against the persons, the order calling upon them to execute the bond was held to be illegal.[26.] Where a preliminary order of the Magistrate or a police report does not indicate any likelihood of commission of any offence in the near future or of definite breach of the peace or disturbance of public tranquillity, an order under section 107 cannot be sustained.[27.] An order passed without enquiry and without recording evidence to ascertain the truth or otherwise of the allegations is not valid.[28.] Directing a person straightway to execute a bond for maintaining peace on the basis of police report, without making preliminary enquiry or furnishing documents or copies of the material relied upon is against the principles of natural justice and fairness. Issue of show cause notice to the person as to why bond should not be executed by him for keeping peace is essential. The Magistrate must also supply the copies of

incriminating material relied upon by him to the person against whom proceedings are initiated.[29.] A joint enquiry of members of rival groups is not permissible. Therefore, an order under section 111 based on such an enquiry is illegal.[30.] Where there is no danger or breach of peace or probability of disturbing public tranquillity initiation of proceedings on quarrels between two private individuals is uncalled for and is not contemplated by these legal provisions.[31.]

[s 107.2] "Receives information".—

The information must be of a clear and definite kind, directly affecting the person against whom process is issued, and it should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet.[32.] There must be satisfactory evidence that the person proceeded against has done something, or taken some step that indicates an intention to break the peace or that he is likely to occasion a breach of the peace.[33.] For passing an order under section 107 CrPC, information as to past acts is not sufficient. The information must relate to facts which show that a breach of peace is imminent.[34.]

[s 107.3] "Any person is likely".—

The section presupposes that the person sought to be put under a rule of bail is likely (not was likely) to commit a breach of the peace or disturb the public tranquillity. There must be a present danger of a breach of the peace; the fact that such a breach is likely to take place at a future time is not enough.[35.] If the accused is willing to give security, this is sufficient proof.[36.]

[s 107.4] "Wrongful act".—

It is the doing of a wrongful act which may occasion a breach of the peace that is to be prevented. A party who has clearly the legal right should be allowed to exercise such right without opposition. The party offering opposition to the exercise of a legal right should be bound over.[37.] It is a wrongful act to perform religious ceremonies in a place not set apart for the purpose with one deliberate intention of wounding the religious feelings of the neighbours[38.] but the granting of leases to tenants of land not in one's possession is not a wrongful act.[39.]

[s 107.5] Jurisdiction [*Sub-section (2)*].—

The person informed against or the place where the breach of the peace is apprehended should be within the jurisdiction of the Magistrate. A temporary residence is enough.[40.]

[s 107.6] Sections 107 and 110.—

Where the evidence shows that there is an apprehension of anyone using violence towards a particular person or particular persons, he ought to be bound over to keep the peace as provided by section 107, and ought not to be proceeded against under section 110.[41.]

[s 107.7] Sections 107 and 145.—

There is no conflict between the two sections.[42.] The words in section 145 are mandatory, while the language in section 107 is discretionary.[43.] The Magistrate can in a proper case convert proceedings under section 107 into one under section 145.[44.] Where a dispute likely to cause a breach of the peace exists concerning possession of land, the Magistrate has a discretion to proceed under either of the sections.[45.] See section 145, sub-section (10).

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
11. Ins. by Act 45 of 1978, section 11 (w.e.f. 18-12-1978).
12. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
13. *CV Krishnappa Shetty v Karnataka*, 1979 Cr LJ (NOC) 184 .
14. *Amit Pal Singh v Anil Kumar Mishra*, 1978 Cr LJ 1066 ; *Chandramani Nayak v State of Orissa*, 1992 Cr LJ 2188 (Ori).
15. *Sudarsan Singh v Govind*, 1971 Cr LJ 1822 .
16. *Ramsaran Singh v Ramakant*, (1962) 2 Cr LJ 575 .
17. *Gajanand*, (1943) Nag 609 : AIR 1943 Nag 88 .
18. *Sekar v Padmalosai*, 1987 Cr LJ 1405 (Mad).
19. *Rajendra v State of UP*, 1993 Cr LJ 3058 (All).
20. *Mithya v State of Rajasthan*, 1987 Cr LJ 1042 (Raj).
21. *Ram Chandra Das v Kailash Chandra Gochhayat*, 1993 Cr LJ 1621 (Ori).
22. *Ishwar Prasad v Sagamal*, (1965) 2 Cr LJ 840 .
23. *Asghar Kha v State*, AIR 1964 All 391 : 1964 Cr LJ 260 *Rupdeo Singh v Natha Singh*, 1970 Cr LJ 724 : AIR 1970 Pat 134 .
24. *Ramnarain Singh v State of Bihar*, AIR 1972 SC 2225 : 1972 Cr LJ 1444 : (1972) 2 SCC 532 .
25. *Ishwar Prasad v Sagamal*, (1965) 2 Cr LJ 840 .
26. *Budhu Ram v Orissa*, 1982 Cr LJ 497 (Ori).
27. 1980 BLJ 271 .
28. *Chandreshwar Bhattacharjee v State of Assam*, 1982 Cr LJ 2248 ; *Arjunsingh v State of MP*, 1984 Cr LJ 1616 (MP).

29. *Christalin Costa v State of Goa*, 1992 Cr LJ 3608 (Bom); *Chandra Mani Nayak v State of Orissa*, 1992 Cr LJ 2188 (Ori).
30. *KP Murugeshan v State of Tamil Nadu*, 1984 Cr LJ 760 (Mad); *Thenmalaiyandi v State*, 1984 Cr LJ 1079 .
31. *Christalin Costa v State of Goa*, 1992 Cr LJ 3608 (Bom).
32. *Jai Prakash Lal*, (1883) 6 All 26 , 30 (FB).
33. *Babua*, (1883) 6 All 132 ; *Muhammad Yakub*, (1910) 32 All 571 .
34. *DM Bhandari v State of Orissa*, 1995 Cr LJ 3201 (Ori).
35. *Basdeo*, (1904) ILR 26 All 190, 193; *Shadi Lal*, (1930) 12 Lah 457; *Shivram*, (1904) 6 Bom LR 663 ; *Ram Chandra Haldar*, (1908) 35 Cal 674 ; *Chanbasawa*, (1904) 6 Bom LR 862 .
36. *Emperor v Ghariba*, (1924) ILR 46 All 109 : AIR 1924 All 269 ; *Nasir Ahmed*, (1927) 50 All 120 ; *Emperor v Kishan Narain*, (1928) ILR 50 All 599 : AIR 1928 All 270 .
37. *Dindayal Mozumdar v Emperor*, (1907) ILR 34 Cal 935; *Bacho Singh v State of Bihar*, 1970 Cr LJ 1706 .
38. *Emperor v Murli Singh*, (1911) ILR 33 All 775.
39. *Driver*, (1898) 25 Cal 798 .
40. *Shama Charan Chakravarti v Katu Mundal*, (1897) ILR 24 Cal 344.
41. *Kallu*, (1904) 27 All 92 , 95.
42. *Abbas*, (1911) 39 Cal 150 (FB).
43. *Balajit Singh v Bhoju Ghose*, (1907) 35 Cal 117 .
44. *Khundrakpam Thambalangou v Laisram*, (1963) 1 Cr LJ 823 .
45. *Belagal Ramcharlu*, (1902) 26 Mad 471; *Kali Kissen Tagore v Anund Chunder Roy*, (1896) 23 Cal 557 ; *Sheoraj Roy v Chatter Roy*, (1905) 32 Cal 966 ; *Ram Baran Singh*, (1906) 28 All 406 ; *Thakur Pande*, (1912) 34 All 449 ; *Ram Lochan*, (1913) 36 All 143 ; *Mallappa*, (1925) 28 Bom LR 488 : AIR 1926 Bom 313 .

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The gist of this Chapter is prevention of crimes and disturbances of public tranquillity and breaches of the peace. The action being preventive is not based on any overt act but on the potential danger to be averted. The provisions are essentially in the public order and in the interest of the general public and, therefore, well within clauses (2), (3), (4) and (5) of Article 19 of the Constitution of India.[2.] Although an order to execute a bond before an offence is committed has the appearance of an administrative order, it is really judicial in character. Detention really results only on default of execution of the bond.[3.]

[s 108] Security for good behaviour from persons disseminating seditious matters.—

(1) When [46.][an Executive Magistrate] receives information that there is within his local jurisdiction any person who, within or without such jurisdiction,—

(i) either orally or in writing or in any other manner, intentionally disseminates or attempts to disseminate or abets the dissemination of, —

(a) any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 295A of the Indian Penal Code (45 of 1860), or

(b) any matter concerning a Judge acting or purporting to act in the discharge of his official duties which amounts to criminal intimidation or defamation under the Indian Penal Code (45 of 1860),

(ii) makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation any obscene matter such as is referred to in section 292 of the Indian Penal Code (45 of 1860), and the Magistrate is of opinion that there is sufficient ground for proceeding, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

(2) No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 (25 of 1867), with reference to any matter contained in

such publication except by the order or under the authority of the State Government or some officer empowered by the State Government in this behalf.

This and the two following sections specify the three classes of persons from whom security can be demanded for good behaviour. Under this section, proceedings can be taken against a person who commits or is about to commit an offence punishable under section 124A or 153A, or section 153B or 295A of the Indian Penal Code, or criminal intimidation or defamation of a Judge, or an offence punishable under section 292 of the Indian Penal Code. The object of enabling a Magistrate to take security for good behaviour is for the prevention and not for the punishment of offences.[47.] The object is to secure good behaviour in future. The mere record of previous convictions is not sufficient, for it is wrong to use these provisions so as to add to the punishment for past offences.[48.]

[s 108.1] Scope.—

The test under this section is whether the person proceeded against has been disseminating the offending matter and whether there is any fear of a repetition of the offence. In each case that is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances.[49.] A person comes within the scope of the section if he disseminates matter which reveals an intention to promote feelings of enmity between classes.[50.] The section does not apply to a person who is found circulating offending notices on one occasion only.[51.]

[s 108.2] "Any matter the publication of which is punishable under...Section 153A".—

It seems to mean "matter which is the vehicle of an attempt to promote enmity".[52.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

46. Subs. by Act No. 63 of 1980, section 2, for "a Judicial Magistrate of the first class" (w.e.f. 23-9-1980).

47. *Hari Telang v Queen-Empress*, (1900) ILR 27 Cal 781, 784.
48. *Raja*, (1885) 10 Bom 174.
49. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
50. *PK Chakravarti*, (1926) 54 Cal 59 .

51. *Chiranji Lal*, (1928) 50 All 854 ; *Chandra Bhan Gupta*, (1934) 9 Luck 344 ; *Swami Sarupa Nando*, (1940) 16 Luck 260 : AIR 1941 Oudh 98 .

52. *PK Chakravarti, supra*.

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[s 109] Security for good behaviour from suspected persons.—

When [53.][an Executive Magistrate] receives information that there is within his local jurisdiction a person taking precautions to conceal his presence and that there is reason to believe that he is doing so with a view to committing a cognizable offence, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

The second class of cases in which security for good behaviour can be demanded is that of a suspected person, i.e., one who is taking precautions to conceal his presence with a view to commit a cognizable offence. As the section deals with what may be called anticipatory jurisdiction, that is to say an anticipation that such a person may in future commit a cognizable offence, it should be sparingly used and used only in cases where reasonable ground exists. The power, however, is given to a Judicial Magistrate of the first class who can accept a bond without sureties.

A person, whether he be of good or bad character, who merely shows a disinclination for the society of the police and endeavours to avoid them by running away on their approach does not come within this clause.[54.] The words "conceal presence" are very wide. They are sufficient to cover the concealment of bodily presence in a house or grove or under a bridge, *etc.*, but they are also sufficient to cover the case when a man conceals his appearance, e.g., by wearing a mask or covering his face or disguising himself by a uniform or in some other manner.[55.] The concealment of presence must be with a view to committing some cognizable offence.[56.] Impersonation of another will not amount to such concealment.[57.] A person cannot be said to conceal his presence within the meaning of this clause if he does not hide behind anything but

stands still apparently in the hope that he may be mistaken for an inanimate object by another person happening to turn his eye on him.[58.]

[s 109.1] Sections 109 and 110.—

A person cannot be bound over both under section 109 and 110.[59.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

53. Subs. by Act No. 63 of 1980, section 2, for "a Judicial Magistrate of the first class" (w.e.f. 23-9-1980).

54. *Rambirich Ahir v King-Emperor*, (1926) ILR 6 Pat 177, 183 : AIR 1926 Pat 569 .

55. *Abdul Ghafoor v Emperor*, (1943) All 816 : AIR 1943 All 367 .

56. *Satish Chandra Sarkar*, (1912) 39 Cal 456 ; *State of Mysore v Kotipoojary*, AIR 1965 Kant 264 : 1965 Cr LJ 517 .

57. *Kashi Nath Singh v Emperor*, (1933) 56 All 314 : AIR 1934 All 45 .

58. *Hafiz Ahesanali v Emperor*, (1938) Nag 595 : AIR 1938 Nag 303 .

59. *Rangasami Pillai*, (1915) ILR 38 Mad 555.

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[s 110] Security for good behaviour from habitual offenders.—

When [60.][an Executive Magistrate] receives information that there is within his local jurisdiction a person who—

(a) is by habit a robber, house-breaker, thief, or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860), or under section 489A, section 489B, section 489C or section 489D of that Code, or

(e) habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or

(f) habitually commits, or attempts to commit, or abets the commission of—

(i) any offence under one or more of the following Acts, namely:—

(a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

[61.][(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973);]

(c)

the Employees Provident Funds [62.][and Miscellaneous Provisions] Act, 1952 (19 of 1952);

(d) the Prevention of Food Adulteration Act, 1954 (37 of 1954);

(e) the Essential Commodities Act, 1955 (10 of 1955);

(f) the Untouchability (Offences) Act, 1955 (22 of 1955);

(g) the Customs Act, 1962 (52 of 1962); [63.][* * *]

[64.][(h) the Foreigners Act, 1946 (31 of 1946); or]

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

[s 110.1] CrPC (Amendment) Act, 2005 [*Clause 14*].—

In order to effectively deal with offences under the Foreigners Act, 1946 a need has been felt to strengthen the hands of State authorities by empowering them to take action under section 110 of the Code against persons assisting infiltration. This will help to check the flow of undesirable foreigners into the country. The Foreigners Act, 1946 is, accordingly, being added as item (*h*) of sub-clause (*i*) of clause (*f*). (*Notes on Clauses*).

COMMENT

The third category of persons from whom security can be taken for good behaviour is habitual offenders and desperate characters. "Habitual offender" means (1) habitual robber, house-breaker, thief or forger; (2) habitual receiver of stolen property; (3) habitual harbourer of thieves or habitual abettor in the concealment or disposal of stolen property; (4) habitual kidnapper, abductor, extortioner, cheat or a person habitually committing mischief, offences relating to coin, stamps and currency notes; (5) a person habitually committing offences involving a breach of the peace; (6) habitually committing offences falling under Acts enumerated in (a) to (g) of clause (f) (i) or offences of hoarding, profiteering or adulteration of food or drug or of corruption under any law.

The object of the proceedings under this section is prevention and not punishment of offences.[65.] It is to be used solely for the purpose of securing future good behaviour; it can never be used for the purpose of punishing past offences.[66.]

Proceedings under section 110 CrPC are intended to be precautionary and not punitive and, therefore, a very large amount of security should not be required. The proceedings are judicial and not executive, and the Court is expected to follow the requisite procedure strictly. The predominant ingredient in section 110 is "habit". It implies a tendency resulting from frequent repetition of the same acts. But it is not necessary to take action on the ground of being a habitual offender, that a person should have been convicted of any crime.[67.]

[s 110.2] "Receives information".—

These words are as wide as possible; there is no limit as to the nature of the information, no limit as to the source from which it may be received.[68.]

[s 110.3] "Within his local jurisdiction".—

It is sufficient to give the Magistrate jurisdiction if the person is within his jurisdiction; it is not necessary that he must be *residing* within "the limits of the Magistrate's jurisdiction".[69.]

[s 110.4] "Habit".—

The word is used in the sense of depravity of character as evidenced by the frequent repetition or commission of the offences mentioned in the section.[70.] The evidence of general repute "must be so general and overwhelming as to leave no practical doubt that the accused has been in the habit of committing thefts and robberies or other offences of the kinds specified."[71.]

[s 110.5] "Harbours thieves".—

This clause does not apply to harbouring of dacoits which is intended to be dealt with under the substantive provision of section 216A of the Penal Code.[72.]

[s 110.6] "Offences involving a breach of the peace".—

See comment on section 106.

[s 110.7] "Desperate and dangerous".—

This expression means a man who shows a reckless disregard for the safety of the persons or the properties of his neighbours.[73.] The word "neighbours" denotes the members of the community.[74.] "Dangerous character" means a person who is so desperate and dangerous as to render his being at large without security hazardous to the community.

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .

2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.

3. *Ibid.*

60. Subs. by Act No. 63 of 1980, section 2, for "a Judicial Magistrate of the first class" (w.e.f. 23-9-1980).

61. Subs. by Act 56 of 1974, section 3 and Second Sch., for item (b) (w.e.f. 20-12-1974).

62. Subs. by Act 99 of 1976, section 17, for "Family Pension Fund" (w.e.f. 1-8-1976). Earlier the words "Family Pension Fund" were inserted by Act 56 of 1974, section 3, and Second Sch. (w.e.f. 20-12-1974).

63. The word "or" omitted by Act 25 of 2005, section 14(i) (w.e.f. 23-6-2006).

64. Ins. by Act 25 of 2005, section 14(ii) (w.e.f. 23-6-2006).

65. *Hari Telang v Queen-Empress*, (1900) ILR 27 Cal 781.

66. *Umbica Proshad*, (1877) 1 CLR 268 , 271; Raja, (1885) 10 Bom 174, 175.

67. *Debu v State of Orissa*, 1995 Cr LJ 3547 (Ori).

68. *Mithu Khan*, (1904) 27 All 172 , 173; *Hiranand Ojha v Emperor*, (1922) 1 Pat 621 : AIR 1922 Pat 586 .

69. *Emperor v Durga Halwai*, (1915) ILR 43 Cal 153; *Manindra Mohan Sanyal v Emperor*, (1919) ILR 46 Cal 215; *Rangan*, (1904) 36 Mad 96; *Emperor v Bapoo Yellapa*, (1907) 9 Bom LR 244 ; *Ramjibhai Wagijibhai*, (1912) 14 Bom LR 889 ; *Munna*, (1916) 39 All 139 ; *Sardar Khan*, (1943) Kar 514 .

70. *Bhubaneshwar Kuer v Emperor*, (1925) ILR 6 Pat 1 : AIR 1927 Pat 126 .

71. *Sherkhan*, (1893) Unrep CRC 639, 642.

72. *Manni Lal Awasthi v Emperor*, (1929) ILR 51 All 459 : AIR 1928 All 682 .

73. *Wahid Ali Khan v The Emperor*, (1907) 11 Cal WN 789, 791; *Manindra Mohan Sanyal v Emperor*, (1919) ILR 46 Cal 215; *Parbaticharan Baishya*, (1934) 61 Cal 588 .

74. *Parbaticharan Baishya, ibid*.

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The gist of this Chapter is prevention of crimes and disturbances of public tranquillity and breaches of the peace. The action being preventive is not based on any overt act but on the potential danger to be averted. The provisions are essentially in the public order and in the interest of the general public and, therefore, well within clauses (2), (3), (4) and (5) of Article 19 of the Constitution of India.[2.] Although an order to execute a bond before an offence is committed has the appearance of an administrative order, it is really judicial in character. Detention really results only on default of execution of the bond.[3.]

[s 111] Order to be made.—

When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Sections 111 to 124 provide the procedure according to which security can be asked either for keeping the peace or for good behaviour, i.e. under circumstances detailed in sections 107–110. The inquiry is provided in section 116; and if it results unfavourably to the person, he can be directed to execute a bond (section117); but if it ends in his favour, he is to be discharged (section 118).

This section provides for the passing of a preliminary order. The order in question must be in writing, setting forth the substance of the information received, the amount of the bond, the term of the bond, and the number, character and class of sureties, if any. Where an order passed by a Magistrate under section 111 CrPC did not disclose the substance of information received by the Magistrate, the Allahabad High Court quashed the order and subsequent proceedings under sections 107-116 CrPC on its basis.[75.] Where enquiry on a complaint by the police was started under section 107 CrPC without passing an order under section 111 CrPC, it was held that the enquiry by the Magistrate was in contravention of law and was liable to be quashed.[76.]

[s 111.1] "To show cause".—

When a person is called upon to show cause why he should not be required to give security for good behaviour, he must be ready with his evidence when he appears in obedience to the notice. That is the meaning of the expression "to show cause" in law. If he has been unable to bring the evidence with him on account of the shortness of the

notice or other reasonable cause, it is his duty, when he appears, to apply at once for summons to the witnesses he proposes to call. The onus of proof, however, lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security.

[s 111.2] "Order in writing, setting forth the substance of the information received".—

The passing of the preliminary order is obligatory. A notice issued under this section must be accompanied by the order mentioned; but the omission to do so is only an irregularity which does not vitiate the proceeding. The order must clearly disclose the substance of the information received by the Magistrate otherwise it is illegal. The object of this section in requiring the substance of the information to be given in the notice is not only for the purpose of showing that the Magistrate has applied his mind to the circumstances of the case before initiating preventive action,[77.] but also to afford reasonable opportunity to the accused to come prepared for what he has to meet. Thus, the person to be proceeded against or called upon to show cause gets proper notice of what has weighed with or moved the Magistrate to take action.[78.] The failure to comply with the provisions of this section, however, does not divest the Magistrate of his jurisdiction to deal with proceeding, and in the absence of prejudice the subsequent proceedings ought not to be treated as being void *ab initio*.[79.] But the Allahabad High Court has held that the provisions being mandatory and not merely directory, noncompliance cannot be treated as mere irregularity.[80.] The source of information need not be disclosed.[81.] The Orissa High Court has held that section 111 compels giving substance of information received by the Magistrate. Non-compliance vitiates the notice issued. Non-application of judicial mind vitiates the order.[82.]

The order that the Magistrate concerned has to pass under section 111, must set forth in writing the substance of the information received, the bond to be executed and the terms for which it is to be enforced and the number, character and class of the sureties, if any required. This is the peremptory requirement of the law and any infirmity therein must inevitably vitiate the entire proceedings.[83.]

[s 111.3] "Amount of the bond".—

In fixing the amount of security, the Magistrate should consider the station in life of the person concerned and should not go beyond a sum for which there is a fair probability of his being able to find security. The imprisonment is provided as a protection to society against the perpetration of the crime by the individual, and not as a punishment for a crime committed, and, being made conditional on default of finding security, it is only reasonable and just that the individual should be afforded a fair chance at least of complying with the required condition of security.[84.]

[s 111.4] "Term for which it is to be in force".—

Where a show cause notice why he should not execute a bond for keeping the peace for one year is issued to a person and the order does not direct that the period of one year should commence from a particular date, the fact that by the time revision is heard the period of one year from the date of passing the order has already expired does not mean that the order has to be set aside.[85.]

[s 111.5] "The number, character and class of sureties".—

According to the Allahabad High Court, the object of requiring security to be of good behaviour is to ensure that a particular accused person shall be of good behaviour for the time mentioned in the order. It seems, therefore, to be reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand sureties. The Calcutta High Court has differed from this view and held that the test of the fitness of a surety is not whether he can supervise the person bound down, but whether he is a person of sufficient substance to warrant his being accepted. The Bombay High Court is of the opinion that the condition that the surety should be able to control the accused is not a desirable condition.[86.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
75. *Naresh Kumar Jain v State of UP*, 1993 Cr LJ 1352 (All).
76. *Mathangi Salyanaraiyana v State of AP*, 1996 Cr LJ 1809 (AP).
77. *Mrs Charles De Courpalay v The State of Mysore*, (1961) 1 Cr LJ 536 .
78. *Chit Narain v Kedar Nath*, 1973 Cr LJ 895 .
79. *Raghunath v The State*, (1952) 31 Pat 902 : AIR 1953 Pat 1 .
80. *Zahir Ahmed v Ganga Prasad*, AIR 1963 All 4 : 1963 Cr LJ 20 .
81. *Mithu Khan*, (1904) 27 All 172 .
82. *Bairage Charan v State of Orissa*, 1988 Cr LJ 286 (Ori).
83. *Babu Ram v State of HP*, 1989 Cr LJ NOC 6 (HP).
84. (1860) 4 Mad HCR (Appx) 46 ; *Dedar Sircar*, (1877) 2 Cal 384 , 385; *Rama* (1892) 16 Bom 372, 373; *Queen-Empress v Raza Ali*, (1900) ILR 23 All 80; *Wasaya*, (1901) PR No. 28 of 1901; *Mohamad Yasin*, 1969 Cr LJ 1133 .
85. *Balkishun v Munno Khan*, 1970 Cr LJ 586 : AIR 1970 Pat 107 .
86. *Emperor v Jiva Natha*, (1914) 16 Bom LR 138 .

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CHAPTER VIII SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

The provisions of this Chapter are preventive in their scope and object, and are aimed at persons who are a danger to the public by reason of the commission by them of certain offences.[1.] The preventive magisterial jurisdiction provided for in this Chapter constitutes a powerful adjunct to executive authority, salutary if used in moderation and over a sufficiently extended period, though harmful if resorted to immoderately and simultaneously in a large number of local areas.

The gist of this Chapter is prevention of crimes and disturbances of public tranquillity and breaches of the peace. The action being preventive is not based on any overt act but on the potential danger to be averted. The provisions are essentially in the public order and in the interest of the general public and, therefore, well within clauses (2), (3), (4) and (5) of Article 19 of the Constitution of India.[2.] Although an order to execute a bond before an offence is committed has the appearance of an administrative order, it is really judicial in character. Detention really results only on default of execution of the bond.[3.]

[s 112] Procedure in respect of person present in Court.—

If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

The order setting forth the substance of the allegations takes the place of charge and it is meant to enable the person to know what are the allegations against him which he has to meet. That being so, the Magistrate cannot travel beyond the allegations on the basis of which the order under the section was made in requiring the person to execute an interim bond under section 117(3).[87.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
87. *Abdul Latif v Amanat Ali*, 1974 Cr LJ 1092 , 1095 (Gau).

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[s 113] Summons or warrant in case of person not so present.—

If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court:

***Provided* that whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.**

Ordinarily a summons should be issued to the person affected. It should be accompanied by a copy of the order.

[s 113.1] Warrant for arrest [Proviso].—

In ordering the arrest of a person, the Magistrate must act on recorded information; it is not enough for him to express a belief that such a course is necessary. An order passed without complying with statutory provisions like notice under section 111 or where the substance of the allegation had not been incorporated and only a vague fact had been mentioned was held to be illegal.[88.]

In a preliminary order asking to show cause why the bond should not be executed, failure to mention the period during which the bond was to be in force was total and make the order illegal.[89.]

1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
88. *Tavinder Kumar v State (Delhi)*, 1990 Cr LJ 40 (Del).
89. *Mahadevswamy v State of Karnataka*, 1989 Cr LJ 756 (Karn).

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[s 114] Copy of order to accompany summons or warrant.—

Every summons or warrant issued under section 113 shall be accompanied by a copy of the order made under section 111, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

The use of the word "shall" render it incumbent on a Magistrate to send a copy of the order made by him under section 111 along with the summons or the warrant issued under section 113.[90.] Mere non-compliance of provisions of section 114 does not vitiate the proceedings.[91.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
90. *Mam Chand v Commissioner of Police*, 1985 (1) Crimes 970 , 973 (Del).
91. *Ramesh Chandra Panda v State of Orissa,* 1996 Cr LJ 2776 (Ori).

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[s 115] Power to dispense with personal attendance.—

The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader.

1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

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[s 116] Inquiry as to truth of information.—

(1) When an order under section 111 has been read or explained under section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons-cases.

(3) After the commencement, and before the completion, of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:

***Provided* that—**

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent

of their liability, shall not be more onerous than those specified in order under section 111.

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs:

***Provided* that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.**

(7) Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions Judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse.

This section provides for inquiry after a notice and order are served upon a person. Where order passed under section 111 CrPC does not at all disclose the substance of information received by the Magistrate, it is bad in law and proceedings under sections 107-116 CrPC cannot be initiated on the basis of such an order.[92.] In cases of persons being called upon to furnish security to keep the peace and in cases for giving security for good behaviour, the procedure to be followed is that prescribed for conducting trials and recording evidence in summons cases. In cases of urgency, the Magistrate has power to bind down the person till the close of the trial. There are two provisos: (1) that a provisional bond for good behaviour can be taken only from a person proceeded against under sections 108–110; and (2) the conditions of the bond exacted under section 116 can never be more onerous than those demanded under section 111. Further, in cases under section 110, evidence of general repute is admissible. A joint trial of two or more persons is permissible. Generally, the inquiry should terminate within six months. The Magistrate may, in special cases, recording his reasons in writing, continue it beyond six months; but such order is subject to revision by the Sessions Judge. Six months' period should be calculated from the date when the Magistrate decided to issue summons or directed the party to produce witnesses. Where the Magistrate calculated six months from the date of examining witnesses for continuation of proceedings, the order was set aside.[93.] In no case, however, if the person be in detention, should the inquiry drag on beyond six months.[94.]

[s 116.1] Inquiry [*Sub-section (2)*].—

The inquiry under this section must necessarily be made.[95.]

[s 116.2] Execution of Bond [*Sub-section (3)*].—

The words "any offence" appearing in this sub-section do not mean any particular offence of the nature set out in section 110. An order under sub-section (3) calling upon a person to furnish interim bond can be passed only during the inquiry, i.e., after the commencement and before the completion of such inquiry.[96.]

It is not given to a Magistrate to postpone the case and hear nobody and yet ask for furnishing of bond for good conduct.[97.] The inquiry contemplated under this section is to ascertain the truth regarding the information. Only if immediate measures are necessary that pending an inquiry, bond can be asked for. Therefore, a Magistrate cannot adjourn case from day to day and yet ask for an interim bond.[98.]

The Magistrate is the sole judge whether immediate measures are necessary for prevention of breach of the peace pending completion of inquiry. But interim bond will not be asked for merely on police report; it is for the Magistrate to apply his mind. The provision of safeguard for recording his reasons in writing indicates that he should not mechanically follow the police report.[99.]

[s 116.3] Evidence of general repute [*Sub-section (4)*].—

Evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community in which the person concerned lives or to which he belongs or the personal opinion of the witnesses who are examined.

A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand, if the state of things is that a body of his fellow-townsmen who know him, look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character.[100.]

[s 116.4] Period for completing inquiry [*Sub-section (6)*].—

Where six months has expired and the enquiry was not completed, it was held that the proceedings shall stand terminated in view of section 116(6) unless special reasons are recorded. Any extension of time had to be directed before the expiry of six months and not thereafter. Once enquiry comes to an end, the Magistrate is not empowered to revive it. Where the person against whom enquiry was initiated, applied for closing the enquiry after expiry of six months, the Magistrate did not pass any order, it was held that the Magistrate neglected his duty to close the enquiry.[101.] Where the Magistrate extended the life of proceedings beyond six months on the ground of continuance of apprehension of breach of peace after about nine months of the expiry of six months, the High Court set aside the order of extension holding that extension, if at all needed, must be directed prior to the expiry of six months and not subsequently. Six months' time is to be calculated from the date of the commencement of the inquiry, and the inquiry commences when the opposite party appears and shows cause or his plea is taken.[102.] Inquiry under section 116 CrPC commences from the date on which the Magistrate starts recording evidence and does not commence from the date of appearance of both the parties.[103.] Where the proceedings were closed on the lapse of six months, it was held that since there did not exist apprehension of breach of peace

during the continuance of proceedings, the proceedings were rightly terminated.[104.] Where the inquiry could not be completed within six months, but before the expiry of six months, the Assistant Public Prosecutor raised the question of extension of time and thereupon the Magistrate extended the period by further six months, the Orissa High Court held that raising of the question by Assistant Public Prosecutor was not a special reason by itself and the extension of time was contrary to law, if it was done without giving any special reasons.[105.]

For calculating the period of six months, the date of issuing the summons and not the date of examination of the witnesses should be considered.[106.]

[s 116.5] "Or otherwise".—

The Bombay High Court[107.] has ruled that hearsay evidence amounting to evidence of general repute is admissible. The Allahabad High Court[108.] has, however, laid down that evidence of repute should be the evidence of persons who are speaking to matters within their personal knowledge, and not from hearsay, vague and general statements that a man is a habitual offender. The effect of words "or otherwise" is to render admissible any evidence which would be relevant if the accused person or persons were being tried on a charge of being habitual offenders. The principle of section 30 of the Indian Evidence Act applies.[109.]

[s 116.6] "Associated together".—

The phrase applies to persons acting in concert, whether that concert is due to mutual agreement among themselves, or to the obedience to the orders of a common master,[110.] or to persons who are confederates or partners as against whom all the evidence is equally applicable.[111.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
92. *Naresh Kumar Jain v State of UP*, 1993 Cr LJ 1352 (All).
93. *Chakradhar Das v Bijoy Kumar Behara*, 1992 Cr LJ 906 (Ori).
94. *Ram Deo Yadav*, 1985 Cr LJ 436 (Pat).
95. *Kanhai Lal v Mul Chand*, (1914) 37 All 30 .
96. *Shankar Lal v State of HP*, 2002 Cr LJ 3516 (HP).
97. *Madhu Limaye v Ved Murti*, AIR 1971 SC 2481 : 1971 Cr LJ 1715 : (1971) 2 SCR 742 .
98. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 .

99. *Upendranath v State at the instance of Hadibandhu Kanungo*, AIR 1966 Orissa 75 : 1966 Cr LJ 432 .
100. *Rai Isri Pershad v Queen-Empress*, (1895) ILR 23 Cal 621, 628; *Rahu v Emperor*, (1920) 43 All 186 : AIR 1921 All 278 ; *Emperor v Angnu*, (1922) 45 All 109 ; *Jai Singh*, (1930) 6 Luck 36 .
101. *Christalin Costa v State of Goa*, 1992 Cr LJ 3608 (Bom).
102. *Bhagaban Pradhan v Jayaram Mohanty*, 1995 Cr LJ 607 (Ori).
103. *Mathewkutty v State of Kerala*, 1995 Cr LJ 3293 (Ker).
104. *Bhagat Ram v Kanta Devi*, 1995 Cr LJ 1404 (HP).
105. *Ram Chandra Das v Kailash Chandra Gochhayat*, 1993 Cr LJ 1621 (Ori).
106. *Chakradhar Das v Bijay Kumar Behara*, 1992 Cr LJ 906 (Ori).
107. *Raoji Fulchand*, (1903) 6 Bom LR 34 .
108. *Rup Singh*, (1904) 1 ALJR 616.
109. *Sarju*, (1918) 41 All 231 , 234.
110. *Srikanta Nath Shaha v The Emperor*, (1905) 1 Cal LJ 616 , 625.
111. *Emperor v Angnu*, (1922) 45 All 109 .

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CHAPTER VIII SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

The provisions of this Chapter are preventive in their scope and object, and are aimed at persons who are a danger to the public by reason of the commission by them of certain offences.[1.] The preventive magisterial jurisdiction provided for in this Chapter constitutes a powerful adjunct to executive authority, salutary if used in moderation and over a sufficiently extended period, though harmful if resorted to immoderately and simultaneously in a large number of local areas.

The gist of this Chapter is prevention of crimes and disturbances of public tranquillity and breaches of the peace. The action being preventive is not based on any overt act but on the potential danger to be averted. The provisions are essentially in the public order and in the interest of the general public and, therefore, well within clauses (2), (3), (4) and (5) of Article 19 of the Constitution of India.[2.] Although an order to execute a bond before an offence is committed has the appearance of an administrative order, it is really judicial in character. Detention really results only on default of execution of the bond.[3.]

[s 117] Order to give security.—

If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

***Provided* that—**

- **(a) no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 111;**
- **(b) the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;**
- **(c) when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.**

If the result of the inquiry is unfavourable to the person, he is called upon to execute the bond and furnish sureties. There are three safeguards: (1) the terms and conditions cannot be more onerous than those fixed in the notice; (2) amount of the bond shall be reasonable; and (3) if the person is a minor, the bond is to be executed by his sureties.

[s 117.1] Amount of security.—

In fixing the amount of security, the Magistrate should consider the station in life of the person concerned, and should not go beyond a sum for which there is a fair probability of his being able to find security.[112.] The amount should not be in excess of that stated in the notice.[113.]

1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

112. *Rama*, (1892) 16 Bom 372; *Queen-Empress v Raza Ali*, (1900) 23 All 80 ; *Wasaya*, (1901) PR No. 28 of 1901.

113. *Belagal Ramacharlu*, (1902) 26 Mad 471.

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[s 118] Discharge of person informed against.—

If, on an inquiry under section 116, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

If the inquiry against the accused results in his favour, the person is allowed to depart, or is discharged if he is in custody.

The term "discharged" is not used in its technical sense, for there is no "charge" framed in security proceedings. It is used in the sense of a permission to depart. It is not competent therefore to a superior Magistrate to interfere with a discharge under this section and order further inquiry.[114.] Similarly, a Sessions Judge has no jurisdiction to set aside an order of discharge passed under this section and to order further inquiry.[115.]

1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

114. *Velu Tayi Ammal v Chidambaravelu Pillai*, (1908) 33 Mad 85; *Emperor v Roshan Singh*, (1923) 46 All 235 : AIR 1924 All 592 ; *Imam Mondal*, (1900) 27 Cal 662 ; *Dayanath Taluqadar*, (1905) 33 Cal 8 .

115. *Muhammad Yusuf v Abdul Majid*, (1920) 53 All 148 .

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[s 119] Commencement of period for which security is required.—

(1) If any person, in respect of whom an order requiring security is made under section 106 or section 117, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

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[s 120] Contents of bond.—

The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Where the bond taken is for good behaviour, it is a breach of the bond if the person is, during its term, convicted either of abetment or attempt or commission of an offence, punishable with imprisonment, wherever committed.[116.] A bond for keeping the peace is broken when the person does some act "which is likely in its consequences to provoke a breach of the peace."[117.] In each case, the surety can be called upon to forfeit his bond. The onus lies on him to show that he is not liable.[118.]

1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*
116. *Sham Sundar Choudhry*, (1868) 2 Beng LR (A Cr J) 11.
117. *Ananthacharri v Ananthacharri*, (1881) 2 Mad 169; *Haran Chunder Roy*, (1872) 18 WR (Cr) 63.
118. *Man Mohan Lal*, (1898) 21 All 86 .

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[s 121] Power to reject Security.—

(1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter, on the ground that such surety is an unfit person for the purposes of the bond:

***Provided* that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.**

(2) Such Magistrate shall, before holding the inquiry, give reasonable notice to the surety and to the person by whom the surety was offered and shall, in making the inquiry, record the substance of the evidence adduced before him.

(3) If the Magistrate is satisfied after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any), that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing:

***Provided* that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.**

The Magistrate has power to refuse to accept a surety or to reject a surety already accepted by him or his predecessor. In either case, the ground of refusal should be that the surety is an unfit person, such unfitness being for the purposes of the bond. There

should invariably be an inquiry recording evidence before the refusal or rejection; and before commencing the inquiry, there should be notices both to the surety and the person bound over. The order for refusal or rejection should be in writing and contain reasons for the order. Where a surety who has once been accepted is rejected, the presence of the person bound over is necessary in Court.

[s 121.1] "An unfit person".—

The grounds upon which a Magistrate has power to refuse to accept a surety must be such as are valid and reasonable in the circumstances of each case as it arises.[119.] It is no disqualification in a surety that he is a relative.[120.] As long as the security is good and sufficient, and the sureties are of a satisfactory character and class, it and they cannot be rejected.[121.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

119. *Emperor v Asiraddi Mandal*, (1914) 41 Cal 764 .
120. *Emperor v Shib Singh*, (1902) 25 All 131 .
121. *Ganni*, (1875) 7 NWP 249.

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[s 122] Imprisonment in default of security.—

(1) **(a)** **If any person ordered to give security under section 106 or section 117 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.**

(b) **If any person after having executed a [122.][bond, with or without sureties] for keeping the peace in pursuance of an order of a Magistrate under section 117, is proved, to the satisfaction of such Magistrate or his successor-in-office, to have committed breach of the bond, such Magistrate or successor-in-office may, after recording the grounds of such proof, order that the person be arrested and detained in prison until the expiry of the period of the bond and such order shall be without prejudice to any other punishment or forfeiture to which the said person may be liable in accordance with law.**

(2) **When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge and the proceedings shall be laid, as soon as conveniently may be, before such Court.**

(3) **Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, and after giving the concerned person a reasonable opportunity of being heard may pass such order on the case as it thinks fit:**

Provided **that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.**

(4) If security has been required in the course of the same proceeding from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned, shall not exceed the period for which he was ordered to give security.

(5) A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (4) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(6) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(7) Imprisonment for failure to give security for keeping the peace shall be simple.

(8) Imprisonment for failure to give security for good behaviour shall where the proceedings have been taken under section 108, be simple, and, where the proceedings have been taken under section 109 or section 110, be rigorous or simple as the Court or Magistrate in each case directs.

[s 122.1] CrPC (Amendment) Act, 2005 [*Clause 15*].—

This clause seeks to amend sub-section (1) of section 122 to remove the discrepancy between section 107(1) and section 122(1)(*b*) of the Code. (*Notes on Clauses*).

COMMENT

Where a person fails to give security, he is to be detained in prison. Where, after executing a bond for keeping the peace without sureties, a person is proved to have committed breach thereof, he may be arrested and detained in prison until the expiry of the period of bond. The imprisonment awarded for failure to give security for peace (sections 106 and 107) and for good behaviour in cases of sedition (section 108) is simple; in other cases, that is of suspected persons (section 109), or of habitual offenders (section 110), it may be rigorous or simple. The extreme limit of such imprisonment is three years. Where the period of security exceeds one year in duration, the proceedings are to be laid for orders before the Sessions Judge.

[s 122.2] Consequence of failure to provide security [*Sub-section (2)*].—

Where a reference is made to the Sessions Judge, he is bound to give notice to the person concerned and also to hear his pleader if he should be so represented. If the

Judge confirms the order of imprisonment, he is bound to find special ground, on which the order is passed, having special reference to the section. It is not sufficient to find in general terms that it is for the interest of the community at large that such person should be bound over to be of good behaviour.[123.]

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

122. Subs. by Act 25 of 2005, section 15, for "bond without sureties" (w.e.f. 23-6-2006).

123. *Nakhi Lal Jha v Queen-Empress*, (1900) ILR 27 Cal 656; *Emperor v Amir Bala*, (1911) 35 Bom 271 : 13 Bom LR 203.

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[s 123] Power to release persons imprisoned for failing to give security.—

(1) Whenever [124.][the District Magistrate in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case] is of opinion that any person imprisoned for failing to give security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the High Court or Court of Session, or, where the order was made by any other Court, the [125.][District Magistrate, in the case of an order passed by an Executive Magistrate under section 117 or the Chief Judicial Magistrate in any other case,] may make an order reducing the amount of security or the number of sureties or the time for which security has been required.

(3) An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts:

***Provided* that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.**

(4) The State Government may prescribe the conditions upon which a conditional discharge may be made.

(5) If any condition upon which any person has been discharged is, in the opinion of the [126.][District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case] by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before the [127].[District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case.]

(7) Unless such person gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the [128].[District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case] may remand such person to prison to undergo such unexpired portion.

(8) A person remanded to prison under sub-section (7) shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

(9) The High Court or Court of Session may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by any order made by it, and the [129].[District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case] may make such cancellation where such bond was executed under his order or under the order of any other Court in his district.

(10) Any surety for the peaceable conduct or good behaviour of another person ordered to execute a bond under this Chapter may at any time apply to the Court making such order to cancel the bond and on such application being made, the Court shall issue a summons or warrant, as it thinks fit, requiring the person for whom such surety is bound to appear or to be brought before it.

The Chief Judicial Magistrate may release a person before the expiration of the period with or without conditions, if it can be done without hazard to the community or to any other person. It is open to him to reduce the amount or number of sureties or shorten the period of security. If there is breach of the condition, the order of discharge is liable to be cancelled and the person can be called upon to furnish sureties for the rest of the unexpired term.

[s 123.1] Cancellation of bond—[*Sub-section (9)*].—

This sub-section applies to cases in which a bond has been executed and the High Court, the Court of Session or the Chief Judicial Magistrate thinking it no longer necessary that the person should be bound over, cancels the bond, thus discharging him and his surety from all liability.

[s 123.2] "For sufficient reasons".—

These words should be given their plain natural meaning. A Full Bench of the Calcutta High Court[130.] had, under the old Code, held that the Magistrate had power to direct cancellation of a bond on grounds other than that the bond was no longer necessary. A Full Bench of the Madras High Court[131.] following the same view has held that the Chief Judicial Magistrate can set aside the order passed by a subordinate Magistrate as having been passed on insufficient grounds. The Allahabad High Court[132.] has taken a different view and has held that the cancellation can only be on the ground that the bond is no longer necessary. The Patna High Court[133.] has followed the Allahabad High Court.

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1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

124. Subs. by Act No. 45 of 1978, section 12(i), (w.e.f. 18-12-1978) for the words "the Chief Judicial Magistrate".

125. Subs. by Act 45 of 1978, section 12(ii), for "Chief Judicial Magistrate" (w.e.f. 18-12-1978).

126. Subs. by Act 45 of 1978, section 12(ii), for "Chief Judicial Magistrate" (w.e.f. 18-12-1978).

127. Subs. by Act 45 of 1978, section 12(ii), for "Chief Judicial Magistrate" (w.e.f. 18-12-1978).

128. Subs. by Act 45 of 1978, section 12(ii), for "Chief Judicial Magistrate" (w.e.f. 18-12-1978).

129. Subs. by Act 45 of 1978, section 12(ii), for "Chief Judicial Magistrate" (w.e.f. 18-12-1978).

130. *Nabu Sardar v Emperor*, (1907) ILR 34 Cal 1, 3 (FB); *Dayanath Thakur v Emperor*, (1909) 37 Cal 72 .

131. *Mare Gowd*, (1914) 37 Mad 125 (FB) : AIR 1914 Mad 613 .

132. *Banarsi Das v Partap Singh*, (1912) 35 All 103 ; *Sita Ram*, (1917) 39 All 466 ; *Shankar Lal*, (1919) 41 All 651 ; *Nizam-ud-din Khan v Muhammad Zia-ul-nabi Khan*, (1922) ILR 44 All 614 : AIR 1922 All 1 91 . **But see**, contra, *Baldeo Singh v Jugal Kishore*, (1911) ILR 33 All 619; *Lalji*, (1917) 40 All 140 .

133. *Durga Singh v Amar Dayal Singh*, (1921) 3 PIT 103 : AIR 1922 Pat 334 .

The Code of Criminal Procedure, 1973

CHAPTER VIII SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

The provisions of this Chapter are preventive in their scope and object, and are aimed at persons who are a danger to the public by reason of the commission by them of certain offences.[1.] The preventive magisterial jurisdiction provided for in this Chapter constitutes a powerful adjunct to executive authority, salutary if used in moderation and over a sufficiently extended period, though harmful if resorted to immoderately and simultaneously in a large number of local areas.

The gist of this Chapter is prevention of crimes and disturbances of public tranquillity and breaches of the peace. The action being preventive is not based on any overt act but on the potential danger to be averted. The provisions are essentially in the public order and in the interest of the general public and, therefore, well within clauses (2), (3), (4) and (5) of Article 19 of the Constitution of India.[2.] Although an order to execute a bond before an offence is committed has the appearance of an administrative order, it is really judicial in character. Detention really results only on default of execution of the bond.[3.]

[s 124] Security for unexpired period of bond.—

(1) When a person for whose appearance a summons or warrant has been issued under the proviso to sub-section (3) of section 121 or under sub-section (10) of section 123, appears or is brought before the Magistrate or Court, the Magistrate or Court shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security.

(2) Every such order shall, for the purposes of sections 120 to 123 (both inclusive), be deemed to be an order made under section 106 or section 117, as the case may be.

This section lays down that when a Magistrate rejects a surety under section 121(3) or discharges him under section 123(10), he shall cancel the bond and make a fresh order under section 106 or 117.

1. *Vaman Sakharam v Emperor*, (1909) 11 Bom LR 743 .
2. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2481 : 1971 Cr LJ 1720 : (1970) 3 SCC 746 , 739.
3. *Ibid.*

The Code of Criminal Procedure, 1973

CHAPTER IX ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

[s 125] Order for maintenance of wives, children and parents.—

(1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate [1][***], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[2] [*Provided further* that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of the notice of application to such person.]

Explanation.— For the purposes of this Chapter,—

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[3][(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so

ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [4][allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided **that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:**

Provided further **that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.**

Explanation.**— If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.**

(4) No wife shall be entitled to receive an [5][allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

[s 125.1] State Amendment

Madhya Pradesh.—I. *The following amendments were made by Madhya Pradesh Act 10 of 1998, section 3 (w.e.f. 29-5-1998).*

In its application to the State of Madhya Pradesh, in section 125, sub-section (1), for the words "five hundred rupees", substitute "three thousand rupees".

[Note this State amendment was made prior to the enactment of Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees in the whole" have been omitted (*See* section 2, Cr.P.Code (Amdt.) Act, 2001 (w.e.f. 24-9-2001)].

II. *In its application to the State of Madhya Pradesh, the following amendments were made in section 125 by Madhya Pradesh Act 15 of 2004, section 3 assented on 26th November, 2004 by the President and Published in the Madhya Pradesh Gazette (Extraordinary) dated 6th December, 2004.*

(i) for the marginal heading, the following marginal heading shall be substituted, namely:—

"Order for maintenance of wifes, children, parents and grandparents."

(ii) In sub-section (1),—

(a) After clause (d), the following clause shall be inserted, namely:—

"(e) his grandfather, grandmother unable to maintain himself or herself.";

(b) In the existing para, for the words "a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding three thousand rupees in the whole, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct", the words "a Magistrate of the first class may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father, mother, grandfather, grandmother at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct" shall be substituted;

(c) After the existing first proviso, the following proviso shall be inserted, namely:—

"*Provided further* that the relatives in clause (e) shall only be entitled to monthly allowance for maintenance if their sons or daughters are not alive and they are unable to maintain themselves."

Maharashtra.— *The following amendments were made by Maharashtra Act 21 of 1999, section 2 (w.e.f. 20-4-1999).*

In its application to the State of Maharashtra, in section 125,—

(*a*) in sub-section (1),—

(i) for the words "not exceeding five hundred rupees", substitute "not exceeding fifteen hundred rupees";

(ii) before the existing proviso, insert the following proviso, namely:—

"*Provided* that, the Magistrate on an application or submission being made, supported by an affidavit by the person who has applied for the maintenance under this sub-section, for payment of interim maintenance, on being satisfied that, there is a *prima facie* ground for making such order, may direct the person against whom the application for maintenance has been made, to pay a reasonable amount by way of interim maintenance to the applicant, pending the final disposal of the maintenance application:

Provided further that, such order for payment of interim maintenance may, in an appropriate case, also be made by the Magistrate *ex parte*, pending service of notice of the application, subject, however, to the condition that such an order shall be liable to be modified or even cancelled after the respondent is heard in the matter:

Provided also that, subject to the ceiling laid down under this sub-section, the amount of interim maintenance shall, as far as practicable, be not less than thirty per cent of the monthly income of the respondent.";

(iii) in the existing proviso, for the words "Provided that", substitute "Provided also that";

(*b*) after sub-section (2), insert the following sub-section, namely:—

"(2-A) Notwithstanding anything otherwise contained in sub-sections (1) and (2), where an application is made by the wife under clause (*a*) of sub-section (1) for the maintenance allowance, the applicant may also seek relief that the order may be made for the payment of maintenance allowance in lump-sum in lieu of the payment of monthly maintenance allowance, and the Magistrate may, after taking into consideration all the circumstances obtaining in the case including the factors like the age, physical condition, economic conditions and other liabilities and commitments of both the parties, pass an order that the respondent shall pay the maintenance allowance in lump-sum in lieu of the monthly maintenance allowance, covering a specified period, not exceeding five years at a time, or for such period which may exceed five years, as may be mutually agreed to, by the parties."

(*c*) in sub-section (3),—

(i) after the words "so ordered", insert "either under sub-section (1) or sub-section (2-A), as the case may be,";

(ii) after the words "each month's allowance", insert "or, as the case may be, the lump-sum allowance to be paid in lieu of the monthly allowance".

[Note this State amendments were made prior to the enactment of Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001), section 2 (w.e.f. 24-9-2001)].

Rajasthan.— *The following amendments were made by Rajasthan Act 3 of 2001, section 2 (w.e.f. 10-5-2001).*

In its application to the State of Rajasthan, in section 125, sub-section (1), for the words "five hundred" occurring after the words "at such monthly rate not exceeding" and before the words "rupees in the whole", substitute "two thousand five hundred".

[Note this State amendment has been made prior to the enactment of the Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001), section 2 (w.e.f. 24-9-2001).]

Tripura.— *The following amendments were made by Tripura Act 9 of 1999, section 2 (w.e.f. 9-4-1999).*

In its application to the State of Tripura, in section 125, sub-section (1), for the words "five hundred rupees", substitute "one thousand five hundred rupees".

[Note this State amendment was made prior to the enactment of Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees) in the whole" have been omitted (See section 2, Cr.P.Code (Arndt.) Act, 2001 (w.e.f. 24-9-2001)].

Uttar Pradesh.— *The following amendments were made by Uttar Pradesh Act 36 of 2000, section 2 (w.e.f. 13-8-2001).*

In its application to the State of Uttar Pradesh, in section 125,—

(*a*) in sub-sec. (1), for the words "five hundred rupees", substitute "five thousand rupees";

(*b*) after sub-section (5), insert the following sub-section, namely:—

"(6) Where in a proceeding under this section it appears to the Magistrate that the person claiming maintenance is in need of immediate relief for his support and the necessary expenses of the proceeding, the Magistrate may, on his application, order the person against whom the maintenance is claimed, to pay to the person claiming the maintenance, during the pendency of the proceeding such monthly allowance not exceeding five thousand rupees and such expenses of the proceeding as the Magistrate consider reasonable and such order shall be enforceable as an order of maintenance".

The following amendments were made by Uttar Pradesh Act 15 of 2011, section 2.

(*c*) in section 125, in sub-section (6), as amended by section 2 of Uttar Pradesh Act 36 of 2000 (w.e.f. 13-8-2001), omit the words "not exceeding five thousand rupees".

West Bengal.— *The following amendments were made by the Cr.P.C. (West Bengal Amendment) Act, 1992 (W.B. Act No. XXV of 1992), dated 22-4-1993 (w.e.f. 2-8-1993).*

S. 125(1).—In sub-section (1) of section 125 of the principal Act,—

(1) for the words "five hundred rupees", the words "[6.][* * *]" shall be substituted;

(2) after the existing proviso, the following proviso shall be inserted:—

"*Provided further* that where in any proceeding under this section it appears to the Magistrate that the wife referred to in clause (a) or the minor child referred to in clause (b) or the child (not being a married daughter) referred to in clause (c) or the father or the mother referred to in clause (d) is in need of immediate relief for her or its or his support and the necessary expenses of the proceeding, the Magistrate may, on the application of the wife or the minor child or the child (not being a married daughter) or the father or the mother, as the case may be, order the person against whom the

allowance for maintenance is claimed, to pay to the petitioner, pending the conclusion of the proceeding, the expenses of the proceeding, and monthly during the proceeding such allowance as, having regard to the income of such person, it may seem to the Magistrate to be reasonable."

[Note this State amendment was made prior to the enactment of Code of Criminal procedure (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees) in the whole "have been omitted (*See* section 2, Cr.P.Code (Amdt.) Act, 2001 (w.e.f. 24-9-2001)].

[s 125.2] Code of Criminal Procedure (Amendment) Act, 2001 [w.e.f. 24-9-2001]

[s 125.2.1] Interim maintenance allowance.—

Statement of Objects appended to the Bill stated thus:

It has been observed that an applicant, after filing application in a Court u/s. 125 of the Code of Criminal Procedure, 1973, has to wait for several years for getting relief from the Court. It is, therefore, felt that express provisions should be made in the said Code for interim maintenance allowance to the aggrieved person under said s. 125 of the Code. Accordingly, it is proposed that during the pendency of the proceedings, the Magistrate may order payment of interim maintenance allowance and such expenses of the proceedings as the Magistrate considers reasonable, to the aggrieved person. It is also proposed that this order be made ordinarily within sixty days from the date of the service of the notice.

(*Para*, Statement of Objects and Reasons to the Bill) (w.e.f. 24-9-2001).

[s 125.2.2] Ceiling on maintenance allowance abolished.—

Statement of Objects appended to the Bill stated thus:

The ceiling of rupees five hundred per month for maintenance allowance was prescribed in the year 1955 in s. 488 of the Code of Criminal Procedure, 1908. A ceiling of rupees five hundred was prescribed in s. 125 of the Code of Criminal Procedure, 1973 on the lines of Section 488 of the Code of Criminal Procedure, 1908 which has since been repealed. In view of the cost of living index centrally rising, retention of a maximum ceiling is not justified. If a ceiling is prescribed and retained, it would require periodic revision taking into account the inflation and rise in the cost of living as well as amendment of provisions of the Act from time to time. This would necessarily be time consuming. Accordingly, it is also proposed to amend Section 125 and make consequential changes in Section 127 of the Code of Criminal Procedure to remove the ceiling of maintenance allowance.

(*Para*, Statement of Objects and Reasons to the Bill) (w.e.f. 24-9-2001).

State Amendments prescribing any ceiling would no longer be valid being inconsistent with the Amendment of 2001.[7.]

COMMENT

This provision is a measure for social justice and specially enacted to protect women and children (also old and infirm poor parents) and falls within the constitutional sweep of Article 15(3) reinforced by Article 39.[8.] This section gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions apply and are enforceable irrespective of the personal law by which the persons concerned are governed.[9.] But the personal law of the parties is relevant for deciding the validity of the marriage and therefore cannot be altogether excluded from consideration.[10.] The Supreme Court had held that section 125 is applicable to all irrespective of their religion. It was, therefore, applicable to Muslim women also.[11.] However, subsequently, Parliament passed the Muslim Women's (Protection of Rights on Divorce) Act, 1986, which provides other remedies for Muslim women and allows them to use the remedy provided by section 125 only if the husband consents to it.

Subsequent to the enactment of the 1986 Act, it was considered that the jurisdiction of the Magistrate under section 125 CrPC can be invoked only when the conditions precedent mentioned in section 5 of the Act are complied with. The validity of the provisions of the Act was for consideration before the constitution bench in the case of *Danial Latifi v UOI.*[12.] In the said case by reading down the provisions of the Act, the validity of the Act was upheld and it was observed that under the Act itself when parties agree, the provisions of section 125 CrPC could be invoked as contained in section 5 of the Act and even otherwise, the Magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in section 125 CrPC.

In two cases,[13.] the Supreme Court was seized of the question as to whether the appellant's application for grant of maintenance under section 125 of the Code was to be restricted to the date of divorce and, as an ancillary to it, because of filing of an application under section 3 of the Act after the divorce for grant of *mehar* and return of gifts would disentitle the appellant to sustain the application under section 125 of the Code. It was held that seeking of option would not make any difference. The High Court was found not correct in opining that when the appellant-wife filed application under section 3 of the Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under section 125 of the Code to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable.

There is no inconsistency between this section and the Hindu Adoptions and Maintenance Act, 1956. The scope of the two laws is different. This section provides a summary remedy and is applicable to all persons. It has no relationship to the personal law of the parties.[14.] A suit for maintenance under Hindu Adoption and Maintenance Act, 1956, is maintainable even after compromise in section 125 proceedings.[15.]

Chapter IX is a self-contained one and the relief given under it is essentially of a civil nature. The findings of a Magistrate under this Chapter are not final, and the parties can legitimately agitate their rights in a Civil Court.[16.]

The proceeding under section 125 CrPC cannot be permitted to continue when the petitioner has already chosen the alternative remedy under Regular Civil Suit. It is well-settled law that judgment of Civil Court shall prevail over the judgment of the Criminal Court.[17.] However, it is not possible to uphold the contention that the remedy under section 125 of the Code of Criminal Procedure was barred because of the decision of the Civil Court under the Hindu Adoptions and Maintenance Act.[18.]

In a case relating to grant of maintenance, the Supreme Court observed that in both constitutional and statutory interpretations, the Court is supposed to exercise discretion in determining the proper relationship between subjective and objective purposes of law.

Section 125 was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that suitable arrangements can be made by the Court and she can sustain herself and her children. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband.[19.]

In *Shamima Farooqui v Shahid Khan,*[20.] it was held that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises.

[s 125.3] Constitutional validity.—

The decision of the High Court declaring sub-section (2) to be violative of Article 14 without notice to the Attorney General and without such contention being raised in the pleadings was held to be not sustainable.[21.]

[s 125.4] Nature of proceeding.—

The proceeding under section 125 is summary in nature. If the petitioner is able to establish that there was valid marriage under law and both of them were living together as husband and wife, the wife is entitled to claim maintenance.[22.]

The proceeding is basically of civil nature. Once marriage is *prima facie* proved, it is not necessary to further probe into whether the procedure adopted in solemnising the marriage was complete as per Hindu rites or otherwise. The husband was not allowed to plead absence of such rites. They were living together as man and wife which created a strong presumption of marriage for the purposes of section 125.[23.] Proceedings under the section are of *quasi*-civil and *quasi*-criminal nature. The provision has been enacted with a view to providing a summary remedy. Orders passed under this section do not finally determine the rights and obligations of the parties.[24.]

[s 125.5] Application for amending amount of interim maintenance.—

An application was filed seeking permission to alter the amount of interim maintenance. The Court said that there is no provision in the Code for amending the amount claimed in an application under section 125. The order allowing such amendment would be improper.[25.]

[s 125.6] Interim relief.—

There is no provision for the payment of interim maintenance under section 125. However, the Supreme Court granted interim maintenance, under its inherent power.[26.]

Thereafter, it has been granted by a number of High Courts.[27.]

No revision is maintainable under section 397(2) CrPC against the grant of interim maintenance as it is only an "interlocutory order".[28.] Where a woman was *prima facie* proved to be the legally married wife and therefore the child born of that wedlock was legitimate, it was held that the Magistrate can very well award interim maintenance pending final disposal of the case.[29.]

The provisions of section 210 of the Code would not apply to a proceeding under section 125 of the Code as it does not relate to any offence as defined in section 2(n) of the Code.[30.] *Ex parte* order of interim maintenance may be either confirmed, modified or even cancelled if the circumstances so required on the application of the husband for reconsideration of the matter. Refusal to reconsider the order on the ground that the order was passed *ex parte* is not correct approach.[31.]

An interim maintenance can be granted even on the basis of an affidavit. The argument that without recording evidence, interim maintenance could not be allowed was rejected.[32.]

The Court has the implied power to grant interim maintenance.[33.] But there has to be a written application for such grant.[34.]

An *ex parte* decree for restitution of conjugal rights obtained by the husband against his wife was held to be not an absolute bar to the consideration of his wife's claim for maintenance under section 125.[35.]

An order of interim maintenance was set aside where the decree of restitution of conjugal rights was granted to the husband, but the wife refused to join him without assigning any reasons.[36.]

In *Bhuwan Mohan Singh v Meena,* a case of grant of maintenance, there was long delay in disposal of proceedings due to adjournments taken by the husband and laxity shown by the Court in dealing with the case and the wife was made to sustain herself for years, it was held by Supreme Court that the circumstances justify the grant of maintenance from the date of application.[37.]

[s 125.7] Scope.—

This section does not cease to operate when the relationship of marriage or paternity is denied. It is competent to the Magistrate to allow an issue on the question to be raised and decide it.[38.] The Magistrate can grant maintenance to the wife if the husband challenges the validity of the marriage. The husband may go to the Civil Court for establishing invalidity of the marriage, as the Magistrate is not competent to decide on such issue.[39.]

An order for maintenance passed under this section in favour of a wife will not cease to be operative merely because there was subsequent resumption of cohabitation between husband and wife,[40.] though it would remain under suspension during that period. It would revive when the wife again lives separately from her husband unless and until it is cancelled by the competent authority in a proper proceeding under sub-section (5) of this section.[41.]

In a revision against the maintenance awarded by the Magistrate to a wife under section 125 CrPC, it was held that insufficiency of the reason for the wife to live

separately (section 125(4) CrPC) has to be established by the husband in the Trial Court, as it involves factual evaluation, and cannot be considered in revision.[42.]

[s 125.8] Compromise.—

Proceedings under this section were disposed of in terms of the compromise between the parties. The husband agreed to pay maintenance allowance in the event that he did not maintain the wife as settled between them. It was held that such conditional order was outside the pale of section 125. It could not be executed under section 128.[43.]

[s 125.9] "Any person".—

The words "any person" include a Hindu not divided from his father.[44.] This section does not contemplate proceedings against a whole family merely because the husband against whom the proceedings are taken is a member of a joint Hindu family. Though the Magistrate may consider what is the property of the family, in considering what sum he should award to the wife for maintenance, and the order should be passed against the husband himself and not against the joint family.[45.] An order made under this section can be enforced against a person even if he resides outside the jurisdiction of the Court.[46.] The words "any person" include only father or son or husband but does not include a daughter or mother or wife.[47.] However, a married daughter is included in "any person".[48.]

Under this section, a person can claim maintenance from his daughter but not from his wife. A claim against wife is maintainable only under the provisions of the Hindu Marriage Act, 1955.[49.]

[s 125.10] "Sufficient means".—

An order under this section can be passed only if a person "having sufficient means" neglects to maintain his wife or child. But the expression "means" occurring in this section does not signify only visible means such as real property[50.] or definite employment. If a man is healthy and able-bodied, he must be held to possess the means to support his wife, children and parents and he cannot be relieved of his obligation on the ground that he is a mere boy and is unemployed. The words "sufficient means" should not be confined to the actual pecuniary resources but should have reference to the earning capacity.[51.] The maintenance has to be determined in the light of the standard of living of the person concerned, the earnings of the husband, his other financial commitments, *etc*.[52.] Insolvency of the husband was not conclusive to such determination. His capacity to work and earn is material.[53.] Omission to plead that the husband has "sufficient means" does not take away the right of the wife to get maintenance.[54.]

[s 125.11] "Neglects or refuses to maintain".—

A neglect or refusal to maintain may be by words or by conduct. It may be express or implied.[55.]

"Maintenance" means to have appropriate food, clothing and lodging.[56.] However, the word is not to be narrowly interpreted. Where constant expenditure is essential to be made by the wife for keeping herself in fit state of health, some reasonable amount towards the same can be included in the sum awardable under this section.[57.] Refusal to provide for medical treatment during illness of wife has been held as amounting to neglect of wife.[58.]

Even where the wife relinquished her rights to maintenance and agreed to keep her son in a consent divorce proceeding, if the Magistrate finds that the wife is neglected or refused maintenance, he is bound to award appropriate maintenance despite the agreement, the same being opposed to public policy. Maintenance is statutory right of the wife.[59.]

Where the parties had been living together for years as husband and wife, the Court said that it would be presumed that they were legally married. The very denial by the man of any marriage would entitle the woman to maintenance because such denial amounted on the face of it as neglect and refusal.[60.]

[s 125.12] Private agreement.—

The existence of a private agreement between the husband and the wife does not mean that if the husband fails to pay the maintenance allowance, there is no refusal or at least neglect to maintain the wife.[61.]

"The jurisdiction of the Magistrate under section 125 is not ousted by any agreement between the parties especially if it is illusory and, if facts and circumstances of the case otherwise justify the grant of maintenance".[62.]

Even where the wife agreed not to claim any maintenance allowance, and on account of such agreement, the Matrimonial Court granted divorce under section 13B of the Hindu Marriage Act and the agreement was incorporated in the decree, it was held that the agreement would not be binding on the wife so as to prevent her from claiming maintenance allowance in future. Such agreement is against the spirit of section 125 as well as against public policy.[63.]

[s 125.13] "Wife".—

Wife means only a legitimate wife[64.] or legally wedded wife,[65.] and therefore a marriage proved illegal cannot give a wife any right to get maintenance.[66.] Executing a registered document and making a declaration therein that the executant would live as husband and wife would not confer upon them the status of a husband and wife. Where marriage is denied by the husband, the factum of marriage should be properly proved. Marriage cannot be proved by few cursorily made statements.[67.] The second wife is not entitled to get maintenance.[68.]

A catholic Christian wife was held to be entitled to maintenance in view of the Criminal Law and laws of other communities in India, as she was compelled to live separately due to the conditions created by her husband.[69.]

Wife includes a woman who obtains divorce by mutual consent.[70.] The wife's right to maintenance is not absolute. Her separate income, if any, will be taken into

consideration.[71.] The husband cannot ask a divorced wife to come and reside with him as a condition precedent to the payment of maintenance. The words "refusing to live with the husband without a sufficient cause" or "living separately by mutual consent" in sub-sections (4) and (5) of section 125 are applicable to a wife whose marriage is subsisting and not in the case of wife as defined in Explanation (b) of section 125(1).[72.] A divorced wife, who has not remarried, has to live separately, and the question of living separately with mutual consent does not arise. Acceptance of any lump-sum payment by the wife in divorce proceedings does not mean relinquishment of claim for maintenance in future. She was held entitled to maintenance.[73.]

Definition of "wife" cannot be stretched to include the nullity of marriage as envisaged by section 11 or section 12 of the Hindu Marriage Act. It is confined to divorce only.[74.]

Where the husband made an allegation of leading an adulterous life by wife, it was held that if this fact is not proved, then the wife gets justification for living separate and gets grounds for claiming maintenance.[75.]

The Supreme Court has held that where the husband failed to gain potency for a sufficiently long time, the wife was entitled to live separately and claim maintenance from him.[76.]

[s 125.14] Marriage in violation of Child Marriage Restraint Act.—

It has been held that a man cannot avoid paying maintenance on the ground that he was married in violation of the Child Marriage Restraint Act, 1929.[77.]

[s 125.15] Marriage.—

The standard of proof required to show the existence of marriage is not as strict as is required for the offence of bigamy under section 494 IPC The Supreme Court has said:

> The validity of the marriage for the purpose of summary proceedings u/s. 125, Cr.P.C., is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence u/s. 494, IPC. If the claimant succeeds in showing that she and the respondent have lived together as husband and wife, the Court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption.

[s 125.16] Second wife and her children.—

Where the accused's first wife was alive and the marriage had not been annulled by a decree of divorce or otherwise, it was held that the High Court erred in granting maintenance to the second wife. That award was set aside. But the payment of maintenance to the children of the second marriage was not disrupted.[78.]

Such second marriage is void *ab-initio*. Burden lies upon the husband to prove the fact of his first marriage and also a valid one. The mere keeping of a mistress does not debar the so-called second wife from claiming maintenance.[79.]

Where the husband sought to repudiate the marriage with appellant wife as void on account of subsistence of an earlier marriage and the trial court declared the marriage as valid and directed the husband to pay maintenance to the appellant wife, it was held

by the Supreme Court that interference by the High Court exercising its revisional jurisdiction was improper.[80.] It was further held in the case that where the husband takes the plea of earlier marriage to deny the payment of maintenance to second wife, he has to prove the subsistence of an earlier marriage by tendering satisfactory evidence. On his failure to establish the plea of subsistence of an earlier marriage, the wife would be entitled to maintenance when she successfully proved that she was legally married with 3 children and was deserted almost after 25 years.[81.]

The Supreme Court has observed that the scope of section 125 cannot be enlarged to include a woman not lawfully married. The plight of women unwittingly entering into wedlock with a married man can only be improved by legislation. The principle of estopped cannot be pushed into service to obtain the benefit of section 125.[82.]

A Muslim married the sister of his existing wife. The Court said that the marriage was irregular and not void. It continued to subsist and would continue to do so till terminated in accordance with the law. The wife and children of such marriage were held entitled to maintenance.[83.]

[s 125.17] Divorce of Muslim woman.—

The pronouncement of divorce is a condition precedent so as to disentitle a Muslim Woman from claim to maintenance. Where that was not proved, the Supreme Court said that neither the marriage between the parties stood dissolved nor did the liability of the husband to pay maintenance come to an end on that day. Husband shall continue to be liable for payment of maintenance until the obligation comes to an end in accordance with the law.[84.]

Muslim Women (Protection of Rights on Divorce) Act, 1986, has been held to be not retrospective in operation. It did not have the effect of nullifying orders already made under section 125 or section 127.

The remedy under section 125 remains available despite the provisions for maintenance in the Act.[85.] A petition by a divorced Muslim woman under section 125 against her husband remains maintainable even after *iddat* period, so long as she does not remarry. The amount of maintenance to be awarded is not to be restricted for *iddat* period only.[86.] The rights of a Muslim divorced woman to claim maintenance under section 125 CrPC and payment under section 3 of the Act are entirely exclusive domains and not mutually exclusive or capable of extinguishing the existing rights.

It is only payment under section 3 of the Act and absolution of liability granted by the Court under section 127(3)(b) of CrPC, which extinguishes her right to claim maintenance under section 125.[87.]

Section 125 remains applicable as long as there is no divorce. The fact of divorce would have to be strictly proved to invite the application of the 1986 Act.[88.]

A divorced Muslim woman has been held to be entitled to claim maintenance for her minor children under section 125 of CrPC. This right is independent of the right of the divorced woman to seek maintenance for her minor kid or kids under section 3(1)(b) of the 1986 Act for a period of two years from the date of infant's birth. These were claims and counterclaims about paternity. The Court said that the finding of the criminal about the legitimacy of the child would stand till the parties were able to resolve their dispute in civil proceedings.[89.]

The 1986 Act applies only to divorced women. It does not apply to a woman who is not divorced. She can proceed under section 125.

Proceedings under section 125 are of civil in nature. Where the Court notices that the petition has been filed by a divorced woman, the Court can treat it as a petition under the 1986 Act.[90.]

[s 125.18] Refusal to live with husband.—

Torture or ill-treatment in the husband's house would be sufficient for refusal by wife to live with her husband, though husband may not be guilty personally. Where a wife cannot reasonably hope to live with dignity with her husband, she may refuse to live with him. However, where wife left the house of her husband without any justifiable reason and failed to establish and substantiate the apprehension of danger to her life, wife was not entitled to maintenance.[91.]

Where the husband claimed exemption from payment of maintenance as he renounced the world and had become a "Sadhu", it was held that it did not absolve him of the duty of maintaining his wife and children.[92.]

Where a Muslim wife was justifiably living separately with her minor son, it was held that both of them were entitled to maintenance as there was specific finding of fact that neither divorce was effected, nor were "Jahez" articles returned nor *mehar* amount was paid.[93.]

An order passed under this section does not come to an end owing to the resumed co-habitation between the husband and wife.[94.]

Where the husband admitted that he did not like his wife to return to him, it would be a sufficient reason for the wife to leave his house and the husband would have to pay maintenance to her.[95.]

[s 125.19] Leaving matrimonial home under compulsion.—

The case of the husband was that his wife left matrimonial home by herself leaving two minor children behind stating that she was unable to take care of the children. But he failed to explain any real or strong reason. The wife on the other hand said that she made serious efforts to get custody of the children. She further said that the husband was making unlawful demands, maltreated her and drove her away. The finding that a young woman could not have left her home and children without a strong reason was held to be proper. The wife was entitled to maintenance.[96.]

[s 125.20] Decree for restoration of conjugal rights.—

As against the wife's claim for maintenance, the husband obtained a decree for restitution of his conjugal rights. The Court said that such decree shows that she had no just and reasonable cause to withdraw from the society of her husband. She was not allowed to claim maintenance.[97.] Living separately has been held as not necessarily amounting to refusal to live. The Court distinguished failure to live with the husband and refusal to live. Mere failure does not destroy the right.[98.]

[s 125.21] Unable to maintain herself, income of wife.—

The expression "unable to maintain herself" has been held by the Supreme Court to mean that it covers the means available to the wife while she was living with her husband and not after her desertion by the husband. It is for the husband to show that he did not have sufficient means to discharge his obligation or that he did not neglect or refuse to maintain her. An assertion by the wife that she was unable to maintain herself would be enough. It would then be for the husband to show that this was not so.[99.]

[s 125.22] "Child".—

In *Nanak Chand v Chandra Kishore,* the Supreme Court said as to the word "child":

> If the concept of majority is imported into the section (old s. 488) a major child who is an imbecile or otherwise handicapped will fall outside the purview of this section. The emphasis is always on inability to maintain himself.[100.] The new provisions in the present Code make specific mention of major children (except married daughters) where they are unable to maintain themselves.

[s 125.23] Presumption in favour of child Section 112, Evidence Act.—

The father of the child failed to prove that he had no access to the mother of the child at about the time when he was begotten. Further, there is a presumption of legitimacy of the child under section 112 of the Evidence Act. The maintenance to the child was held to be properly awarded.[101.]

[s 125.24] Unmarried daughter.—

An unmarried daughter can claim maintenance from her parents irrespective of religion to which she belongs even after attaining majority.[102.]

[s 125.25] Illegitimate child.—

An illegitimate child has no other right than the right to claim maintenance under section 125.

Duty lies on a person having sufficient means to maintain his legitimate or illegitimate minor child whether married or not. Legitimacy of the child is an immaterial factor. It is not necessary to elicit a finding on that point. Direction for conducting DNA test for determinate paternity cannot be issued.[103.]

Where a wife made claim for maintenance for herself and the daughter, the appellant-husband denied paternity of the daughter. Though the husband had pleaded non-access to wife, he was not able to prove it. However, the DNA test showed that the appellant was not the biological father of the child. It was held that the husband's plea of non-access to wife stood proved. Therefore, the appellant cannot be compelled to bear the fatherhood of the daughter, who is scientifically not his daughter, and he cannot be asked to maintain her.[104.]

[s 125.26] "Unable to maintain itself".—

The phrase means "unable to earn a livelihood for itself," that is to say, a complete livelihood, such as an adult person might earn, without depending on any other person. In different communities and different circumstances, the words "unable to maintain itself" may mean different things. Among the labouring classes, it may even be possible to hold that a healthy boy aged 16 is not unable to maintain himself.[105.] Unable to maintain does not mean that the person must be destitute.[106.]

The maintenance allowed to a girl cannot be cancelled on her marriage without proof that she has thereby become able to maintain herself and ceased to depend upon the maintenance ordered.[107.] It may be noted that the Hindu Adoptions and Maintenance Act, 1956, also makes provisions for maintenance of a wife for her lifetime. But the provision made here is to meet hard cases where the husband may not be able to maintain her. The provisions of this section apply irrespective of the personal law. However, the maintenance in case of married daughter ceases on her attaining majority.

Even in cases where the child (except a married daughter) has attained majority, if he or she is unable to maintain himself or herself, owing either to a physical or a mental defect, the Court can make an order for maintenance. The Karnataka High Court has held that major children, not suffering from any mental or physical abnormality or injury so as to be unable to maintain themselves, are not entitled to claim maintenance.[108.]

The claims were by daughters who had attained majority. Their inability to maintain themselves was not attributable to any mental or physical abnormality or injury. The Court said that they became disentitled to claim maintenance from their father under section 125 after attaining majority. The Court advised them to approach the Civil Court under personal law.[109.] A major daughter could not recover any maintenance from her mother. Her petition did not even show that she was not able to earn anything because of any physical condition.[110.]

[s 125.27] Christian law.—

Daughters sought maintenance from father. The Court said that a Christian father would have the obligation to maintain his daughters who have not become capable of looking after themselves not withstanding that they had attained the age of majority. There is no restriction on the power of the Civil Court. Maintenance at the rate of Rs 3,000 for all the three children, who were students, was not excessive. The Court said that a charge could be created on property for payment of maintenance, but the Court could not, in a proceeding like this, restrain the owner from alienating the property.[111.]

[s 125.28] "His father or mother".—

This provision for maintenance of father or mother who may not be able to maintain himself or herself is new. The Supreme Court has held that the word "his" in clause (d) includes both male and female children. Therefore, a married daughter is liable to maintain her parents.[112.] A question may arise as to whether "father or mother" will include adoptive father or mother or step-father and step-mother. Probably, the Legislature did not envisage such wider meaning in the Code.

The Karnataka High Court has held that a step-mother was entitled to maintenance when she proved that she was living alone and due to old age was unable to maintain herself.[113.] The Court noted the decision of the Madhya Pradesh High Court to the effect that a step-mother could not claim maintenance from her step-son[114.] and also a decision of the Patna High Court in which various cases were discussed to ultimately conclude that a step-mother was entitled to maintain a petition against her step-son.[115.] The Court also noted the decision of the Supreme Court to the effect that liberal construction must be given to the provision to achieve the intention of the legislature. The Supreme Court ruled that a childless step-mother could claim maintenance from her step-sons provided she was widow of her husband and was also incapable of supporting and maintaining herself.[116.]

[s 125.29] Paternity test.—

Where a person challenging the paternity of daughter born to his wife sought orders for blood test, the Supreme Court confirming rejection of the prayer by the Courts below laid down the following principles:

(1) Courts in India cannot order blood-test as a matter of course.

(2) Wherever applications are made for such prayers in order to have roving enquiry, the prayer for blood-test cannot be entertained.

(3) There must be a strong *prima-facie* case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Indian Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood-test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.[117.]

Where the person who denied paternity refused to undergo the DNA test, the Supreme Court held that such a person would become disentitled from disputing paternity.[118.]

The proceedings under the section being of civil nature, the Court has to decide the matter in dispute on a balance of probabilities. The Court rejected the contention as to paternity when the father did not even deny the school certificate and statements of witness. The balance of probabilities was against him.[119.]

[s 125.30] Other persons protected by this section.—

Parents may make an application for maintenance against any one of the sons. It is not necessary that all the sons should be made party to such application.[120.] Maintenance can be claimed by the mother from her son irrespective of the fact that her husband was alive.[121.]

[s 125.31] "Or such child".—

Power is given to make an order for maintenance of the wife "or such child". Therefore, an application can be made for the maintenance of the wife or for the maintenance of the child. There is nothing in the section which says that if such an application is made on behalf of the wife, an application shall not lie on behalf of the child.[122.]

The word "child" is used with reference to the father and has no qualification of age—the only qualification being that the child must be unable to maintain itself. The word is not confined to a child who is under the age of majority.[123.] Sub-section (1)(c) makes it clear that the inability in the case of major children (except married daughters) should arise on account of physical or mental injury or abnormality.

In dealing with an application under this section, submitted by more persons than one, the Magistrate should, if he is satisfied that they are entitled to maintenance, make an order directing payment of maintenance at specified rates in favour of each of the persons whom the respondent is bound to maintain. An order which directs a consolidated payment to be made for the benefit of several persons entitled to maintenance is an irregular order.[124.] A joint award of maintenance to wife and child is not within the contemplation of sub-section (1).[125.]

A compromise arrived between the parties for providing a reasonable lump sum for maintenance of the child was upheld by the Supreme Court.[126.]

[s 125.32] "Monthly rate"—Quantum of maintenance.—

The rate awarded should be determinate and fixed. It is not permissible to make an order for maintenance at a progressively increasing rate. The rate may, if necessary, be altered from time to time under section 127.[127.]

[s 125.33] "In the whole".—

By the Amendment of the year 2001, the words "not exceeding Rs 500" from sub-section (1)(d) were deleted. Hence, no upper limit is now applicable.

In a Special Leave Petition, the Supreme Court held that in view of the amendment of section 125 by the Parliament deleting the ceiling of maintenance allowance, the State Amendments are no longer valid, being inconsistent with the Amendment to section 125 by Parliament in 2001.[128.] When the above SLP (Special Leave Petition) was taken up as Criminal Appeal, it was further ordered that all the State Amendments to section125 by which a ceiling has been fixed to the amount of maintenance have become invalid and therefore where the Magistrate granted maintenance at Rs 4,000 per month, the same was proper.[129.]

In the determination of quantum of maintenance, it has to be limited to one-fifth of the husband's income.[130.]

[s 125.34] Enhancement of amount.—

The remedy in moving an application under section 125(3) of CrPC for enhancement of the maintenance amount which the wife is already getting does not prevent her from filing an application under section 24 of the Hindu Marriage Act, 1955. The two

provisions are separate and independent, and their scope is different, and the relief given under one provision cannot deprive a person from getting the same or similar relief under the other provision if he is otherwise entitled to it. Whereas under section 125 CrPC, wife and child are entitled to maintenance only, but under section 24 of the Act of 1955 counsel's fees and litigation expenses can also be obtained.[131.]

Grant of maintenance *pendente lite under section* 24 of the Hindu Marriage Act, 1955, is not improper even if there is an order of maintenance in favour of the wife under section 125 CrPC. However, if the wife is given maintenance *pendente* lite, order under section 125 of the Code may be kept in abeyance to survive it on ceasing of operation of the former order.[132.]

[s 125.35] Amount awarded adjustable against award in matrimonial proceedings.—

The amount awarded under this section is adjustable against the amount awarded in matrimonial proceedings under section 24 of the Hindu Marriage Act, 1955, as alimony to wife.[133.]

[s 125.36] Date from which the order is to be effective [*Sub-section (2)*].—

Sub-section (2) clearly mentions that the maintenance shall be payable from the date of the order, or if so ordered, from the date of the application of maintenance. Thus, if the date is not mentioned in the order, impliedly it is from the date of the order.[134.]

Section 125(2) expressly enables the Court to grant maintenance from the date of order or from the date of application. However, section 125 of the Code must be construed with sub-section (6) of section 354 of the CrPC. In other words, sections 125 and 354(6) must be read together. Therefore, section 125 impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. Thus, in a case where the wife had worked before marriage but had not done so during marriage, there was no evidence of her income during marriage. Hence, the Supreme Court set aside the order of High Court and directed payment of maintenance from the date of application.[135.]

[s 125.37] Warrant for levying the amount [*Sub-section (3)*].—

It is necessary, before the order can be enforced by a sentence of imprisonment, that it should be made out that the non-payment of maintenance was the result of wilful negligence on the part of the defendant. A sentence of imprisonment can, therefore, be passed only after there has been wilful neglect to comply with the order, followed by an unsuccessful process of distraint. The imprisonment that is ordered is not a punishment for contempt of the Court's order, but it is for the unpaid portion of the maintenance.[136.]

It was held by the Supreme Court that the financial liability cast by the order of maintenance can be enforced by arrest and detention. The purpose of sending a person to jail must be understood as being a manner, procedure or device for the satisfaction of the liability. Arrest and detention are only to coerce compliance. The

liability to pay would be discharged only by actual payment of the amount due. Remaining in jail would not discharge the liability to pay.[137.]

In a case of enforcement of maintenance order, the husband against whom the order was to be executed was living outside India. It was held by the Supreme Court that elaborate provision has been made in section 105 for service of summons to party living outside India. When the enforcement and execution of an order passed under a statute is contemplated by the statute itself, normally, an aggrieved litigant has to take recourse to the remedy provided under the statute. Thus, in view of the availability of such remedy, invocation of writ jurisdiction was held to be not proper.[138.]

Where there was failure to comply with the order of maintenance, it was held that the Magistrate was empowered to sentence the defaulting person for a term up to one month for each month of default.[139.]

Explanation.—The *Explanation* to the second proviso to sub-section (3) has this effect that if the husband is living with another woman, the wife would become entitled to live separately and claim maintenance even if she has failed to prove her allegation of the second marriage of her husband.[140.]

[s 125.38] "Sufficient cause".—

An order of adjudication of the husband as an insolvent does not, in itself, amount to rebuttal of an allegation that the insolvent has failed "without sufficient cause" to comply with the order,[141.] nor does an order of protection given by the Insolvency Court bar the Magistrate from proceeding with a petition under sub-section (3).[142.] The husband must prove that his insolvency afforded him sufficient cause within the meaning of sub-section (3) not to comply with the order.[143.] An agreement between the husband and the wife enforceable in a Civil Court, by which the husband agrees to pay the wife a specific sum of money per month, does not oust the jurisdiction of the criminal court under this section, if the husband fails to act up to the agreement. Anything short of a decree entitling the wife to maintenance is not sufficient to oust such jurisdiction.[144.]

An application under clause (3) is an information to the Court of the breach of maintenance order. After the maintenance order is passed, it becomes the duty of the Court itself to see that payments are duly made. The only legal obligation placed on the wife or the minor or parents in whose favour the order is made, is to present an application within one year from the date on which the amount becomes due. When that is done, it is for the Court to get its own order enforced and see that it is complied with. The proceedings from that stage cannot be treated as a case between the two original parties. Non-appearance of a party or its non-prosecution does not necessarily entail the dropping of the proceeding. The Court is bound to enquire into the reasons for non-compliance of the order and to issue a warrant for levying the amount due.[145.]

[s 125.39] "Imprisonment for a term which may extend to one month".—

According to the Madras and the Calcutta High Courts, the imprisonment in default of payment of maintenance awarded is not limited to one month. The maximum that can be imposed is one month for each month's arrears; and, if there is a balance representing the arrears of a portion of a month, a further term of a month's imprisonment may be imposed for such arrears.[146.] The Allahabad High Court has

adopted this view.[147.] There is an old decision of the Bombay High Court holding that the maximum sentence of one month's imprisonment can be only passed for non-payment of all accumulated arrears.[148.] The Bombay decision cannot be regarded as sound law. The maximum period of imprisonment which can be awarded to the defaulter husband is 12 months. The order sentencing him for 24 months was illegal.[149.] The Supreme Court has stated the law to be something like this:

The language of section 125(3) is quite clear, and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if made sooner. This power of the Magistrate cannot be enlarged: The only remedy would be after expiry of one month, for breach or non-compliance with the order of the Magistrate, the wife can approach the Magistrate again for similar relief. By no stretch of imagination can the Magistrate be permitted to impose sentence for more than one month.[150.]

The Supreme Court in *Poongodi v Thangavel*[151.] ruled that proviso to section 125(3) is a mode of enforcement rather than mode of liability. What it requires to establish is that it is a levy of fine and the detention of the defaulter in custody would not be available to a claimant who had slept over her claim and did not approach the court within a year commencing from the date on which the entitlement to receive maintenance has accrued. In such a situation, the ordinary mode of recovery in civil law would also be liable.

It has been held that salary could be attached.[152.] But salary cannot be attached for the recovery of future maintenance.[153.] Such warrant of attachment of future salary of the husband remains dormant till the end of the month.[154.] While maintenance proceedings were going on, the husband made a gift of his only property situated in the jurisdiction of the Court in order to defeat maintenance, the gifted property was held to be liable to be charged for maintenance to the wife.[155.]

Imprisonment is not an absolution from liability. The liability to pay remains.[156.] Imprisonment cannot be ordered for arrears which have become time-barred.[157.]

[s 125.40] Set-off.—

The High Court of Rajasthan awarded interim alimony to the wife under section 24 of the Hindu Marriage Act in a divorce petition by the husband. The wife claimed maintenance under this section in a Magistrate's Court in Gujarat, which was also granted. The husband claimed set-off for the amount so paid against alimony in the divorce case. It was held that nature of both the proceedings is different and wife can pursue both the remedies simultaneously. Amount of maintenance under this section cannot be set-off against the alimony awarded in a different proceeding. Orders of maintenance under this section can only be modified, altered or set aside under section 125(4)(5) and/or under section 127 of the Code.[158.]

[s 125.41] Limitation, "One year from the date on which it became due" [*Proviso 1*].—;

The proviso is intended to prevent a person entitled to maintenance from being negligent and allowing arrears to pile up until their recovery would become a hardship or an impossibility. The proviso in clear and categorical terms puts an embargo on the powers of the Magistrate to issue any warrant for recovering the amount due unless

the application is made to the Court within a period of one year from the date on which it became due.[159.] Where against an order of maintenance revision was pending before the Sessions Judge, but the Sessions Judge had not stayed the operation of the order, it could not be said that the amount did not become due during the period the matter was pending before the Sessions Judge.[160.] Maintenance becomes due on the date of passing of the order, though it is granted from the date of the application. Therefore, the limitation of one year for recovering the arrears starts from the date of the order.[161.] Where the execution application for maintenance was filed after about three and half years after the passing of the maintenance order, the arrear amount for the entire back period was not recoverable. Application for recovery has to be made within one year from the date of the order or from the date when it becomes due.[162.]

The application for issuance of warrant was filed within the stipulated period of one year. A subsequent application was filed in the same proceedings claiming arrears for the still subsequent period. That was held to be not a fresh application. It was not barred by limitation.[163.]

[s 125.42] "Offers to maintain his wife" [*Proviso 2, Explanation*].—

It is open to the husband to offer to maintain his wife; he cannot be compelled to maintain her "as his wife." If the Legislature had meant that the offer was to be one to live with the woman as his wife, it would have used those words.[164.] The Supreme Court has held that the first wife was entitled to live separately and claim maintenance even though the husband's second marriage was valid because his personal law permits him to do so. The Court further held that whether he had remarried or had kept a mistress, the first wife was entitled to maintenance. His offer to take the first wife back could not be considered *bona fide*.[165.]

Even written consent of the first wife for the second marriage of the husband would not disentitle her from claiming maintenance.[166.]

The Supreme Court reversing the decision of the Allahabad High Court has held that an unreasonable threat constituted sufficient reason for the wife to refuse to live with him and maintenance was granted to her.[167.] Impotency of the husband was held to be a just ground as contemplated by the second proviso to section 125 for the wife's refusal to live with her husband and therefore for her to claim the maintenance.[168.]

According to a decision of the Supreme Court, the fact that the first wife (legally wedded) left the house 4 to 5 years ago and did not come back, it was no ground to justify a second marriage by the husband. It would not disentitle the legally wedded wife to claim maintenance. She had categorically stated that she and her children were thrown out when the husband brought in the second wife. A casual remark by her in cross-examination that she had left the husband and that is why he brought in a second wife was considered to be of no significance. The fact that she did not call *Panchayat* was also regarded as immaterial.[169.]

Even where the wife is living in the same house with the husband, she may be subjected to neglect by the husband and would be entitled to maintenance.[170.]

[s 125.43] Disentitlement of wife [*Sub-section (4)*].—

The sub-section governs the whole section including sub-section (1). A wife who refuses to live with her husband on account of his remarriage is, therefore, not prevented by sub-section (4) from claiming maintenance allowance under sub-section (1).[171.] Husband and wife executed divorce agreement on grounds of incompatibility of marriage and remote chances of living together. The wife was living separately in pursuance of the agreement. It was held that it was not an agreement for living separately by mutual consent. Wife was entitled for maintenance.[172.] Even a wife, who has been divorced on the ground of her desertion, is entitled to claim maintenance.[173.]

[s 125.44] Cancellation of maintenance.—

A decree of restitution of conjugal rights was passed by a Civil Court. The Court found that there was no sufficient reason for the wife to live separately. The Court said that determination by a Civil Court must prevail. The existing order of maintenance became liable to be cancelled.[174.]

[s 125.45] J&K Criminal Procedure Code, Section 488.—

From the very beginning of the maintenance petition, the husband had been offering the wife that she could live with him. At one time, she said that she had been driven out by him and her in-laws. At another time, she said that the atmosphere there was bad because of drinking habits. The Court said that such contradictory statements showed that she had no good reason for her refusal.[175.]

[s 125.46] Divorced wife.—

A divorced woman would be entitled to claim maintenance from her former husband if she could not provide for herself and remained unmarried. Such husband remains under a statutory duty and obligation to provide maintenance to his former wife. The fact that the divorce was based on desertion was no ground to deny the maintenance. The Court rejected the plea that upon divorce, mutual rights, duties and obligation of parties came to an end, so wife would no longer be entitled to maintenance.[176.] A divorced wife is entitled to claim maintenance whatever may be the reasons for the divorce and whatever may be procedure adopted or forum chosen.[177.]

[s 125.47] Consent divorce.—

On dissolution of marriage by consent decree, no provision for maintenance was made in the decree. The husband only agreed to pay Rs 1,00,000 in two months failing which the petition for divorce was deemed to have been dismissed with costs. No payment was made. The wife was allowed to revive her application for maintenance.[178.]

[s 125.48] Annulled marriage and child born of such marriage.—

The woman claimant whose marriage was annulled by a Court decree was not entitled to any maintenance, but the child born of such marriage was allowed maintenance.[179.]

[s 125.49] "Living in adultery" [*Sub-section (4)*].—

The term "adultery" is used in the popular sense of the term, *viz*., breach of the matrimonial tie by either party.[180.] It does not mean a single act of adultery. It refers to a course of conduct and means something more than a single lapse from virtue.[181.] The High Court of Rajasthan held that continuous adulterous acts with a single person did not amount to living in adultery.[182.] The fact that the wife had once an illegitimate child is not enough to disqualify her if she led a chaste and respectable life for about two years before the application.[183.]

Where adultery was a ground for divorce, is the wife entitled to maintenance under section 125? Under the Hindu Marriage Act, adultery is a ground of divorce. Here even one single act of adultery is enough. But the words in clause (4) of section 125 are "living in adultery" and which means continuous act of adultery. Therefore, even if a husband has obtained divorce on the ground of adultery, he will be liable to pay maintenance to the wife unless he proves in the proceedings under section 125 that the wife was living in adultery.[184.]

Maintenance can be denied to the wife only for the period during which she was living in adultery. The expression "if she is living in adultery" as used in section 125(4), the Court said about this that it conveys the present continuous tense. The wife who ceased to live in adultery could not be deprived of maintenance in the present because she was doing so in the past.[185.]

[s 125.50] Counter petitions for divorce and maintenance.—

There was petition by the husband under the Divorce Act, 1869, and petition by the wife for maintenance. The husband was seeking divorce on the ground of adultery, cruelty and non-consummation of marriage. The Court said that the petition seeking maintenance has a necessary bearing on the divorce petition. The Court must hear them together in view of the serious allegations being made against each other and also in view of the amount awarded in the maintenance petition. The proceedings being of summary nature, a greater burden was cast on the Court to ensure that rights of the partners were not transferred or diluted by technicalities of law.[186.]

[s 125.51] "Mutual consent".—

Living separately, prior to divorce, under mutual consent is a disentitlement to maintenance.[187.] A contrary ruling has been delivered by the Allahabad High Court. The Court said that a provision in the compromise agreement under which the wife was not to claim any maintenance was immaterial since any such agreement is not enforceable because it is opposed to public policy.[188.]

[s 125.52] Benefit of personal law.—

In order to avoid multiplicity of proceedings, the benefit of personal law for award of or continuance of maintenance should be given to the claimant where there is ineligibility under section 125.[189.] An order of maintenance under section 125 does not foreclose remedy under section 18(2) of the Hindu Adoption and Maintenance Act. These Acts

are co-existent, mutually complimentary, supplementary and in aid and addition of each other.[190.]

[s 125.53] Maintenance of girl child after majority till marriage.—

Though section 125 does not fix liability of parents to maintain children beyond attainment of majority, the right of a minor girl for maintenance from parents after attaining majority till her marriage is recognised under section 20(3) of Hindu Adoption and Maintenance Act, 1956. On a combined reading of the two provisions, it was held that the High Court was justified in upholding the order of the Family Court, by which it granted maintenance under section 125 to the daughter even after her attaining majority but till her marriage, taking the view that it would avoid multiplicity of proceedings. Otherwise, the party would have been forced to file another petition under section 20(3) for further maintenance.[191.]

[s 125.54] Maintenance under protection of women from Domestic Violence Act, 2005.—

Monetary relief by way of maintenance is provided under section 20 of the Domestic Violence Act, 2005 to the victim of domestic violence. The Court is competent to award maintenance to the aggrieved person and child of such person. The aggrieved person is not required to establish case under section 125 CrPC.[192.]

[s 125.55] Husband old and infirm.—

The husband was an old man in the evening of his life and incapable of maintaining himself. Their children were well placed and settled. His wife's application for maintenance was found to be malicious and dismissed.[193.]

[s 125.56] Maintenance from date of application.—

Ordinarily, maintenance is granted from the date of application. It is only in special circumstances and for sufficient reasons that the grant may be made with effect from a subsequent date.[194.]

[s 125.57] Alimony *pendente lite*.—

Alimony *pendente lite* can be claimed by wife by resorting to both provisions, i.e., under section 125 and also under section 24 of the Hindu Marriage Act, 1955. The question of adjustment has to be decided by the Court considering the totality of the circumstances, amount granted, and the capacity of the person directed to make payment.[195.]

[s 125.58] Remedy under Hindu Marriage Act.—

The rejection of an application under section 125 CrPC has been held to have no bearing on the application under section 24 of the Hindu Marriage Act, 1955. The proceedings under the two Acts are of different nature. It was held that the grant of Rs 1,500 p.m. because the wife had not sufficient means to support herself and her two minor children was not improper.[196.]

The observation of the Supreme Court is to the effect that for the purposes of a petition for maintenance under section 125, the Family Court has exclusive jurisdiction.[197.]

[s 125.59] Appeal against order of maintenance by Family Court.—

Appeal under section 19(1) of the Family Courts Act, 1984, cannot lie against an order of maintenance passed by a Family Court under section125 CrPC. Section 125 comes under Chapter IX of the CrPC, and there is a bar on filing appeal against an order passed under Chapter IX of the Code.[198.]

[s 125.60] Revision.—

Proceedings under the section are of civil nature. Strict proof is not requisite in maintenance cases. The order in question was passed by the Magistrate by properly appreciating evidence on record. The Revisional Court did not properly consider the contentions of wife, reached an erroneous conclusion by cryptic findings and observations which were not maintainable in law. The order was set aside. The wife was held entitled to maintenance.[199.] An order was passed by the Family Court in an application under section 125 CrPC. It was held that a revision against such order should be registered as a Criminal Revision.[200.]

[s 125.61] Mother-in-law claiming maintenance from earning daughter-in-law. —

The mother-in-law, a widow of 65 years, not able to earn for herself, claimed maintenance from the daughter-in-law who was appointed at Rs 10,000 at compassionate ground on the death of her husband, who was the only son of the claimant. The daughter-in-law had given an undertaking as a part of the compassionate appointment that she would support her mother-in-law. For these reasons, she was held liable to do so.[201.]

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1. The words "not exceeding five hundred rupees in the whole" omitted by Act 50 of 2001, section 2(i)(a) (w.e.f. 24-9-2001).
2. Ins. by Act 50 of 2001, section 2(i)(b) (w.e.f. 24-9-2001).
3. Subs. by Act 50 of 2001, section 2(ii), for sub-section (2) (w.e.f. 24-9-2001).

4. Subs. by Act 50 of 2001, section 2(iii), for "allowance" (w.e.f. 24-9-2001).

5. Subs. by Act 50 of 2001, section 2(iii), for "allowance" (w.e.f. 24-9-2001).

6. The words "one thousand and five hundred rupees" omitted by WB Act, 33 of 2001.

7. *Manoj Yadav v Pushpa*, AIR 2011 SC 847 : 2011 Cr LJ 981 : (2010) 4 Crimes 345 : (2010) 15 SCC 287 , all State Amendments under which a ceiling has been imposed have been invalidated by the 2001 Amendment of CrPC.

8. *Ramesh Chandra Kaushal v Veena Kaushal*, AIR 1978 SC 1807 : (1978) 4 SCC 70 ; The Supreme Court observed in this case that the direction under section 24 of the Hindu Marriage Act is not a final determination but an order *pendente lite* and, therefore, it would not prevent the Magistrate to exercise his power under section 125. The Magistrate awarded higher maintenance. Another similar authority is *Chigurupati Bambasiva Rao v Chigurupati Vijayalakshmi*, (1997) 11 SCC 84 : (1998) 9 JT 482 , pending divorce proceedings, the husband was directed to pay maintenance *pendente lite* to his wife and minor daughters, divorce declined, but maintenance order continued. The claim to maintenance being valid, it was taken to have been passed under section 125; *Sriram Mamkyama v Sriram Appoji*, 1992 Cr LJ 1794 (Ori).

9. *Nanak Chand v Chandra Kishore*, AIR 1970 SC 446 : 1970 Cr LJ 522 : (1969) 3 SCC 802 ; *Maung Tin v Ma Hmin*, (1933) ILR 11 Ran 226 (FB) : AIR 1933 Rangoon 138 ; *R Begum v MN Motiallah*, 1989 Cr LJ NOC 155 (Ori).

10. *Yamunabai v Anantrao*, 1988 Cr LJ 793 : AIR 1988 SC 644 : (1988) 1 SCC 530 .

11. *Mohd Ahmed Khan v Shah Bano Begum*, 1985 Cr LJ 875 : AIR 1985 SC 945 : (1985) 2 SCC 556 ; *Bai Tahira v Ali Hussain Fissali* 1979 Cr LJ 151 : AIR 1979 SC 362 : (1979) 2 SCC 316 ; *Mohd Yameen v Shamin Bano*, 1984 Cr LJ 1297 (All).

12. *Anial Latifi v UOI*, (2001) 7 SCC 740 : AIR 2001 SC 3958 : 2001 (6) Scale 537 : JT 2001 (8) SC 218 : 2001 Cr LJ 4660 .

13. *Shamim Bano v Asraf Khan*, (2014) 12 SCC 636 : 2014 (5) Scale 299 : JT 2014 (6) SC 393 ; *Khatoon Nisa v State of UP* (2014) 12 SCC 646 .

14. *Nanak Chand v Chandra Kishore*, AIR 1970 SC 446 : 1970 Cr LJ 522 : (1969) 3 SCC 802 .

15. *Nagendrappa Natikar v Neelamma*, (2014) 14 SCC 452 .

16. *Nandlal Misra v KL Misra*, (1960) 3 SCR 431 : AIR 1960 SC 882 : 1960 Cr LJ 1246 .

17. *Ravindra Haribhau Karmarkar v Shaila Karmarkar*, 1992 Cr LJ 1845 (Bom).

18. *Vishwanath Pundlik Chavan v Sau Nirmala*, 1992 Cr LJ 1262 (Bom).

19. *Bhuwan Mohan Singh v Meena*, AIR 2014 SC 2875 : 2014 Cr LJ 3979 (SC) : (2015) 6 SCC 353 .

20. *Shamima Farooqui v Shahid Khan*, (2015) 5 SCC 705 : AIR 2015 SC 2025 : 2015 (4) Scale 521 : 2015 Cr LJ 2551 .

21. *Basant Lal v State of UP*, (1998) 8 SCC 589 : 1998 SCC (Cr) 1548, the matter was remitted to the High Court for fresh decision, the order on merits was also set aside, the husband was directed to pay Rs 500 per month and all arrears.

22. *Susilamma v Chandrappa*, 2002 Cr LJ 701 (Mad); *Dhyanoba v Mukta Dhyanoba Kamble*, 2002 Cr LJ 4459 (Bom), when validity of the marriage was in question, claimant wife succeeded in showing that she and the respondent husband lived together as wife and husband, Court could presume that they were legally wedded spouses.

23. *Krishan Pal Singh v Babli*, AIR 2009 NOC 2412 HP.

24. *Ranjeeta Deepak Balsekar v Deepak Baburao Balsekar*, AIR 2009 NOC 1319 Bom.

25. *Mohd Akhtar Siddiqui v State of UP*, AIR 2010 NOC 706 All : (2010) 3 All LJ 240.

26. *Savitri v Govind Singh*, 1986 Cr LJ 41 : AIR 1986 SC 984 : (1985) 4 SCC 337 .

27. *Gurupartap Singh v Satwant Kaur*, 1990 Cr LJ NOC 152 (P&H); *Ratna v Dwijendra*, 1990 Cr LJ NOC 31 (Gau); *Naresh Chandra v Reshma Bai,* 1992 Cr LJ 579 (MP); *Anil Kumar Jha v State of Bihar*, 1992 Cr LJ 2510 (Pat.)
28. *Mamta v Ashok M Vaidya*, 1992 Cr LJ 2605 (Bom).
29. *Kunji Lal v Susheela*, 1995 Cr LJ 1972 (Bom).
30. *Anil Kumar Jha v State of Bihar*, 1992 Cr LJ 2510 (Pat).
31. *Paritosh Das v Kalyani Das*, 1993 Cr LJ 2898 (Cal).
32. *Suresh v Lalita*, 2002 Cr LJ 380 (Raj).
33. *Shail Kumari Devi v Krishan Bhagwan Pathak*, AIR 2008 SC 3006 : (2008) 9 SCC 632 ; *NM Subramaniam v Nagamani*, AIR 2008 NOC 513 Mad, husband retired with Rs 2,300 pension, interim maintenance of Rs 500 allowed to wife.
34. *Pratibha Dinesh Kumar Vania v State of Gujarat*, AIR 2008 NOC 511 Guj. The Family Court went wrong in this respect.
35. *Haizaz Pashaw v Gulzar Banu*, 2002 Cr LJ 3282 (Ker).
36. *Renu v Hiralal*, 2002 Cr LJ 2599 .
37. *Bhuwan Mohan Singh v Meena*, AIR 2014 SC 2875 : 2014 Cr LJ 3979 (SC); *Shail Kumari Devi v Krishan Bhagwan Pathak*, AIR 2008 SC 3006 : (2008) 9 SCC 632 —Ref.
38. *Mathura v Mt Marachoo*, (1945) 24 Pat 692 : AIR 1946 Pat 391 .
39. *Rudramma v HR Pu Haveerabhadrappa*, 1987 Cr LJ 677 (Kar).
40. *Bhupinder Singh v Daljit Kaur*, AIR 1979 SC 442 : (1979) 1 SCC 352 .
41. *Kasinath Panda v Padmabati Debi*, (1956) Cut 509; *Genu Tatyaba v Taibai*, (1972) 75 Bom LR 283 .
42. *Sraban Kumar Pradhan v Menaka Kumari Rout*, 1993 Cr LJ 2428 (Ori); *Rajesh Kochar v Reeta Kumari*, 2002 Cr LJ 3357 (Pat), a petition for maintenance under section 125 is not barred by section 8 of the Family Courts Act.
43. *Namdeo Sheshrao Dinde v Sou Rekha Namdeo Dinde*, AIR 2008 NOC 2378 Bom.
44. *Queen-Empress v Ramasami*, (1889) 13 Mad 17.
45. *Hemibai v Kunbibai*, (1941) Kar 58 .
46. *Gnanambal Ammal*, (1929) ILR 52 Mad 77 : AIR 1928 Mad 1171 .
47. *Rajkumari v Yashodhas Devi*, 1978 Cr LJ 600 (Punj); *TPSH Selva Saroja v TPSH Sasinathana*, 1989 Cr LJ 2032 (Mad).
48. *Vijaya v Kashirao*, 1987 Cr LJ 977 : AIR 1987 SC 1100 .
49. *Gnansoundari v KS Subramaniam*, AIR 2009, NOC 1838 Mad.
50. *Dasarathi Ghosh v Anuradha Ghosh*, 1988 Cr LJ 64 (Cal).
51. *B Veragam v Manoranjan*, (1963) Cut 416; *Kandaswami Moopan v Angammal*, AIR 1960 Mad 348 : 1960 Cr LJ 1098 ; *Chander Prakash v Shila Rani*, AIR 1968 Delhi 174 : 1968 Cr LJ 1153 .
52. *Raibari Behera v Mangaraj Behera*, 1983 Cr LJ 125 (Ori).
53. *Tarak Shaw v Minto Shaw*, 1984 Cr LJ 206 (Cal).
54. *Rameshwar v Ramibai*, 1987 Cr LJ 1952 (MP).
55. *Bhikaiji v Maneckji*, (1907) 9 Bom LR 359 : AIR 1925 Bom 259 ; *Mithleshkumari v Bindhawasni*, 1990 Cr LJ 830 (All).
56. *Arunchala v Anandayammal*, (1933) 56 Mad 913.
57. *Ramanlal v Shantaben*, AIR 1968 Guj 171 : 1968 Cr LJ 1073 .
58. *Manglabai Chotulal Gaikwad v Chotulal Kashiram Gaikwad*, AIR 2009 NOC 2407 Bom : (2009) 4 AIR Bom R 268.
59. *Ranjit Kaur v Pavittar Singh*, 1992 Cr LJ 262 (P&H).
60. *Pyare Lal v Basanti Devi*, AIR 2009 NOC 1325 HP.

61. *Ram Lotan v Vidya Debi*, 1973 Cr LJ 318 ; *Chimata N v Chimata N*, 1991 Cr LJ 291 (AP).
62. *Hanamant Basappa Choudhari v Laxmawwa*, 2002 Cr LJ 4397 (Kant).
63. *Rajesh Kochar v Reeta Kumari*, 2002 Cr LJ 3357 (Pat); *Vinita Devangan v Rakesh Kumar Devangan*, AIR 2010 NOC 117 Chh, agreement for divorce by mutual consent with relinquishment of right to maintenance, being opposed to public policy, the husband could not use it as a shield to his liability for maintenance.
64. *Savithramma (Smt) v Ramanarasimhaiah*, (1963) 1 Cr LJ 131 ; *Bansidhar v Chhabi*, AIR 1967 Pat 277 : 1967 Cr LJ 1176 ; *KK Nath v K Bala Nath*, 1989 Cr LJ NOC 194 (Gau).
65. *Yamunabai v Anantrao*, 1988 Cr LJ 793 : AIR 1988 SC 644 : (1988) 1 SCC 530 ; *Bakulabai v Gangaram*, (1988) 1 SCC 537 : 1988 (1) Scale 188 .
66. *Ishwar Singh v Smt Hukam Kaur*, AIR 1965 All 464 : 1965 Cr LJ 449 ; *Naurang Singh v Sapla Devi*, AIR 1968 All 412 : 1968 Cr LJ 1636 .
67. *Shibsankar Samanta v Sobhana Samanta*, 1993 Cr LJ 2196 (Cal).
68. *Yamunabai v Anantrao*, 1988 Cr LJ 793 : AIR 1988 SC 644 : (1988) 1 SCC 530 ; *Bakulabai v Gangaram*, (1988) 1 SCC 557 ; *Sayanna v Laxmibai*, 1992 Cr LJ 1070 (AP).
69. *TC Chacko v Annamma*, AIR 1994 Ker 107 .
70. *Kongini Balan v M Visalakshy*, 1986 Cr LJ 697 (Ker); *Sadasivan Pillai v Vijayalakshmi*, 1987 Cr LJ 765 (Ker).
71. *KM Nagapmallappa v BJ Lalitha*, 1985 Cr LJ 1706 (Ker).
72. *Velukutty v Prasannakumari*, 1985 Cr LJ 1558 (Ker); *Haroon v Sainabha Beeve Zeenath*, 1992 Cr LJ 3275 (Ker).
73. *Molya Bai v Vishram Singh*, 1992 Cr LJ 69 (MP).
74. *K Sivarama v K Bharathi*, 1986 Cr LJ 317 (AP).
75. *Arana Kar v Dr Sarat Kumar Dash*, 1995 Cr LJ 3526 (Ori).
76. *Ashok Kumar Singh v VI Additional Sessions Judge*, *Varanasi*, 1996 Cr LJ 392 : AIR 1996 SC 333 : (1996) 1 SCC 554 .
77. *Roop Narayan Verma v UOI*, AIR 2007 Chh 64 DB.
78. *Khemchand Om Prakash Sharma v State of Gujarat*, (2000) 3 SCC 753 : 2000 SCC (Cr) 748; *Nagireddi Sai Kumari v Nagireddi Vara Nageshwara Rao*, AIR 2008 NOC 2089 AP, second marriage, during subsistence of the first, being void, no maintenance for wife.
79. *Nageshwar Rai v Sunaina Devi*, AIR 2009 NOC 817 (Pat).
80. *Pyla Mutyalamma v Pyla Suri Demuda*, 2012 Cr LJ 660 (SC) : 2011 (9) Scale 403 : (2011) 12 SCC 189 .
81. *Ibid*
82. *Savitaben Somabhai Bhatiya v State of Gujarat*, AIR 2005 SC 1809 : (2005) 3 SCC 636 : 2005 Cr LJ 2141 : (2005) 2 Crimes 1 .
83. *Chand Patel v Bismillah Begun*, AIR 2008 SC 1915 : (2008) 4 SCC 774 : (2008) 2 Crimes 108 .
84. *Shamim Ara v State of UP*, (2002) 7 SCC 518 : 2002 Cr LJ 4726 ; *Md Mahfooz Ali v State of Jharkhand*, 2003 Cr LJ NOC 199 (Jhar) : (2002) 3 East CriC 655, the husband who was already under maintenance order could not prove the fact of divorce, order not quashed; *Syed Younus v Jabeen*, AIR 2009 NOC 208 (Bom) : (2008) 5 AIR Bom LR 700, the husband not able to prove divorce could not deny maintenance; *Mohd Haji Miya v Abeda Banu*, AIR 2008 NOC 2852 (AP), triple divorce not proved to have been made in accordance with the prescribed procedure, rights under section 125 continued.
85. *Shaukat Ibrahim Qureshi v Fridabanu Hasambhai Qureshi*, AIR 2010 NOC 713 (Guj).
86. *Shabana Bano v Imran Khan*, AIR 2010 SC 305 : (2010) 1 SCC 666 : 2010 Cr LJ 521 ; *Shabana Bano v Imran Khan*, AIR 2009, NOC 1018 (MP).

87. *Kunhimohammad v Ayishakutty*, AIR 2010 NOC 992 Ker; *SK Abdul Khader v Lubaina Farzana*, AIR 2009 NOC 219 Mad, position under the Muslim Women (Protection of Rights on Divorce) Act, 1986.

88. *Md Zakir Hussain v State of Bihar*, AIR 2009 NOC (Pat.); *CK Aboobacker v Rabiyanath*, AIR 2008 NOC 2860 (Ker), rights under the Act are larger than these under section 125, it is not necessary that she should be unable to maintain herself. section 125 rights become extinguished on payment under section 3 of the Act.

89. *Md Rizban Alam v State of Bihar*, AIR 2008 NOC 1581 (Pat).

90. *Iqbal Bano v State of UP*, AIR 2007 SC 2215 : (2007) 6 SCC 785 : (2007) 3 Crimes 31 .

91. *Mitanjali Mohanty v Fanendra Mohanty*, 1992 Cr LJ 4046 (Ori); *Sayyed Jabbar Ali v Saheba Fatima*, 2002 Cr LJ 1332 (Bom), the husband in the course of deposition had stated that he was ready and willing to take the applicant with him, but the wife was not willing to go. In the facts situation of the case, the grant of maintenance was held to be not justified. She was not able to prove any harassment, *etc.*; *Samita Saha v Mohan Saha*, AIR 2010 NOC 711 (Cal), wife pressurised the husband for living with her in her home. He refused, she refused conjugal life. Not entitled to maintenance.

92. *Hardev Singh v State of UP*, 1995 Cr LJ 1652 (All).

93. *Nasreen Jahan Begum v S Mohd*, *Alamder Ali Abedi*, 1996 Cr LJ 564 (AP); *Molasseriyil Usha v Molasseriyal Kunhimon*, 2003 Cr LJ 291 (Ker), due to cruel treatment of the husband, the petitioner wife became a mental wreck and she had to be hospitalised, notwithstanding refusal of the wife to cohabit with the husband any further, she was entitled to get maintenance from him, especially when she was a person of no means.

94. *Laxman Gaju v Sitabai Laxman*, (1957) 59 Bom LR 567 : AIR 1958 Bom 14 .

95. *Khangembam Daoji Singh v Yumnam Ningol Mema*, 1995 Cr LJ 2327 (Gau).

96. *Ranjeeta Deepak Balsekar v Deepak Baburao Balsekar*, AIR 2009 NOC 1319 (Bom).

97. *Balak Ram v Kirna Devi*, AIR 2009 NOC 2132 HP.

98. *Kavungal Zeenath v Mundakkattu Sulfiker*, AIR 2008 NOC 2859 (Ker).

99. *Rajathi v C Ganesan*, AIR 1999 SC 2374 : 1999 Cr LJ 3668 , her husband had started living with another woman. It justified her refusal to live with him.

100. *Nanak Chand v Chandra Kishore*, AIR 1970 SC 446 : 1970 Cr LJ 522 : (1969) 3 SCC 802 .

101. *Prasanta Banerjee v Tandra Banerjee*, AIR 2009 NOC 810 (Cal).

102. *Thadisina Chinna Babu Rao v Rum Thadisina Sarala*, AIR 2010 NOC 330 (AP), Hindu Adoption and Maintenance Act, 1956, section 20(3).

103. *Alok Banerjee v Atoshi Banerjee*, AIR 2008 NOC 1574 (All).

104. *Nandlal Wasudeo Badwaik v Liata Nandlal Badwaik*, AIR 2014 SC 932 : (2014) 2 SCC 576 : 2014 Cr LJ 1098 (SC).

105. *Abdul v Azra*, AIR 1968 All 125 .

106. *Abdul Salim v Najima Begum*, 1980 Cr LJ 232 (All); *Vishwanadhulu Lingaiah v Vishwanadhulu Kavitha*, 2003 Cr LJ 961 (AP), Court can direct the father to pay maintenance to his minor unmarried daughter from the date of petition till she gets married and reasons therefor need not be recorded by it.

107. *Meenatchi Ammal v Karuppana Pillai*, (1924) 48 Mad 503; *Ranchhoddasa v Narotamdas*, (1948) 50 Bom LR 281 : (1948) Bom 380 : AIR 1949 Bom 36 .

108. *L Usha Rani v DS Lakshmaiah*, 1993 Cr LJ 982 (Knt).

109. *Amod Kumar Srivastva v State of UP*, AIR 2009 NOC 497 (All).

110. *Teejan Bai Chandrakar v Rajeshwari Chandrakar*, AIR 2009 NOC 812 (Chh).

111. *Devassia v Aney*, AIR 2007 DOC 196 (Ker).

112. *Vijaya Arbat v Kashirao*, 1987 Cr LJ 977 : AIR 1989 SC 1100 : (1987) 2 SCR 331 .

113. *Ullappa v Gangabai*, 2003 Cr LJ 2566 (Kant).

114. *Rewalal v Kamlabai*, 1986 Cr LJ 282 .

115. (1996) 4 Crimes 281 .

116. *Kertikant D Vadodaria v State of Gujarat*, (1996) 4 SCC 479 : (1996) 6 JT (SC) 244; *Makiur Rahaman Khan v Mahila Bibi*, 2002 Cr LJ 1751 (Cal), a Muslim woman can maintain proceeding under section 125 against her children despite pendency of proceedings under sections 3 and 4 of Muslim Women (Protection of Rights on Divorce) Act against her husband.

117. *Goutam Kundu v State of West Bengal*, AIR 1993 SC 2295 : 1993 Cr LJ 3233 .

118. *Dwarika Prasad Satpathy v Biduyt Prava Dixit*, (1999) 7 SCC 675 : AIR 1999 SC 3348 : 2000 Cr LJ 1 .

119. *Smita Halarnkar v Mahendra Halarnkar*, AIR 2009 NOC 206 (Bom).

120. *A Ahathinamiligai v Arumughnam,* 1988 Cr LJ 6 (Mad).

121. *Rafiuddin v Saleha Khatoon*, AIR 2008 NOC 776 (Bom).

122. *Bulteel v Bulteel*, (1938) Mad 729 : AIR 1938 Mad 721 ; *Rahamathulla v Piayre*, 1996 Cr LJ 4322 (Mad), Muslim child's right to maintenance.

123. *Ahmed Mahomed v Bai Fatma*, (1942) 44 Bom LR 919 : (1943) Bom 38 : AIR 1943 Bom 48 ; *Abdul v Azra*, AIR 1968 All 125 .

124. *Kalavantibai Tekchand Bhavnani*, (1953) 55 Bom LR 383 : AIR 1953 Bom 366 ; *Parameswaran Pillai v Rukmani Amma*, (1954) TC 150 .

125. *Thankappan Asari v Pankajakshi*, AIR 1960 Ker 66 ; *Yadav Nand v Asha Rani*, AIR 2009 NOC 500 (HP), claim by wife and child, legally wedded wife, there was no non-access, liable to pay maintenance to both wife and child.

126. *Boomi v Leela Rajan*, AIR 1977 SC 700 : 1977 Cr LJ 342 : (1977) 4 SCC 596 .

127. *Upendra Nath Dhal v Soudamini Dasi*, (1886) ILR 12 Cal 535; *Ramayee*, (1890) ILR 14 Mad 398.

128. *Manoj Yadav v Pushpa alias Kiran Yadav*, AIR 2011 SC 847 : (2010) 15 SCC 287 .

129. *Manoj Yadav v Pushpa*, AIR 2011 SC 847 : (2011) 14 SCC 398 .

130. *Paramveer Singh v Suresh Kanwar*, AIR 2008 NOC 514 (Raj).

131. *Sunita Tasera v Lalit Kumar Jagrawal*, AIR 2012 Raj 82 : 2012 (2) WLC 190 (Jaipur Bench).

132. *Kamlesh Kumari v Aman Kishore*, AIR 2012 HP 33 : 2012 (2) DMC 321 .

133. *Sandeep Chaudhary v Radha Chaudhary*, AIR 1999 SC 536 : 1999 Cr LJ 466 : (1997) 11 SCC 286 .

134. *Con Mani v Esther Pachikara*, 1981 Cr LJ NOC 76 (Ker); *Mohd Tahir v State*, 2002 Cr LJ 389 (Delhi), the discretion in this respect to be exercised judicially. Proceeding was delayed not because of wife, but otherwise, inflation was to be taken into account in awarding maintenance from the date of the proceeding.

135. *Jaiminiben Hirenbhai Vyas v Hirembhai Rameshchandra Vyas*, AIR 2015 SC 300 : (2015) 2 SCC 385 ; *Shail Kumari Devi v Krishan Bhagwan Pathak*, AIR 2008 SC 3006 : (2008) 9 SCC 632 : 2008 Cr LJ 3881 —**Rel.on**.

136. *Sidheswar Teor v Gyanada Dasi*, (1894) 22 Cal 291 , 294.

137. *Subrata Ray Sahara v UOI*, AIR 2014 SC 3241 : (2014) 8 SCC 470 : 2014 Cr LJ 3437 (SC).

138. *Bhaskar Lal Sherma v Monica*, 2014 Cr LJ 1848 (SC) : (2014) 3 SCC 383 [Three-Judge Bench].

139. *Suo Motu v State of Gujarat*, AIR 2009 NOC 499 (Guj—FB); *Sunil Kumar v Jalaja*, AIR 2007 DOC 211 (Ker—DB), Continuing breach, application for consolidated period of 84 months, not improper.

140. *Rajathi v C Ganesan*, AIR 1999 SC 2374 : 1999 Cr LJ 3668 .

141. *Radha Rani Dasi v Mati Lal Sen*, (1940) 2 Cal 525 .

142. *Mylswami v Muthammal*, AIR 1965 Mad 77 : 1965 Cr LJ 186 .

143. *Emperor v Amirkhan*, (1948) ILR Nag 387 : AIR 1948 Nag 416 .

144. *Netram v Rajjubai*, (1949) ILR Nag 435 : AIR 1949 Nag 337 .

145. *Hamir Singh v Gurdial Kaur*, (1955) Patiala 449; *Raja Roy v Dolly Roy*, AIR 2009 NOC 2639 (Ori), only one enforcement application has to be filed within one year from the date of order, five applications make no illegality but only redundancy.

146. *Allapichai Ravuthar v Mohidin Bibi*, (1896) ILR 20 Mad 3; *Bhiku Khan v Zahuran*, (1897) 25 Cal 291 .

147. *Beni*, (1938) All 715 FB, overruling *Narain*, (1887) 9 All 240 (FB).

148. *Pandu Mahadu*, (1895) Unrep CRC 801.

149. *Pokala Brahmaniah v Pokala Padma*, 1991 Cr LJ 607 (AP).

150. *Shahada Khatoon v Amjad Ali*, (1999) 5 SCC 672 : 1999 Cr LJ 5060 .

151. *Poongodi v Thangavel*, (2013) 10 SCC 618 : AIR 2014 SC 24 : 2013 (12) Scale 186 : 2013 Cr LJ 5006 .

152. *KV Rudraiah v RS Mudala Gangamma*, 1985 Cr LJ 707 (Knt).

153. *Govind Sahai v Prem Devi*, 1988 Cr LJ 638 (Raj); *Md Jahangir Khan v Mst Manola Bibi*, 1992 Cr LJ 83 (Cal).

154. *S Mrudangia v R Mrudangia*, 1990 Cr LJ 639 (Ori).

155. *Lakshmi v Valliyammal*, 1993 Cr LJ 1179 (Ker).

156. *Rayin Kutty v State of Kerala*, AIR 2008 NOC 1863 (Ker).

157. *Laxman Singh v State of Uttaranchal*, AIR 2008 NOC 1864 (Utr).

158. *Hansaben v Ramesh Kumar*, 1992 Cr LJ 3688 (Guj).

159. *Govind Sahai v Prem Devi*, 1988 Cr LJ 638 (Raj).

160. *Bimala Devi v Karna Mulia*, 1986 Cr LJ 521 (Ori), dissented from 1983 Cr LJ 1935 (Guj).

161. *Takkalapally Laxmamma v Takkalapally Rangaiah*, 1992 Cr LJ 266 (AP).

162. *Sk Abubakkar v Ohidunnessa Bibi*, 1992 Cr LJ 2826 (Cal); *T Rayappa v T Susheela*, 2003 Cr LJ NOC 179 (AP) : (2002) 2 Andh LT (Ori) 428 , a second application which was filed after about 2 1/2 years of the first application was held to be time barred because it could not be treated as a continuation of the first application; *Anil Solanki v Ila Solanki*, AIR 2010 NOC 548 (Raj), the stipulated period of one year commences from the date when the maintenance or interim maintenance becomes due and not from the date of order.

163. *Shantha v HG Shivananjappa*, AIR 2005 SC 2410 : (2005) 10 SCC 393 .

164. *Gulabdas Bhaidas*, (1891) 16 Bom 269, 275, dissenting from *Marakkal v Kandappa*, (1883) 6 Mad 371.

165. *Subanu v AM Abdul Gafoor*, 1987 Cr LJ 980 : AIR 1987 SC 1103 .

166. *Ansuya Bai v Nawaslal*, 1991 Cr LJ 2959 (MP).

167. *Smt Khatoon v Mohd Yamin*, AIR 1982 SC 853 : (1982) 2 SCC 373 .

168. *Siraj Mohmed Khan v Hafizunissa Yasinkhan*, 1981 Cr LJ 1430 : AIR 1981 SC 1972 .

169. *Saigo Bai v Chueeru Bajrangi*, AIR 2011 SC 1557 : (2010) 13 SCC 762 , The man was getting Rs 10,000 as a police constable and also had agricultural income. She was allowed Rs 1,500 p.m. from the date of application.

170. *Rajpal v State of UP*, AIR 2007 NOC 1269 (All) : (2007) 2 All LJ 512.

171. *Kandaswami v Nachammal*, AIR 1963 Mad 263 : 1963 Cr LJ 166 .

172. *M Ramakrishna Reddy v T Jayamma*, 1992 Cr LJ 1368 (AP).

173. *Sugandha Bai v Vasant Ganpat Deobhat*, 1992 Cr LJ 1838 (Bom).

174. *Satish v Yoglata*, AIR 2009 NOC 819 (Raj).

175. *Saleema v Farooq Ad Sheikh*, AIR 2008 NOC 1576 (J&K).

176. *Rohtash Singh v Ramendri*, (2000) 3 SCC 180 : AIR 2000 SC 952 : 2000 Cr LJ 1498 ; *Naimunbee v Sikandar Rehman*, 2003 Cr LJ 3257 (Bom), the husband could not prove divorce. Section 125 applicable but not the Muslim Women (Protection of Rights on Divorce) Act, 1986; *Arab Chani Begum v Md Azizur Rehman*, 2001 Cr LJ 21 (Gau), both parties agreed to be outside the above Act, cancellation of the order of maintenance because of divorce set aside.

177. *Gita v Chandrashekhar*, AIR 2009 NOC 2409 (Bom) : 2009 Cr LJ 3499 .

178. *Asha Gupta v Prem Prakash Gupta*, AIR 2008 NOC 1371 (P&H).

179. *Prem Chand Mahto v Laxmi Devi*, 2003 Cr LJ 3242 (Jhar).

180. *Gantapalli Appalamma v Gantapalli Yellayya*, (1897) ILR 20 Mad 470, 476 FB, **overruling** *Queen Empress v Mannatha Achari*, (1893) ILR 17 Mad 260.

181. *Shivram*, (1890) Unrep CRC 506; *Gantapalli Appalamma v Gantapalli Yellayya*, (1897) ILR 20 Mad 470 FB; *Fulchand Maganlal*, (1927) 30 Bom LR 79 : 52 Bom 160 : AIR 1928 Bom 59 ; *Patala Atchamma v Patala Mahalakshmi*, (1907) 30 Mad 332; *Tharickchalam Pillai v Dhakshayani*, 1966 Cr LJ 221 ; *Laxman Naik v Nalita*, 2002 Cr LJ 3418 (Ori), husband would not be absolved from his liability to pay maintenance by merely proving one or more instances of lapses in the character of his wife; *Sau Chanda P Wadate v Preetam G Wadate*, 2002 Cr LJ 1397 (Bom). "Living in adultery"—The husband has to establish a continuous course of adulterous conduct of the wife. Stray instances of departure from virtue would not be sufficient to deny maintenance to wife.

182. *Sarla v Mahendra Kumar*, 1989 Cr LJ 729 (Raj); *Subal Chandra Saha v Pritikana Saha*, 2003 Cr LJ 2200 (Gau), the wife was found living with another man in a rental house as a husband and wife till they were apprehended by the police from that house. The order granting maintenance to her was set aside.

183. *Kallu v Kaunsilia*, (1904) ILR 26 All 326; *Raj Devi v Ram Lakhan*, AIR 2008 NOC 1368 (All), allegation of adultery and illegitimate child, but did not ask for DNA, nor any other proof, on the contrary there was proof of torture and being driven away. Maintenance of Rs 500 allowed.

184. **See** *Nalini Kumar Pal v Khukurani Pal*, 1977 Cr LJ NOC 148 (Cal).

185. *Md Abdul Sattar v State of Assam*, AIR 2009 NOC 212 (Gau).

186. *Sunandh Selvaraj v Amitha Gilbert*, AIR 2010 NOC 714 (Kar) : (2010) 2 AIR Kar R 433.

187. *Santosh Prasad v State of Bihar*, AIR 2009 NOC 2642 (Pat).

188. *Mahesh Chandra Dwivedi v State of UP*, AIR 2009 NOC 205 (All) : (2003) 6 All LJ 7, there is a similar ruling of the HP High Court in *Suresh Kumar v Vidya*, AIR 2009 NOC 213 (HP).

189. *Jagdish Jugtawat v Manjit Lata*, (2002) 5 SCC 422 .

190. *Aher Mensi Ramsi v Aherani Bal Mini Jetha*, AIR 2001 SC 148 : (2001) 3 SCC 117 .

191. *Jagdish Jugtawat v Manju Lata*, (2002) 5 SCC 422 ; *Noor Saba Khatoon v Modh Quasim*, (1997) 6 SCC 233 : 1997 SCC (Cri) 924 .

192. *Rajesh Kurre v Safurabai*, AIR 2009 NOC 813 (Chh).

193. *Mugappa v Munyamma*, 2003 Cr LJ NOC 170 (Kant) : 2003 AIR Kant HCR 1535.

194. *Ranjeeta Deepak Balsekar v Deepak Baburao Balsekar*, AIR 2009 NOC 1319 (Bom); *Santosh Kumar v Ramwati*, AIR 2008 NOC 2863 (Raj), grant by Magistrate under section 125(2) from the date of application in the circumstances of the case was in accordance with the law.

195. *Ashok Singh Pal v Manjulata*, AIR 2008 MP 132 : (2008) 2 MPHT 275.

196. *Khanabhai Kasnabhai Parmar v Beenaben*, AIR 2010 (Guj) 79 .

197. *Shabana Bano v Imran Khan*, AIR 2010 SC 305 : (2010) 1 SCC 666 .

198. *Geeta Bareth v Keshav Prasad Bareth*, AIR 2013 Chh 3 (DB).

199. *Manglabai Chotulal Gaikwad v Chotulal Kashiram Gaikwad*, AIR 2009 NOC 2407 (Bom) : (2009) 4 AIR Bom LR 268.

200. *Rajesh Shukla v Meena R Shukla*, AIR 2006 NOC 268 (All—FB) of MP High Court.

201. *Saroj Mukhawar v Chandrakalabai Polshetwar*, AIR 2009 NOC 2408 (Bom).

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CHAPTER IX ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

[s 126] Procedure.—

(1) Proceedings under section 125 may be taken against any person in any district —

(a) where he is, or

(b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided **that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.**

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

This section deals with the jurisdiction, mode of taking of evidence and grant of costs in respect of proceedings initiated under section 125.

[s 126.1] Jurisdiction [*Sub-section (1)*].—

The proper Court to take cognizance of the complaint of the wife is the Court within the jurisdiction of which (1) the husband is, or (2) where the husband resides,[202.] or (3) where the wife resides,[203.] or (4) where they last resided together, or (5) where the husband last resided with the mother of the illegitimate child.

The word "is" indicates that a Magistrate is competent to entertain an application for maintenance against a person who works for gain within the territorial jurisdiction of such Magistrate, although he may not have a permanent residence within such jurisdiction.[204.]

The word "reside" connotes some sort of permanent intention to stay at a particular place, and a mere casual visit to a place other than the one where a person has a fixed home will not be sufficient. In the case of persons who have a fixed residence, a visit to

another place for however long a period, so long as it is casual, will not confer jurisdiction. Where, however, the parties have no home of any sort and are moving about from place to place, each place where they so live would be their home for the time being; the sole test being whether a party has *animus manendi* or an intention to stay for an indefinite period, at one place, and if he has such an intention, then alone can he be said to reside there.[205.]

"Residence" means a place where the husband has been living voluntarily for some time with the intention of treating it as his home. It is a question of fact in each case whether the particular place where the husband is found, is or is not his residence within the meaning of this section. One of the tests is to see whether he has a permanent place of living to which he intends to go back or would ordinarily be expected to go back.[206.]

The word "reside" means to live or to have a dwelling place or an abode and is not equivalent to something in the nature of having a domicile in a particular place or having a place as the place of origin or the place where the family used to live.[207.] It may mean joint family home also.[208.]

[s 126.2] "Last resided".—

The term "resided" includes a temporary residence and is not to be confined to permanent residence,[209.] but it implies something more than a mere brief flying visit.[210.]

Although section 126 does not mention, a father seeking maintenance can apply at a place where he resides. Analogy of section 177 applied in such case.[211.]

[s 126.3] Jurisdiction—Where wife resides [*Sub-section (1)(b)*].—;

Where the wife filed her application at the place where she was residing and the Magistrate dismissed it on the ground that her husband was not residing within his jurisdiction, the Supreme Court held that the dismissal was not proper and passed this observation that it seemed that the Courts below had not taken note of the statutory provisions.[212.]

[s 126.4] Mode of taking evidence [*Sub-section (2)*].—

This sub-section is mandatory in form, and in clear terms, it prescribes the procedure to be followed by the Magistrate.[213.] The word "shall" is mandatory; it is only when for good reasons the personal attendance is dispensed with that the presence of pleader can be deemed to be sufficient compliance with the requirements of the sub-section.[214.]

[s 126.5] Service.—

There is no distinction between the service mentioned in sub-section (2) and summons referred to in section 62. So, when a notice is served by a civil process server and not

by a police officer, such irregularity is not curable.[215.]

[s 126.6] "Within three months from the date thereof".—

There is difference of opinion as to whether the period of three months runs from the date of the *ex parte* order or begins from the date the aggrieved party had or ought to have knowledge thereof. The Punjab[216.] and the Mysore[217.] High Courts hold the former view and the Andhra Pradesh High Court[218.] the latter. In a Full-Bench judgment of the Punjab High Court, which overruled its previous decision in *Hari Singh v Mt Dhanna*,[219.] it has been held that a decision adversely affecting a party does not come into force before that party acquires notice thereof and the period of limitation should, therefore, be reckoned from the date of knowledge of the *ex parte* order. A *quo terminus* for reckoning the period is not the date of the order.[220.]

[s 126.7] Duration of order.—

An order once passed remains in force until it is either cancelled under section 125(5) or modified under section 127.[221.]

[s 126.8] Cancellation of order.—

Cancellation of order granting maintenance allowance does not operate retrospectively. It is effective only from the date it is ordered and therefore arrears for the period between the granting of the original order and the date of its cancellation are recoverable.[222.]

[s 126.9] Insolvency of husband.—

An order of discharge shall not release an insolvent husband from liability under an order for maintenance passed under section 125; section 45(1)(d) of the Presidency-towns Insolvency Act, 1909 (III of 1909); section 44(1)(d) of the Provincial Insolvency Act, 1909 (V of 1920). A protection order, under section 25 of the Presidency-towns Insolvency Act, (1909), does not protect the insolvent against the special statutory power of committal given to a Court under section 125 to enforce an order to pay maintenance by levying the amount as fine and sentencing the defaulter to suffer imprisonment.[223.] A Magistrate who has passed a sentence of imprisonment cannot cancel the sentence merely because an insolvency Court issues an order of protection. Neither the protection order nor the adjudication order can be conclusive on this point.[224.]

[s 126.10] Death of husband.—

A claim for arrears of maintenance abates on the death of the husband and cannot be enforced thereafter against his estate.[225.]

[s 126.11] Civil suit.—

An order passed under section 125 is no bar to a suit for maintenance in a Civil Court.[226.] If there is inconsistency between the decision of theCriminal Court and the decision of the Civil Court, in such a case the decision of the latter prevails, although ordinarily the decision of the Civil Court is irrelevant in a criminal proceeding.[227.]

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202. *Jagir Kaur v Jaswant Singh*, AIR 1963 SC 1521 : 1963 (2) Cr LJ 413 .
203. *Moti Ram v 1st Addl District Judge, Bareilly*, 1992 Cr LJ 1007 (All).
204. *Rupchand Issardas v Emperor*, (1941) Kar 4 AIR 1942 Sindh 32 .
205. *Khairunnissa v Bashir Ahmed*, (1929) 31 Bom LR 931 : ILR 1929 53 Bom 781 : AIR 1929 Bom 410 ; *Ram Dei v Jhunni Lal*, (1926) 1 Luck 343 : AIR 1926 Oudh 268 ; *Emperor v Shambai*, AIR (1941) Nag 175 .
206. *Ratna v Rai Urs*, (1954) Mys 493.
207. *Rifaqatullah Khan*, (1946) All 879 ; *Jagir Kaur v Jaswant Singh*, (1964) 2 SCR 73 : AIR 1963 SC 1521 : 1963 (2) Cr LJ 413 .
208. *C Raman v V Vasumathi*, 1972 Cr LJ 315 .
209. *Sher Singh v Amir Kunwar*, (1927) 49 All 479 .
210. *Abdur Hamid v Bibi Ashrafunnisa*, AIR 1965 Pat 344 : 1965 Cr LJ 236 .
211. *Ananth Gopal v Gopal Narayan*, 1985 Cr LJ 152 (Kant).
212. *Kumuthan v Kannappan*, AIR 1999 SC 839 : (1998) 5 SCC 693 .
213. *Nandlal Misra v KL Misra*, (1960) 3 SCR 431 : AIR 1960 SC 882 : 1960 Cr LJ 1246 .
214. *Het Ram v Smt. Ram Kunwari*, (1975) All LJ 171, at p 173 : 1975 Cr LJ 656.
215. *Revappa v Gurusanthawwa*, AIR 1960 Kant 198 : AIR 1959 Kant 198 : 1960 Cr LJ 1107 .
216. *Hari Singh v Mt Dhanna*, (1962) 2 Cr LJ 581 .
217. *Hyder Khan v Safoora Bee*, AIR 1968 Kant 98 : 1968 Cr LJ 525 .
218. *Zohra Begum v Mohamed Ghouse*, AIR 1966 AP 50 : 1966 Cr LJ 129 ; *Hemendra Nath v Archana*, 1971 Cr LJ 817 : AIR 1971 Cal 244 .
219. *Hari Singh v Mt Dhanna*, (1962) 2 Cr LJ 581 .
220. *Jogender Singh v Balkaran Kaur*, 1972 Cr LJ 93 .
221. *Budhni v Dalal*, (1905) ILR 27 All 11.
222. *Sadashiv Nathu v Pasubai*, AIR 1967 MP 85 : 1967 Cr LJ 379 .
223. *Mahomed Hussein Abdul Kadar Shaikh Bhikan v Emperor*, (1940) 42 Bom LR 742 : AIR 1940 Bom 344 , dissenting from *Halfhide v Halfhide*, (1923) 50 Cal 867 .
224. *Muni Krishnayya v Akkulamma*, AIR (1940) Mad 697 .
225. *Ead Ali v Lal Bibi*, (1914) ILR 41 Cal 88 : AIR 1914 Cal 172 ; *Lingappa Goundan v Esudasan*, (1904) 27 ILR Mad 13, 15; *Ambadas v Annapurna Bai*, (1953) Nag 576 : 1953 Cr LJ 1267.
226. *Ghana Kanta Mohanta v Gereli*, (1904) 32 Cal 479 .
227. *Dahyalal v Bai Madhukanta*, AIR 1965 Guj 247 : 1965 Cr LJ 497 a.

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[s 127] Alteration in allowance.—

[228.][(1) On proof of a change in these circumstances of any person, receiving under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance, for the maintenance or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance as the case may be.]

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, remarried cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,—

(i) in the case where such sum was paid before such order, from the date on which such order was made;

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to [229.][maintenance or interim maintenance, as the case may be,] after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a [230.][monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person [231.][as monthly allowance from the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order.

[s 127.1] State Amendment

Madhya Pradesh.—In its application to the State of Madhya Pradesh, in sub-section of section 127, of the Principal Act, for the words "father or mother" the words "father, mother, grandfather, grandmother" shall be substituted *vide* M.P. Act 15 of 2004, section 3 (w.e.f. 26-11-2004 and published in M.P. Gazette (Extra-ordinary) dated 6-12-2004).

Maharashtra.— *The following amendments were made by Maharashtra Act 21 of 1999, section 3 (w.e.f. 20-4-1999).*

In its application to the State of Maharashtra, in section 127,—

(a) in sub-section (1), in the proviso, for the words "five hundred rupees", substitute "fifteen hundred rupees".

(b) in sub-section (4),—

(i) for the words "monthly allowance", where they occur for the first time, substitute "maintenance allowance";

(ii) after the words "monthly allowance", where they occur for the second time, insert "or, as the case may be, the lump-sum allowance".

[Note these State amendments were made prior to the enactment of the Code of Criminal Procedure, 2001 (Central Act 50 of 2001), section 3 (w.e.f. 24-9-2001)].

Rajasthan.— *The following amendments were made by Rajasthan Act 3 of 2001, section 3 (w.e.f. 1-5-2001).*

In its application to the State of Rajasthan, in section 127, sub-section (1), for the words "five hundred" occurring after the words "the monthly rate of" and before the words "rupees in the whole", substitute "two thousand five hundred".

[Note this State Amendment has been made prior to the enactment of the Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001), section 3 (w.e.f. 24-9-2001)].

Tripura.— *The following amends. were made by Tripura Act 9 of 1999, section 3 (w.e.f. 9-4-1999).*

In its application to the State of Tripura, in section 127, sub-section (1), in the proviso, for the words "five hundred rupees", substitute "one thousand rupees".

[Note this State amendment was made prior to the enactment of Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees) in the whole" have been omitted (*See* section 2, Cr.P.Code (Amdt.) Act, 2001 (w.e.f. 24-9-2001)].

U.P.— *The following amendments. were made by U.P. Act 36 of 2000, section 3 (w.e.f. 13-8-2001).*

In its application to the State of Uttar Pradesh, in section 127, sub-section (1), in the proviso, for the words "five hundred rupees", substitute "five

thousand rupees".

S. 127(1).—In the proviso in sub-section (1) of section 127 of the principal Act, for the words "five hundred rupees", the words "one thousand and five hundred rupees" shall be substituted.

[Note this State amendment was made prior to the enactment of Code of Criminal procedure (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees) in the whole "have been omitted (*See* section 2, Cr.P. Code (Amdt.) Act, 2001 (w.e.f. 24-9-2001)].

West Bengal.—*The following amendments were made by W.B. Act 14 of 1995, section 2 (w.e.f. 2-8- 1995)*.

In its application to the State of West Bengal, the proviso to sub-section (1) of section 127 of the Principal Act, for the words "five hundred rupees", the words "one thousand and five hundred rupees" shall be substituted.

In its application to the State of West Bengal, in sub-section (1) of section 127 of the Principal Act, the proviso shall be omitted. [*vide* W.B. Act 33 of 2001, section 4].

[s 127.2] Legislative changes—Code of Criminal Procedure (Amendment) Act, 2001.—

For the notes on changes introduced by the Amendment Act, 2001 (w.e.f. 24-9-2001), see comments under section 125 (*supra*).

COMMENT

Two changes were effected in the old law (section 488 of the 1898 Code)—one of making a provision for the maintenance of parents and the other of making maintenance available even to the divorced wife—by section 125 of this Act. Sub-section (3) becomes applicable to the case of a woman who has been divorced by or has obtained divorce from her husband.

Where once an order for maintenance is passed under section 125, the amount can be increased or decreased by change of circumstances of the person receiving, or of the person paying, the amount. The order can relate back to the date of the application.[232.] It can be cancelled if it is superseded by the Civil Court decree,[233.] or if the parties have arrived at a compromise.[234.] Even though the original order was passed on the basis of a compromise, it can be enhanced under this section.[235.] However, the order of enhancement could be passed only if there was an earlier order of maintenance passed under section 125. Private agreement between the parties did not give jurisdiction to the Court under section 127 to enhance the amount of maintenance A petition under section 127 for enhancement or reduction in the amount of maintenance granted under section 125 has to be filed before the Court which passed the original order under that section.[236.]

The word "the Magistrate" would mean the Magistrate who passed the first order of maintenance. Therefore, the petition under section 127 must be filed before the said Magistrate.[237.]

[s 127.3] "Change in the circumstances".—

The phrase refers to a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed.[238.] Increase in father's salary from the time of the original order is a valid change in the circumstances.[239.] The change does not contemplate a change in the status of the parties; divorce is certainly not a change in circumstances but a change in the status of the parties.[240.] Now, of course, even divorced wife can claim maintenance, subject to the provisions of sub-section (3). Hence, the decree of divorce obtained by the husband on the ground of desertion, subsequent to the order of maintenance under section 125, cannot cancel the order of maintenance.[241.] "Change" would include death of the child or the birth of another, and also the fact that the child has grown older.[242.] If the father takes away a son from the custody of the mother without adhering to proper procedure, he has no right to ask for alteration of the maintenance allowance on the ground of change of circumstances.[243.] Where the parties compromised on application for enhancement of the maintenance, a subsequent application in changed circumstances was maintainable and the compromise in the earlier application would not operate as estoppel or waiver.[244.] Rising cost of living results in the change of circumstances.[245.]

[s 127.4] Effect of Civil Court decision [*Sub-section (2)*].—

A decree for restitution of conjugal rights obtained from a Civil Court does not necessarily put an end to an order for maintenance previously passed under this section. It is within the discretion of the Magistrate to cancel or vary the order if need be, but the discretion must be exercised judicially.[246.] Before cancelling or varying the order, he is entitled, and indeed bound, to satisfy himself that the applicant is *bona fide* prepared to give effect to the decree of the Civil Court and that he is prepared to offer the wife a home which she ought to accept.[247.]

An order of cancellation under this sub-section made in consequence of the decision of the Civil Court should take effect from the date of Civil Court's decision.[248.]

Where there is a binding Civil Court's decision fixing the quantum of maintenance, the Magistrate should refer the parties to the Civil Court.[249.]

[s 127.5] Remarriage [*Sub-section (3)*].—

Three cases are envisaged where the Magistrate can cancel the order of maintenance issued in favour of a woman who has been divorced by or who has obtained divorce from her husband, *viz*., (1) where she has remarried; (2) where she has received the whole sum payable to her under any customary or personal law; and (3) where she has voluntarily surrendered her right. Relinquishment of the right to maintenance could be pleaded under section 127(3)(c) only if there was an earlier order under section 125. Section 127 could not be brought in at a time when application under section 125 was yet to be heard and decided.[250.]

It was held in *Bai Tahira*[251.] by the Supreme Court that if the amount of the *Mehar* paid to a Muslim wife on divorce was sufficient enough to provide resources for her sustenance, the order of maintenance made under section 125 would be cancelled, but when such amount of *Mehar* was merely nominal or was not adequate for her to live

with the requisite standard, the order of maintenance made under section 125 would not be cancelled. This view was reiterated in *Fuzlumbi v K Khader Ali*.[252.] Subsequently, in *Mohd Ahmed Khan v Shah Bano Begum,*[253.] the Supreme Court held that since *Mehar* according to Muslim personal law was not an amount "payable on such divorce" as required by clause (b) of sub-section (3), that amount could not be taken into consideration while deciding an application under section 125.

The Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986), provides that if on the first date of hearing of the application under sub-section (2) of section 3 of that Act, the divorced woman and her husband declare either jointly or separately that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973, the Magistrate shall dispose of their application in accordance with those provisions of the Code. In the absence of such a declaration, they would not be governed by the provisions of the Code.[254.] A Muslim woman was awarded maintenance under this section prior to coming into force of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 (25 of 1986). Subsequently, after the enforcement of this Act, the woman applied for enhancement of the maintenance amount, and the Magistrate actually enhanced the amount. Against this enhancement, the husband went in revision to the High Court. The High Court refused to disturb the enhancement holding it to be a finding of fact. It was further held that since the maintenance was awarded earlier to the passing of the Act 25 of 1986, subsequent application for enhancement of the maintenance amount is not barred by section 3 or 7 of the Act, when there is no proof of divorce.[255.]

This view found support from a Division Bench judgment of Gauhati High Court in *Idris Ali v Ramesha Khatun*.[256.] However, the Calcutta High Court expressed a different view in *Abdul Sattar v Sabani Bibi*.[257.] It held that the maintenance already granted ceased to have effect on commencement of the Act 25 of 1986, and therefore any execution case based on that order is liable to be quashed. A Single Judge of Calcutta High Court being bound by the Division Bench judgment of the same Court was constrained to order the same, although agreeing with the view of the Gauhati High Court. He observed that in view of section 6(c) of the General Clauses Act, a divorced Muslim woman, who had already obtained maintenance under section 125 or 127 CrPC, is still entitled to enforce and execute the same inspite of the coming into force of the Act of 1986. It is submitted that this observation brings forth the correct position of law.[258.] Taking into account the provisions of Muslim Women's (Protection of Rights on Divorce) Act, 1986, a Magistrate limited the period of payment of enhanced amount to the wife up to the date of divorce. The High Court extended it up to the expiry of *iddat*. However, the Act will not affect the rights of children, and they will continue to be entitled to maintenance till they attain majority.[259.] Where the enhanced maintenance of a divorced Muslim woman was made payable upto completion of *iddat* period only, the Allahabad High Court extended the period upto the date of her remarriage in view of section 127(3)(a) CrPC.[260.] The High Court of Gujarat held that there must be a rational relation between the sum so paid and its potential as provision for maintenance. If the amount is illusory, the agreement to surrender the right to future maintenance also would be unlawful as it would be against public policy.[261.]

[s 127.6] Civil Court to take account of order under the section [*Sub-section (4)*].—

It has been made clear that the monthly allowance ordered by any Court to be paid under the provisions of section 125 should be taken into account by a Civil Court when it proceeds to pass a decree for maintenance or for recovery of dowry in favour of the same person.

[s 127.7] Jurisdiction.—

A petition seeking enhancement has to be filed under section 127. A separate application was filed under section 125 before the Family Court either erroneously or under misconception. The order granting enhancement was passed by the Family Court. The Court refused to term it as void.[262.]

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228. Subs. by Act 50 of 2001, section 3(i), for sub-section (1) (w.e.f. 24-9-2001).

229. Subs. by Act 50 of 2001, section 3(ii), for "maintenance" (w.e.f. 24-9-2001).

230. Subs. by Act 50 of 2001, section 3(iii)(a), for "monthly allowance has been ordered" (w.e.f. 24-9-2001).

231. Subs. by Act 50 of 2001, section 3(iii)(b), for "as monthly allowance in pursuance of" (w.e.f. 24-9-2001).

232. *Hiralal v Bai Amba*, (1926) 28 Bom LR 669 : AIR 1926 Bom 419 ; *Ravendra Kaur v Achant Swarup*, AIR 1966 All 133 : 1966 Cr LJ 247 ; *Parameswara v Balameenakshi*, 1969 Cr LJ 484 : AIR 1969 Ker 108 .

233. *Dahyalal v Bai Madhukanta*, AIR 1965 Guj 247 : 1965 Cr LJ 497 a.

234. *Prabhu Lal v Rami*, (1902) ILR 25 All 165.

235. *Balak Ram v State*, 1973 Cr LJ 750 ; *Padmanabhan v Bama*, 1988 Cr LJ 1386 (Mad).

236. *G Balraj v Mallamma*, 1984 Cr LJ 1170 (AP).

237. *Raj Kumar v Shanta Bai*, 2002 Cr LJ 2894 (Raj).

238. *Punjalal Chunilal*, (1928) 30 Bom LR 617 : AIR 1928 Bom 224 ; *Shah Abu Ilyas v Ulfat Bibi*, (1896) ILR 19 All 50; *Bhagwan Dutt v Kamla Devi*, AIR 1975 SC 83 : 1975 Cr LJ 40 : (1975) 2 SCC 286 .

239. *Vasudevan Nair v Kalyani Amma*, 1970 Cr LJ 1173 .

240. *Gulrozbanu v Karmalli*, (1974) 76 Bom LR 515 ; *Anowaruddin v State of WB*, 1989 Cr LJ NOC 20 (Cal).

241. *Mangilal v Gitabai*, 1988 Cr LJ 1591 (MP).

242. *Ramayee*, (1890) ILR 14 Mad 398.

243. *Preetpal Singh v Ishwari Devi*, 1991 Cr LJ 3015 (All).

244. *Joydel Kumar Biswas v Maduri*, 1994 Cr LJ 3342 (Cal).

245. *Prafulla Kumar Panda v Amra Kumari Panda*, 1996 Cr LJ 553 (Ori).

246. *Shiela Rani v Durga Pershad*, AIR 1965 P&H 79 : 1965 Cr LJ 203 .

247. *Fakruddin Shamsuddin v Bai Jenab*, (1943) 45 Bom LR 897 : AIR 1944 Bom 11 ; *Shiela Rani v Durga Pershad*, AIR 1965 P&H 79 : 1965 CrLJ 203 .

248. *Parameswara v Balameenakshi*, 1969 Cr LJ 484 : AIR 1969 Ker 108 .

249. *Nagendra Iyer v Premavathi*, 1973 Cr LJ 1677 .

250. *Leelaben v Goswami*, 1987 Cr LJ 1637 (Guj).

251. *Bai Tahira v Ali Hussain Fissali*, 1979 Cr LJ 151 : AIR 1979 SC 362 .

252. *Fuzlumbi v K Khader Ali*, 1980 Cr LJ 1249 : AIR 1980 SC 1730 : (1980) 4 SCC 125 .

253. *Mohd Ahmed Khan v Shah Bano Begum*, 1985 Cr LJ 875 : AIR 1985 SC 945 : (1985) 2 SCC 556 .

254. *Mohammad Yamud v State of UP*, 1992 Cr LJ 1804 (All).
255. *M Subhan v Maqbool Bee*, 1992 Cr LJ 2612 (AP).
256. *Idris Ali v Ramesha Khatun*, AIR 1989 Gau 24 .
257. *Abdul Sattar v Sabani Bibi*, (1989) CCLR (Cal) 197.
258. *Sk Abubakkar v Ohidunnessa Bibi*, 1992 Cr LJ 2826 (Cal).
259. *Syed Iqbal Husain v Syed Nasmunnissa Begum*, 1992 Cr LJ 1823 (AP).
260. *Hameedan v Mohd Rafiq*, *HVD* (All) 1993 (1) p 262 (first appeal no. 112 of 1990, decided on 2-2-1993 by Lucknow Bench).
261. *Bai Laxmiben v Bharatbhai Patel*, 1986 Cr LJ 1418 (Guj).
262. *M Villai Pandi v Amutha*, AIR 2010 NOC 119 (Mad).

The Code of Criminal Procedure, 1973

CHAPTER IX ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

[s 128] Enforcement of order of maintenance.—

A copy of the order of [263.][maintenance or interim maintenance and expenses of proceedings, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [264.][whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the [265.] [allowance, or as the case may be, expenses, due].

[s 128.1] Legislative changes—Code of Criminal Procedure (Amendment) Act, 2001.—

For the notes on changes introduced by the Amendment Act, 2001 (w.e.f. 24-9-2001), see comments under section 125 (*supra*).

COMMENT

An order of maintenance passed by a Magistrate in proceedings under section 125 CrPC before establishment of Family Courts was held to be executable by a Family Court, as no Magistrate within the jurisdiction of the Family Court can exercise any jurisdiction under Chapter IX of the Code of Criminal Procedure after establishment of Family Courts.[266.]

Where a petition was filed under section 128 for recovery of arrears of maintenance, it was held that the magistrate was not empowered to impose sentence in a petition under section 128 by treating it as one under section 125(3).[267.]

[s 128.2] "Any place".—

The expression includes a place outside the jurisdiction of the Magistrate who passed the order.[268.]

[s 128.3] Executing Court.—

Where an order granting maintenance to the wife was passed, it was held that the execution Court had no power of withholding execution on a finding of its own that the petitioner wife had been divorced by the husband.[269.]

Where a petition for enforcement of the award of maintenance was pending, it was held that the husband was not entitled to seek modification of the decree on the

ground that he had obtained an order for restitution of conjugal rights, and therefore he was not liable to pay maintenance to an unwilling wife. An independent petition under section 127 is needed for such a purpose.[270.]

[s 128.4] Attachment of property.—

Only the property of the husband, whether movable or immovable, over which he has exclusive domain can be attached for realising the amount of maintenance. The property of the husband's mother cannot be attached for the maintenance or interim maintenance amount.[271.]

[s 128.5] No time-limit.—

A petition for recovery of arrears of maintenance was filed after one year of the order. The petition was held to be not barred. The Court said that no period of limitation has been prescribed for initiating petition under section 128.[272.]

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263. Subs. by Act 50 of 2001, section 4, for "maintenance", (w.e.f. 24-9-2001).
264. Subs. by Act 50 of 2001, section 4, for "whom the allowance", (w.e.f. 24-9-2001).
265. Subs. by Act 50 of 2001, section 4, for "allowance due", (w.e.f. 24-9-2001).
266. *Md Pasnur Ali v Rufia Begum*, 1993 Cr LJ 3463 (Gau).
267. *Periyasamy v Lakshmi*, AIR 2010 NOC 715 (Mad).
268. *Karri Papayamma*, (1881) 4 Mad 230.
269. *Shaik Mahaboob v State of AP*, 2003 Cr LJ 2199 (AP).
270. *Srinivasa Gowda v J Leelavathi*, AIR 2008 NOC 1108 (Kar).
271. *Uma Pati Tiwari v State of UP*, AIR 2007 NOC 1268 All : (2007) 2 All LJ 508.
272. *P Vaithi v Kangavallu*, AIR 2010 NOC 717 (Mad).

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

A.—Unlawful assemblies

[s 129] Dispersal of assembly by use of civil force.—

(1) Any Executive Magistrate or officer incharge of a police station or, in the absence of such officer incharge, any police officer, not below the rank of a sub-inspector, may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

The object of this Chapter is the maintenance of public order and tranquillity. Orders passed under Chapter X are police orders and do not envisage elaborate adjudicatory proofs of the rights.[1.] This is a second branch of the preventive provisions of the Code. It deals with an assembly which is unlawful (see section 141 of the Indian Penal Code (IPC)), or which is likely to cause a breach of the peace. An assembly of the kind described may be commanded to disperse either by any Executive Magistrate, or an officer incharge of a police station, or a police officer not below the rank of a sub-inspector. If the assembly shows no disposition to disperse quietly, force may be employed to disperse it; and it is permissible to requisition the aid of any male person (section 129). Where this is ineffectual, the Executive Magistrate of the highest rank present may cause it to be dispersed by the armed forces. The military must use minimum force and cause minimum injury to person and property (section 130). In cases of emergency, when no Magistrate is present, a Commissioned or gazetted Army Officer can act on his own initiative; but he should communicate with the nearest Magistrate at the earliest opportunity (section 131). The officer has also the power to take into custody any offender (section 131). No person acting under the Chapter is liable to be criminally prosecuted except with the sanction of the Central or the State Government, as the case may be (section 132).

[s 129.1] "Assembly likely to cause a disturbance of the public peace".—

Even a religious assembly congregated in a public street so as to draw crowds of people is likely to cause a disturbance of the public peace.[2.] But where it is patently clear that there was no lawful order to resort to firing, State is liable to pay compensation to the relatives, of the deceased, who died in the firing. In such cases, no

sovereign immunity is available to the State. Compensation may be computed on principle of computation in Motor Accidents claims.[3]

[s 129.2] Fundamental right to assembly.—

Article 19(1)(b) of the Constitution of India confers upon all citizens of India the right to assemble peaceably and without arms. This right is subject to reasonable restriction in the interest of the sovereignty and integrity of India and public order.

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1. *Augusthy v Varkey*, 1989 Cr LJ NOC 183 (Ker).
2. *Empress v Tucker, Norman and Thompson*, (1882) 7 Bom 42.
3. *State of Karnataka v B Padmanabha Beliya*, 1992 Cr LJ 634 (Knt).

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

A.—Unlawful assemblies

[s 130] Use of armed forces to disperse assembly.—

(1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces.

(2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(3) Every such officer of the armed forces shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

When the District Armed Reserve Police fired without lawful orders from the authorities on the members of an unlawful assembly and caused the death of one person, it was held that the State Government was vicariously liable and had to pay compensation to the dependents of the deceased.[4.]

[s 130.1] Armed Forces (Special Provisions) Act, 1958.—

In reference to situations requiring use of armed forces in aid of civil power, it has been held that the provisions of sections 130 and 131 are not adequate to deal with the situation.[5.]

4. *Ibid.*
5. *Naga People's Movement of Human Rights v UOI*, AIR 1998 SC 431 : (1998) 2 SCC 109 .

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

A.—Unlawful assemblies

[s 131] Power of certain armed force officers to disperse assembly.—

When the public security is manifestly endangered by any such assembly and no Executive Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such action.

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

A.—Unlawful assemblies

[s 132] Protection against prosecution for acts done under preceding sections. —

(1) No prosecution against any person for any act purporting to be done under section 129, section 130 or section 131 shall be instituted in any Criminal Court except—

(a) with the sanction of the Central Government where such person is an officer or member of the armed forces;

(b) with the sanction of the State Government in any other case.

(2)(a) no Executive Magistrate or police officer acting under any of the said sections in good faith;

(b) no person doing any act in good faith in compliance with a requisition under section 129 or section 130;

(c) no officer of the armed forces acting under section 131 in good faith;

(d) no member of the armed forces doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence.

(3) In this section and in the preceding sections of this Chapter,—

(a) the expression "armed forces" means the military, naval and air forces, operating as land forces and includes any other Armed Forces of the Union so operating;

(b) "officer", in relation to the armed forces, means a person commissioned, gazetted or in pay as an officer of the armed forces and includes a junior commissioned officer, a warrant officer, a petty officer, a non-commissioned officer and a non-gazetted officer;

(c) "member", in relation to the armed forces, means a person in the armed forces other than an officer.

This section gives protection to persons against prosecution for any act purporting to be done under sections 129–131 except with the sanction of the State Government or the Central Government. The protection conferred by this section will be rendered nugatory if the onus is to be thrown on persons to prove at the trial that they acted under the relevant sections. This could not have been the object of the Legislature when it provided safeguards for the protection of public servants while they were acting in the discharge of their duties.[6.] The deeming provision of sub-section (2) takes

the *bona fide* acts of the Executive Magistrate, police officer, officers and members of the armed forces and persons acting *bona fide* in compliance with requisition made under section 129 or section 130, out of the category of offence. The sanction when necessary must precede the complaint and the proceedings on a complaint so instituted without prior sanction would be void.[7.]

The Court can consider the necessity of sanction only when from the evidence recorded in the proceedings or the circumstances of the case it is possible to hold either definitely that the alleged criminal conduct was committed or was probably committed in connection with action under sections 129 to 131 of the Code.[8.]

The police force had gone for discharging some official duties, and because of the objections raised to the police action by the complainant, the police personnel took away some property of the complainant. It was held that prosecution of the police personnel cannot over-ride the legal bar created by sections 132 and 197 of CrPC. Prior sanction for their prosecution was necessary.[9.]

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6. *Yesudasan v Gurusamy*, (1957) ILR Mad 887 : AIR 1957 Mad 555 : 1957 Cr LJ 980 ; *Krishna Pillai v P Sadashiva Pillai*, AIR 1963 Ker 7 : AIR 1963 Ker7 .
7. *Nagraj v State of Mysore*, AIR 1964 SC 269 : (1964) 3 SCR 671 : 1964 (1) Cr LJ 161 .
8. *Nagraj v State of Mysore, ibid.; Rasaraj Singh*, 1980 Cr LJ (NOC) 29 (Gau); *Ram Adhar Yadav v Ramchandra Misra*, 1992 Cr LJ 2216 (All).
9. *Ram Adhar Yadav v Ramchandra Misra,* 1992 Cr LJ 2216 (All).

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 133] Conditional order for removal of nuisance.—

(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation; or owning or possessing such animal or tree, within a time to be fixed in the order—

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

***Explanation.*—A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.**

[s 133.1] Power to deal with public nuisance.—

The third branch of preventive jurisdiction is the power of Magistrate to deal with public nuisances. Though not so dangerous as occasions for keeping the peace or good behaviour, nor so urgent as unlawful assemblies, they are yet sufficiently fraught with potential danger as to warrant a summary action on the part of the magistracy. The power can be exercised either on receipt of a police report or other information and arises under the six circumstances enumerated. It results in a conditional order (section 133). The Magistrate can act on information derived from any source.[10.] Before passing a conditional order under this section (section 133), a Magistrate is not bound to take evidence as the proceedings are entirely *ex parte*. But he must give hearing to the concerned parties before making the order absolute.[11.] The order can be served as if it were a summons (section 134). On the service being effected, the person concerned may carry out the order, in which case the proceedings will come to an end [section 135(a)]. If he does not, he has to show cause against the order or apply to the Magistrate to try whether the order is reasonable and proper [section 135(b)]. If the person does not comply with the order and fails to appear before the Magistrate, the order is made absolute. He may also be prosecuted under section 188 of the IPC (section 136). If he successfully shows cause, the order is discharged; but if the cause shown is not satisfactory, the order is made absolute (section 138).

The Magistrate may, when the person against whom an order is made under section 133 appears before him or contests the existence of any public right before him, direct a local investigation or summon and examine any expert (sections 139 and 140). If the person disputes the existence of any public right in any way, river, channel or place, the Magistrate will hold a preliminary inquiry, and if he finds the contention good, the question will be left to be determined by a Civil Court. If there is no substance in the contention, the inquiry will proceed (section 137).

When an order is made absolute under section 136 or section 138, the person will be called upon to carry it out within a specified time; if he fails to so carry it out, he can be prosecuted under section 188 of the IPC [section 141(1)]. It is also open to the Magistrate to carry out the order and recover costs from the defaulter [section 141(2)]. In case of imminent danger or injury of a serious kind to the public, the Magistrate may forthwith issue an injunction to the person (section 142). The Magistrate has also the power to order any person not to repeat or continue a public nuisance (section 143). The provisions of the section are attracted only in cases of emergency and imminent

danger to the health or physical comfort of the community. Where the obstruction or nuisance has been in existence for a long time, the aggrieved party should move the Civil Court.[12.]

The public nuisances which can be redressed under the section fall under six categories:—

(1) the unlawful obstruction or nuisance to any public place or to any way, river or channel lawfully used by the public;

(2) the conduct of any trade or occupation, or the keeping of any goods or merchandise, injurious to the health or physical comfort of the community;[13.]

(3) the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion;

(4) a building, tent or structure, or a tree as is likely to fall and cause injury to persons;

(5) an unfenced tank, well or excavation, near a public way or place; and

(6) a dangerous animal requiring destruction, confinement or disposal.

In all proceedings initiated under this section, the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and should be on his guard against any tendency to use this section as a substitute for litigation in the Civil Court in order to attain settlement of a private dispute.[14.]

For invoking jurisdiction under section 133(1) CrPC, it is not necessary that there should always be danger or inconvenience to public at large but even if danger or inconvenience is about to be caused, it is actionable under sections 133(1) and 138 CrPC.[15.]

The Magistrate's jurisdiction is not ousted because of a *bona fide* claim of title being raised.[16.] Section 133 of CrPC does not stand automatically or impliedly repealed after the commencement of the Air (Prevention and Control of Pollution) Act, 1981, so proceedings under section 133 of CrPC are not barred. However, the High Court dropped the proceedings against a company, as having become infructuous because the company had installed the requisite air pollution control equipments and the emissions discharged were within the prescribed limits.[17.]

Where in response to a notice under section 133 of CrPC, a person filed reply and was all along aware of the allegations, it was held that he was not at all prejudiced because of a defective and vague notice.[18.]

Where the petitioner against whom the conditional order under section 133(1) was passed appeared before the Magistrate, filed his show cause and also filed evidence but the Magistrate, instead of recording any finding on the evidence adduced, based on his entire finding on local inspection, the order passed by the Magistrate was quashed.[19.]

[s 133.2] Removal of unlawful obstruction or nuisance [*clause (a)*].—

For the applicability of this clause, the public must have a right of way which is being obstructed or on which nuisance is made or it must be a public place where any of these things is done.[20.] The Magistrate has to conduct an inquiry and to decide as to

whether there was reliable evidence or not to come to the conclusion for acting under the section. In this case, a tin shed was erected on a public road to run a tool shop. That being a public nuisance, an order for its removal was held to be proper.[21.]

[s 133.3] "Channel".—

The word "channel" is intended to cover such a flow of water as can be used for positive uses such as navigation or irrigation. It is not intended to cover flow of rainwater across roads, streets or lanes in cities or towns. A flow of rainwater in cities and towns is not a channel which is or may be used by the public.[22.]

[s 133.4] "Public."—

A class or community residing in a particular locality may come within the term "public". The number of persons claiming the right and the nature of right itself will be the criteria on which conclusions may be arrived at. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class. A public right does not depend upon the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public.[23.] The rights of riparian owners are private rights and this section has no application to them.[24.]

The words of the clause seem to imply not only that the way, river or channel must be one of public use but also that the obstruction must be to that public use.[25.] It is immaterial whether the obstruction causes practical inconvenience or not.[26.] An order was passed for demolition of a building which was in dilapidated condition. The Magistrate had taken judicial notice of the incessant rains in that area at that time since he was residing in that town. The order was held legal.[27.]

[s 133.5] "Trade or occupation" [*clause (b)*].—

This clause deals with occupations or trades which are *in themselves* injurious to health and physical comfort, and has nothing to do with trades which in themselves are innocuous but in the course of which the manager or plier of them commits a public nuisance.[28.] Where the engine of a factory was causing noise so as to be a serious nuisance to the people living in the neighbourhood, the Court forbade the working of the engine from 9 p.m. to 5 a.m.[29.] A rice mill working at night during season will not disentitle the inhabitants of the locality to relief under this section if it is established that such working is a nuisance.[30.]

[s 133.6] Prostitution.—

Prostitutes carrying on their occupation at certain places on a public road can,[31.] but prostitutes who live in their houses and behave themselves orderly and quietly cannot,[32.] be dealt with under this section.

[s 133.7] Persons protected [*clause (d)*].—

Persons protected by this clause are "persons living or carrying on business in the neighbourhood, or passing by". The clause does not apply to persons living actually in the alleged dangerous building. It does not apply to a house standing within its own compound.[33.]

[s 133.8] Fencing for prevention of danger to public [*clause (e)*].—

Under this clause, the Magistrate has only the power to require excavation adjacent to a public way to be fenced: he cannot order the person concerned to fill it up[34.] or to repair;[35.] neither can he order a person to excavate a tank.[36.]

[s 133.9] "Conditional order".—

A general[37.] or an unconditional[38.] order cannot be made. The order should not be vague, indefinite or ambiguous, but should be such as to afford by its terms to the person to whom it is directed what he is to do in order to comply with it.

Proceedings under the section are not intended to settle private disputes between different members of public. The word community cannot be taken to mean residents of particular houses.[39.]

[s 133.10] Order not questionable in Civil Court [*Sub-section (2)*].—

The Magistrate's order is not a conclusive determination of the question of title. The party aggrieved may bring a suit under section 42 of the Specific Relief Act against any one of the public, who formally claims to use the land in dispute as a public road.[40.]

[s 133.11] Order under J&K CrPC—

An order of removal of nuisance was passed without following the procedure prescribed by sections 135 and 137 of the J&K CrPC. The order was held to be not sustainable. Any order passed in violation of the mandatory requirement, i.e., providing the opportunity for opting procedure, could not be maintained. It deserved to be set aside.[41.]

[s 133.12] Ban on smoking.—

Considering the adverse effect of smoking on smokers and passive smokers, the Supreme Court issued directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibition of smoking in public places namely: Auditoriums; Hospital Buildings; Health Institutions; Educational Institutions; Libraries; Court Buildings; Public Offices, and Public Conveyances, including Railways.[42.]

[s 133.13] Difference between sections 133 and 144.—

The essential difference between these two sections is that the former expressly directs that the injunctional order of the Magistrate should, in cases to which that section applies, be an order *nisi*, so to speak, that is, an order accompanied by a condition that it is not to operate, if the party shows cause, within a specified time, why the order should not be obeyed; while, on the other hand, section 144 speaks only of an order absolute, without saying that the party is to be afforded an opportunity for showing cause against the order.[43.] Orders under the former section are to be directed to, and served on, persons individually: whereas under the latter section, an order may be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act.[44.] Where proceedings are taken under section 133, no order can be passed under section 144.[45.]

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10. *Tejmal Punamchand Burad v State of Maharashtra*, 1992 Cr LJ 379 (Bom).
11. *Ibid*.
12. *Kalyansundaram v Kalyani Ammal*, (1975) 2 Mad LJ 93.
13. *Suhelkhan Khudyarkhan v State of Maharashtra,* AIR 2009 SC 1868 : (2009) 5 SCC 586 , the conduct of trade must be injurious in *praesenti* to health or physical comfort of the community. There must be imminent danger to health or physical comfort of the community in the locality in which trade or occupation is being conducted.
14. *Farzand Ali v Hakim Ali*, AIR (1914) 37 All 26 , 28.
15. *Budh Singh v Hapu Ram*, 1996 Cr LJ 1576 (Raj).
16. *Ram Sagar Mandal v Alek Naskar*, (1922) ILR 49 Cal 682 (FB) : AIR 1922 Cal 59 ; *Abdul Wahid Khan v Abdullah Khan*, (1923) 45 All 656 .
17. *Lakshmi Cement v State of Rajasthan*, 1994 Cr LJ 3649 (Raj).
18. *Santosh Kumar Sharma v Motilal Maharwar*, 1993 Cr LJ 2072 (Pat).
19. *Brijkishore Rai v State of UP*, 2002 Cr LJ 4577 (All).
20. *Chatrapati Shivaji v Co-op Housing Society*, (1966) 70 Bom LR 588 .
21. *Suhelkhan Khudyarkhan v State of Maharashtra*, AIR 2009 SC 1868 : (2009) 5 SCC 586 .
22. *Dashrat v The State*, (1960) Raj 1457 : 1961 Cr LJ 403 .
23. *Harnandan Lal v Rampalak Mahto*, (1938) 18 Pat 76.
24. *CVM Velappa v VM Narayan Nair*, AIR 1964 Ker 252 : 1964 Cr LJ 417 .
25. *Maharana Shri Jaswantsangji*, (1898) 22 Bom 988, 992.
26. *Kedar Nath*, (1901) 23 All 159 , 16; *Jagroshan Bharthi v Madan Pande*, (1926) ILR 6 Pat 428 : AIR 1927 Pat 265 .
27. *Tejmal Punamchand Burad v State of Maharashtra*, 1992 Cr LJ 379 (Bom).
28. *Bareiro*, (1888) PR No. 47 of 1888; *Moti Shah*, (1889) PR No. 39 of 1889.
29. *Raghunandan Prasad v Emperor*, (1931) ILR 53 All 706 : AIR 1931 All 433 .
30. *State v Manji Raghu*, (1964) 2 Cr LJ 94 .
31. *Mt Nur Jan*, (1899) PR No. 2 of 1900.
32. *Nundo Kumaree Peshagur v Anand Mohun*, (1875) 24 WR (Cr) 68; *Basanta Baistabi*, (1901) 5 Cal WN 566.

33. *Queen-Empress v Jasoda Nand*, (1898) ILR 20 All 501.
34. *Sulemanji Gulam Husen*, (1896) 22 Bom 714; *Aluvala Guruviah*, (1908) ILR 31 Mad 280.
35. *Tatya*, (1871) Unrep CRC 50.
36. *Paul Dass*, (1868) 10 WR (Cr) 51.
37. *Manekchand*, (1887) Unrep CRC 342.
38. *The Empress v Brojokanto Roy Chowdhuri*, (1883) ILR 9 Cal 637.
39. *Suhelkhan Khudyarkhan v State of Maharashtra,* AIR 2009 SC 1868 : (2009) 5 SCC 586 .
40. *Chuni Lall v Ram Kishen Sahu*, (1888) 15 Cal 460 (FB); *Secretary of State v Jethabhai Kalidas*, (1892) 17 Bom 293.
41. *Abdul Aziz v Javaid Ahmad Khan*, 2003 Cr LJ 2942 (J&K).
42. *Murli S Deora v UOI,* AIR 2002 SC 40 at 41 : (2001) 8 SCC 765 . Smoking has now been banned in public places by the "Prohibition of Smoking in Public Places Rules" issued under powers conferred by section 31 of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.
43. *Hari Mohan Malo*, (1868) 1 Beng LR (A Cr J) 20.
44. *Queen-Empress v Jokhu*, (1886) ILR 8 All 99.
45. *Abdul Rakman Mia v Safar Ali*, (1910) 15 Cal WN 667.

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 134] Service or notification of order.—

(1) **The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons.**

(2) **If such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.**

This section lays down the procedure for the service of conditional order made under section 133 for the removal of nuisance. Notice to show cause has to be duly served upon the opposite party, as laid down in this section, before making the conditional order passed under section 133 absolute.

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 135] Person to whom order is addressed to obey or show cause.—

The person against whom such order is made shall—

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) appear in accordance with such order and show cause against the same.

Two alternatives are open to a person who is served with a notice. Firstly, he may carry out the order; and, secondly, he may show cause against the order. These alternatives are mutually exclusive. It is desirable that reasonable opportunity should be given to the party to show cause under clause (b) of this section or adduce evidence under section 138(1).[46.]

The power relating to air and water pollution. The Water Act, 1974, has not taken away the powers of the Sub-Divisional Magistrate (SDM) under section 133. It was held that SDM had power to pass order under section 136 to close a factory causing pollution when appreciation certificate was not produced.[47.]

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46. *Raimohan Karmakar*, (1916) 44 Cal 61 .

47. *Nagarjuna Paper Mills Ltd v SDM & RD Officer*, 1987 Cr LJ 2071 (AP).

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 136] Consequences of his failing to do so.—

If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code (45 of 1860), and the order shall be made absolute.

Whether there is objection or not to show cause, the Magistrate is bound to take evidence and satisfy himself that the order made by him is reasonable and proper.[48.]

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48. *Krishna Jillai Bhaskaran Nair v Varghese Samuel*, 1975 Cr LJ 104 (Ker).

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 137] Procedure where existence of public right is denied.—

(1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 138.

(3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

[s 137.1] Denial of the existence of public rights.—

This section requires, first, that the party against whom a provisional order has been made shall appear before the Magistrate, and deny the existence of the public right in question; secondly, that he shall produce some reliable evidence, eg, record of rights[49.] or settlement officer's receipt;[50.] and, thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction to continue the proceeding ceases. He has no jurisdiction to weigh the evidence and decide on which side the balance leans.[51.] He must leave the matter for decision by the Civil Court. He is not to weigh the evidence for the purpose of arriving at any definite conclusion regarding the truth or otherwise of the denial.[52.] There is no procedure laid down for an inquiry under this section. The Magistrate has not to decide anything finally. All he has to ascertain is whether a person denying the existence of a public right of way has reliable evidence in support of such denial. He need not take any evidence. He need merely satisfy himself that such reliable evidence exists in support of the denial.[53.] He cannot, however, dispense considering the objections and evidence of the people of the locality and rely simply on the local inspection notes left by his predecessor.[54.] Reliable evidence need not necessarily mean sufficient evidence to establish title.[55.] It is the party moving for proceedings under section 133 or somebody interested in asserting such right who has got to go to

the Civil Court.[56] If the Magistrate finds that there is no reliable evidence in support of the denial of a public right, he should proceed as laid down in section 138.

If the person to whom an order under section 133 is made denies the existence of a public right, the Magistrate must hold inquiry under section 137 before proceeding under section 138.[57] Section 137 applies only to those cases where there is no concluded decision by competent Civil Court regarding the existence of a public right and reliable evidence of the denial of such public right has been produced before the Magistrate.[58]

Where public nuisance is alleged to have been committed by construction on a public path, but the person concerned denies that it was a public path, the Magistrate should record a finding whether denial was correct or not. In the absence of such finding, removal order was held erroneous.[59]

A proceeding under section 133 was stayed till the final disposal of a civil suit under section 137(2) in a case where a conditional order for removal of obstruction to the public passage was passed and a civil suit was already filed in respect of the passage in dispute.[60]

In a case where the Magistrate had asked for evidence in support of denial of the existence of a public right, it was held that it must be treated as a step taken under section 137 and not one under section 138.[61]

The provisions of the section are mandatory.[62]

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49. *Atul Krishna v The State*, AIR 1966 Cal 215 : 1966 Cr LJ 528 .
50. *Ibid*.
51. *Thakur Sao v Abdul Aziz*, (1925) ILR 4 Pat 783 : AIR 1926 Pat 170 ; *C.P Veeran v Kuruvilla*, AIR 1960 Ker 211 : 1960 Cr LJ 904 ; *Jai Ram Singh v Bhuley*, (1963) 1 Cr LJ 33 : AIR 1963 All 27 ; *Chunilal v Ratti Ram*, AIR 1965 Punj 340 : 1965 Cr LJ 240 .
52. *Gati Krishna De v Govinda Mandal*, (1949) 2 Cal 41 ; *Rakmini Raman v Herdeo*, 1970 Cr LJ 833 AIR 1970 Pat 207 .
53. *Sushil Chandra Ghosh v Tushar Kanti Ghosh*, (1951) 1 Cal 126 ; *Gowdappa Gowda v Tippangowda*, (1964) 1 Cr LJ 111 .
54. *Joseph Abraham v State*, 1972 Cr LJ 1459 .
55. *Sukh Ram v Manohar Lal*, AIR 1960 Punj 377 : 1960 Cr LJ 993 ; *T N Sudhakaran v EM George*, 1973 Cr LJ 542 .
56. *Kusha Mandal v President, Gopalnagar Union Board*, (1934) 61 Cal 390 ; *Rozan v Faujdar*, (1930) 52 All 592 ; *Bihari*, (1939) Nag 600.
57. *Bharamarbar Das v Nandkishore Sahu*, 1984 Cr LJ (NOC) 84 (Ori); *Pavitaran Madukani v Konjukochu*, 1982 Cr LJ 103 (Ker); *Santosh Kumar Sharma v Moti Lal*, 1993 Cr LJ 2072 (Pat).
58. *KG Narayanan Kutty v TE Sekhara Menon*, 1985 Cr LJ 570 (Ker).
59. *Sri Ram v State of UP*, 1992 Cr LJ 181 (All).
60. *Brahmanand Rai v State of UP*, 1991 Cr LJ 3238 (All).

61. *S Azad Ahmad Rizvi v Md. Zia Uddin*, 1989 Cr LJ NOC 91 (Pat).

62. *Matabbar Molla v Golam Panjaton*, (1929) 57 Cal 368 ; *Julu Mia v Golam Hossain*, AIR 1960 Tripura 3 : 1960 Cr LJ 119 ; *Sarwan v Purilal*, (1962) 2 Cr LJ 716 . Contra *Kishorilal*, AIR 1960 All 244 : 1960 Cr LJ 450 ; *Gulan Singh*, AIR 1960 All 436 : 1960 Cr LJ 879 and *Vengara Narayanan v Orakkan Govindam*, (1963) 1 Cr LJ 819 .

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 138] Procedure where he appears to show cause.—

(1) If the person against whom an order under section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case.

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

The Magistrate is, under this section, bound to take evidence as in a summons case.[63.] The complainant has to start the proceedings by adducing evidence and then the party showing cause may produce his own evidence if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so.[64.] Even though the final order made in proceedings under section 133 is not a judgment as mentioned in section 354, the requirement that it should contain the reasons in support of it cannot be done away with.[65.]

[s 138.1] "As in summon Case".—

Summons case cannot be decided merely on the basis of affidavits. An opportunity must be given to lead evidence. Affidavit evidence can never be a substitute for oral evidence.[66.]

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63. *Bechan Teli v Emporer*, (1924) ILR 47 All 341 : AIR 1925 All 614 ; *Bhura v Tara Singh*, (1926) 49 All 270 ; *Abdul Karim*, (1927) 49 All 453 ; *Tirkha v Nanak*, (1927) 49 All 475 ; *Rameshwar Narayan*, (1938) 41 Bom LR 84 ; *Bhola*, (1963) 2 Cr LJ 542 .

64. *Hingu v Emperor*, (1909) 31 All 453 ; *Raimohan Karmakar*, (1916) 44 Cal 61 ; *Achhru*, (1929) 11 Lah 247; *Ambi v State of Kerala*, (1962) 2 Cr LJ 426 .

65. *Balwant v Chhangi*, AIR 1963 Punj 124 : 1963 Cr LJ 314 .

66. *Vasant Manga Mahajan v Baburao Bhikanna Naidu*, 1979 Cr LJ 526 (Bom).

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 139] Power of Magistrate to direct local investigation and examination of an expert.—

The Magistrate may, for the purposes of an inquiry under section 137 or section 138—

(a) direct a local investigation to be made by such person as he thinks fit; or

(b) summon and examine an expert.

The section empowers the Magistrate to direct local investigation and examine experts. The next section is a corollary to the present section and deals with the powers of the Magistrate to furnish written instructions to the investigator and issue orders as regards expenses and costs of investigators and experts.

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 140] Power of Magistrate to furnish written instructions, *etc.*—

(1) **Where the Magistrate directs a local investigation by any person under section 139, the Magistrate may—**

(a) **furnish such person with such written instructions as may seem necessary for his guidance;**

(b) **declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid.**

(2) **The report of such person may be read as evidence in the case.**

(3) **Where the Magistrate summons and examines an expert under section 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid.**

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 141] Procedure on order being made absolute and consequences of disobedience.—

(1) When an order has been made absolute under section 136 or section 138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code (45 of 1860).

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without such Magistrate's local jurisdiction and if such other property is without such jurisdiction, the order shall authorise its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

A conditional order made under section 133 cannot be questioned by a civil suit, but there is no such bar to an absolute order under this section being questioned in a Civil Court.[67.]

This Chapter of the Code provides a summary remedy for the abatement of public nuisances and it is not meant to give a final adjudication on questions of title. There is, accordingly, no bar to the maintainability of a civil suit to establish proprietary rights by reason of any order under this section.[68.]

The Magistrate cannot compel either party to go to a Civil Court.[69.]

67. *Duli Chand*, (1929) 51 All 1025 .
68. *Mukhtar Husain v Ganga Prasad*, (1951) 1 All 719 .
69. *Chakrapan v Emperor*, (1929) ILR 52 All 91 : AIR 1930 All 319 .

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 142] Injunction pending inquiry.—

(1) If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

This section is controlled in its effect by section 133. In a case, of an imminent breach of the peace, not being one of the matters dealt with in that section, a Magistrate acting under this section has no jurisdiction to pass an order of injunction on that account. The imminent danger or injury of a serious kind apprehended to the public must emanate naturally from the matters specified in section 133.[70.] Before issuing an injunction directing something to be done in the property of an individual, notice must be given to the person concerned of such injunction.[71.] Pre-requisites of an order of injunction are (i) a conditional order under section 133 and (ii) satisfaction by the competent authority under that section that there is imminent danger or serious injury to the public threatened by the public nuisance.[72.]

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70. *Mohammad Ashraf*, (1936) 18 Lah 303.
71. *Chamunny v State of Kerala*, 1979 Cr LJ NOC 151 (Ker).
72. *Mangal v State of UP*, 1977 Cr LJ 1036 (All).

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

B.—Public nuisances

[s 143] Magistrate may prohibit repetition or continuance of public nuisance.—

A District Magistrate or Sub-divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code (45 of 1860), or any special or local law.

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

C.—Urgent cases of nuisance or apprehended danger

[s 144] Power to issue order in urgent cases of nuisance or apprehended danger.—

(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

(7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or

by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

The fourth branch of preventive jurisdiction deals with cases, urgent in their character, of either nuisance or apprehended danger. The nuisance referred to is public nuisance, and the danger apprehended is disturbance of the public tranquillity, or riot, or affray. The very urgency of the case demands the laying aside of the usual formalities and preliminaries to the making of an order. Cases of ordinary public nuisance, shorn of their urgency, have been dealt with earlier. Orders under this section can be issued *ex parte*; but they are always temporary in their duration, for they remain in force only for two months, and, only in exceptional cases, the State Government can enhance the duration up to a further period of six months. An order under this section is an executive order for preserving peace. It was held that reasonable restriction to carry on trade can be imposed for the preservation of peace and such an order could be said to be invalid as infringing Article 19(1)(g) of the Constitution.

It was also held in the same case that the expression "public tranquillity" is not used in restricted sense of public order as understood under the preventive detention law.[73.]

The Executive Magistrate has wide powers under this section. When the Magistrate came to the conclusion that the situation was created which had disturbed public tranquillity and danger to human life, an order passed under section 144 is legal.[74.]

Whenever it appears to the Magistrate (the power is conferred on the District Magistrate, Sub-Divisional Magistrate or any Executive Magistrate specially empowered by the State Government), that (a) immediate prevention of a public nuisance, or (b) speedy remedy of an apprehended danger is desirable, he may issue a written order. The order must set forth the material facts of the case; and be served as a summons. It must either direct any person (a) to abstain from a certain act, or (b) to take certain order with certain property in his possession or under his management. The direction can be given only in the three cases specified in the section, namely, to prevent (1) obstruction, annoyance or injury to any person lawfully employed; (2) danger to human life, health or safety; or (3) disturbance of the public tranquillity, or a riot or an affray. In cases of emergency, the order can be passed *ex parte*. It may either be directed to a person individually or to persons residing in a particular area, or to the public generally when present in a particular place. The Magistrate or the State Government may rescind or alter the order either *suo motu* or on the application of the person aggrieved. On receipt of the application, the person is entitled to be heard. If the application is rejected, reasons for the rejection should be recorded in writing. The order can at the most remain in force for eight months. It was held that the jurisdiction of the Sub-Divisional Magistrate (SDM) is concurrent with the jurisdiction of the Executive Magistrate. The main object of the provision is prevention of the breach of peace. When the provision is a preventive measure, any authority having jurisdiction can initiate the same. Priority of jurisdiction cannot be considered in such circumstances. Thus, initiation of the proceeding by the Sub-Divisional Magistrate and not the Executive Magistrate does not call for any interference in revision.[75.]

The gist of the action under this section is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences. As it is possible under the section to act *ex parte,* it is obvious that the emergency must be sudden and the consequences sufficiently grave. But there is no general proposition that an order under this section cannot be passed without taking evidence.[76.]

The scheme and the provisions of the section show that it is meant to provide for a temporary remedy to meet an emergency and that it applies to cases where the temporary orders in the nature of things would be appropriate and would afford a reasonably adequate relief under the circumstances of the case.[77.] The object of this section is to enable a Magistrate, in cases of emergency, to make an immediate order for the purpose of preventing an imminent breach of the peace, *etc*.; but it is not intended to relieve him of the duty of making a proper inquiry into the circumstances which make it likely that such breach of the peace, *etc*., will occur.[78.] The extent of the authority possessed by the Magistrate is to suspend the exercise of the right on particular occasions and not to prohibit it absolutely and before the occasion arises which entitles him to act.[79.] These restrictions are within the limits of the saving provision of Article 19(2) and (3) of the Constitution.[80.] The exercise of power under section 144 of the CrPC must be in aid of the legal rights and against those who interfere with the lawful exercise thereof. An order under section 144 prohibiting the petitioners from taking out an immersion procession of *Goddess Durga* and passing in front of a mosque with music on a particular day was held to be violative of the rights guaranteed by Articles 25 and 26 of the Constitution of the processionists.[81.] An order under section 144 can be temporary and valid for two months only. An order under section 144 directing the respondent to remove a bund obstructing the flow of water was quashed as it was unlimited in duration and permanent in effect.[82.] The Magistrate cannot order a party to be dispossessed and order other party to be put in possession in a proceeding under section 144.[83.]

An order under section 144 is administrative in nature and not judicial or *quasi*-judicial. It is amenable to writ jurisdiction if it violates the fundamental rights.[84.]

[s 144.1] "Immediate prevention or speedy remedy".—

The existence of the circumstances, showing the necessity of immediate action, is a condition precedent to the Magistrate having the power to act under this section.[85.]

[s 144.2] "The material facts of the case".—

The Magistrate must state the material facts in the order.[86.] Detailed substance, grounds or reasons, on which order is based need not be given.[87.] Magistrate must be satisfied about the existence of urgent circumstances and such urgency must be reflected in the order under section 144 itself with reasons thereof.[88.]

[s 144.3] "Abstain from a certain act".—

The Magistrate is only entitled to make a restrictive order preventing a person from doing an act. He cannot make a mandatory order directing a person to do some act.[89.] The words "abstain from a certain act" do not empower a Magistrate to make a positive order requiring a person to do particular things;[90.] neither can the Magistrate in the garb of a negative order ask the person to do certain thing.[91.] The words "certain act" mean a definite act,[92.] e.g., to widen and heighten the doorway of a temple with a view to prevent over-crowding and improve ventilation.[93.] An order to abstain from interference with a temple and its property is an order to abstain from a "certain act."[94.] An order can be passed against more than one person. One person may be asked to abstain from doing certain act and another person may be directed to act under a

certain order.[95.] So also is an order prescribing different hours of worship at a mosque by different sects of Muslims.[96.] No order can be made directing that all music should cease when any procession is passing a certain place of worship[97.]; or requiring a person to hold a market on certain days only;[98.] or which is by its very nature irrevocable, *e.g.*, an order to cut down a large quantity of trees.[99.]

This section is not confined to acts, which, if allowed to be completed, would amount to an offence, but applies also to acts which if completed would furnish grounds for a civil action only. It applies to an infringement of a right of easement, as it causes an injury to the owner thereof.[100.]

[s 144.4] Speech likely to create communal antagonism.—

A speech in public which is likely to create communal antagonism and hatred and also likely to result in fissiparous activities which may gain foothold and undermine communal harmony. A prohibitory order was passed by the District Administrative Authorities. It was held that interference by the Court in such matters should be an exception and not a rule. No presumption can be drawn that the people of the locality were not so fickle minded as to be swayed away by such speeches. Freedom of speech and expression are subject to reasonable restrictions in social interest, preservation of public order and rule of law. Secularism is not to be confused with communal or religious concepts of a person or group of persons.[101.]

[s 144.5] Public order and tranquillity.—

In urgent cases of nuisance or apprehended danger, prohibitory orders can be imposed by the Executive Magistrate appointed as an Additional District Magistrate (ADM) under jurisdiction conferred by Notifications of 27 March 1974 and 6 July 1974. The fact that the notification was not placed before the High Court was held to be not a ground to conclude that the ADM who passed the order had no authority. It is the burden of the party challenging jurisdiction of ADM to place materials before the Court to substantiate his claim. No hard and fast guideline having universal application can be laid down for passing such orders. The scheme underlying section 144 and the Code carry sufficient in-built safeguards to control unwarranted exercise or abuse of powers. The orders are also preventive and not punitive.[102.]

[s 144.6] Conferment of power on Additional District Magistrates [*Sub-section (1)*].—

ADMs have to be specially empowered by notification for exercise of powers under this section. The Notification relied on by the State in this case did not show proper conferment of powers. The order of the ADM preventing the petitioner from participation in a public meeting was held to be without jurisdiction.[103.]

[s 144.7] " Ex parte" [*Sub-section (2)*].—

Orders can be passed only under two circumstances: (1) in cases of emergency;[104.] and (2) where the circumstances do not admit of personal service.[105.] But, ordinarily,

an order under the section should not be made, without an opportunity being afforded to the person against whom it is proposed to make it, to show cause why it should not be passed.[106.]

Where the operation of tourist buses from a place near national highway was restrained under section 144 of CrPC by the District Magistrate on the ground of traffic hazard, the MP High Court quashed the order as, firstly, there was no urgency, secondly, no opportunity was given to the person affected to explain his position and lastly, the order was based on wrong assumption.[107.]

[s 144.8] Persons to whom order can be directed [*Sub-section (3)*].—

This sub-section is an exception to the general rule that the order shall be directed to a particular person. The effect of the order being in the interest of public order and the interests of the general public, occasions may arise when it is not possible to distinguish between those whose conduct must be controlled and those whose conduct is clear. A general order thus may be necessary when the number of persons is so large that distinction between them and the general public cannot be made without the risks mentioned in the section.[108.] It was held by the Supreme Court that the kind of orders mentioned in section 144(3) are obviously intended to prevent dangers to life, health and safety or peace and tranquillity of members of the public. They are only temporary orders which cannot last beyond two months from the making thereof as is clear from section 144(6) of the Code. The question of the title cannot be decided here at all.[109.]

In a case relating to imposition of prohibitory orders on a crowd holding protest rally at *Ramlila Maidan* in Delhi, it was held by the Supreme Court that clamping of prohibitory orders on persons attending yoga camp and protesting against black money and corruption when they were asleep and resorting to *lathi charge* and shelling tear gas to disperse sleeping persons without giving notice of such prohibitory order, was arbitrary State action when there was no justification for such immediate action.[110.] It was further held by the Court that the use of public place for purpose other than for which permission was obtained or apprehended overcrowding of the public place are not relevant grounds for invoking section 144. It was held that on facts, the actual occupancy in *Ramlila Maidan* by peacefully agitating members of public was less than its capacity and therefore, there was no justification to issue prohibitory order on this count.[111.] It was also held that such prohibitory orders under section 144, being a restriction of freedom of speech and to assemble peacefully, must be in writing and should set out grounds for imposing such order and it should remain in force for a limited period of time.[112.]

[s 144.9] Period of order [*Sub-section (4)*].—

Every order issued under the section is timed to expire at the end of two months. It is not competent to a Magistrate to revive or resuscitate his order from time to time.[113.] The grant of what in effect is an order for perpetual injunction is entirely beyond the Magistrate's powers.[114.] Successive promulgation of orders under this section to avoid a decision of the dispute is an unjustifiable use of the Magistrate's powers.[115.] So, also, a direction by a Magistrate to the Electric Supply company to restore supply of electric energy to a defaulting municipality cannot be warranted under this section because the

direction continues such supply even when the order has spent its force.[116.] But the order is not bad if it omits to state the period of duration.[117.]

The State Government may extend the period to six months from the date on which the order made by the Magistrate would expire on grounds of prevention of danger to human life, health or safety and prevention of riot or affray. The power conferred on the State Government is an executive power; but the same should not be arbitrary or excessive and the manner of imposition should be fair and just. It is possible for the Sessions Judge or the High Court to interfere in revision even with regard to an order under section 144 of the CrPC in exceptional cases when there is glaring defect in the procedure or manifest error on the point of law and consequently flagrant miscarriage of justice. All orders passed under the CrPC are subject to revision under section 397 of the CrPC and there is no exception in respect of orders passed under section 144. The orders under section 144of the CrPC have greater finality than the order merely summoning the accused. The proceedings, therefore, cannot be considered to be wholly interlocutory.[118.]

Period of 60 days has to be counted from the date of the prohibitory order passed at the time of the initiation of the proceedings and not from the date of the final order.[119.]

[s 144.10] Rescission or alteration [*Sub-sections (5) and (6)*].—

Failure to apply under these sub-sections for rescission or alteration of a positive or negative order under section 144 is no bar to the filing of revision petition under section 401 against it.[120.]

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73. *BBN School v Dist Mag, Allahabad*, 1990 Cr LJ 422 (All).
74. *Ummul Kulus v Ex Magistrate, Union Territory*, 1991 Cr LJ 262 (Ker).
75. *M Das v DC Das*, 1989 Cr LJ NOC 163 .
76. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 , 2496 : 1971 Guj LJ 1720 : (1970) 3 SCC 746 , 739.
77. *CJR*, (1919) 22 Bom LR 157 , 163.
78. *Abdul v Lucky Narain Mundul*, (1879) 5 Cal 132 , 135.
79. *Sundaram*, (1882) 6 Mad 203, 213 (FB).
80. *Ram Manohar Lohia*, AIR 1968 All 160 ; *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 : 1971 Guj LJ 1720 : (1970) 3 SCC 746 , 739.
81. *Prabhas Kumar Roy v The Officer in Charge, Raninagar Police Station*, 1985 Cr LJ 957 (Cal). **See** *also Gulam Abbas v State of UP*, AIR 1981 SC 2198 : 1981 Cr LJ 1835 .
82. *Parathodu Panchayat v Kanjirappally Panchayat*, 1984 Cr LJ 971 (Ker); *Acharya Jagdishwaran and Avadhuta v Commissioner of Police, Calcutta*, AIR 1983 SC 2238 : 1983 Cr LJ 1872 .
83. *AH Wheeler v State of Bihar*, 1988 Cr LJ NOC 6 (Pat).
84. *Gulam Abbas v State of UP*, AIR 1981 SC 2198 : 1981 Cr LJ 1835 : (1982) 1 SCC 71 .

85. *Kamini Mohan Das Gupta v Harendra Kumar Sarkar*, (1911) ILR 38 Cal 876; *Jatindranath*, 1967 Cr LJ 1716 (FB).

86. *Karoolal Sajawal v Shyam Lal*, (1905) 32 Cal 935 , 940; *Kamini Mohan Das Gupta v Harendra Kumar Sarkar*, (1911) 38 Cal 876 . **See also** *Prodyot Kumar v Bank of India*, 1973 Cr LJ 1361 .

87. *Chander Singh Mandyal v State of HP*, 1993 Cr LJ 3697 (HP).

88. *Premoda Medhi v Gauhati Roller Flour Mills Ltd*, 2003 Cr LJ 122 (Gau).

89. *Kushumkumaree Debee v Hemalinee Debee*, (1933) 63 Cal 11 .

90. *BN Sasmal*, (1930) 58 Cal 1037 .

91. *Ramanlal Bhogilal Patel v NH Sethna*, 1971 Cr LJ 435 .

92. *Abayeswari Debi v Sidheswari Debi*, (1888) 16 Cal 80 .

93. *Ramchandra Eknath*, (1869) 6 BHC (CRC) 36.

94. *EV Ramanuja Jeeyarsvami v Ramanuja Jeeyar*, (1881) 3 Mad 354.

95. *BBC School v Dist Mag, Allahabad*, 1990 Cr LJ 422 (All).

96. *Abdhulla Saheb*, (1900) 24 Mad 262.

97. *Muthialu Chetti v Bapun Saib*, (1880) 2 Mad 140; *Sundaram*, (1883) 6 Mad 203 (FB).

98. *Shyamanand Das Paharaj v Emperor*, (1904) ILR 31 Cal 990.

99. *Uttam Chunder Chatterjee v Ram Chunder Chatterjee*, (1870) 13 WR 72 .

100. *Rashid Allidina v Jiwan Das Khemji*, (1942) 1 Cal 488 .

101. *State of Maharashtra v Dr Praveen Bhai Thogadia,* AIR 2004 SC 2081 : (2004) 4 SCC 684 : (2004) Cr LJ 1825 .

102. *State of Karnataka v Dr Praveen Bhai Thogadia,* AIR 2004 SC 2081 : (2004) 4 SC 684 : 2004 Cr LJ 1825 .

103. *Praveen Bhai Thogadia (Dr) v State of Karnataka*, 2003 Cr LJ 1769 (Kant).

104. *Joyanti Kumar Mookerjee v Middleton*, (1900) ILR 27 Cal 785, 787; *Sundaram*, (1883) 6 Mad 203, 223 (FB).

105. *Mahamaddi Mollah v Emperor*, (1898) 2 Cal WN 747.

106. *Queen-Empress v Tirunarasimha Chari*, (1896) ILR 19 Mad 18, 20.

107. *Nand Kishore Tiwari v Collector*, 1993 Cr LJ 2883 (MP).

108. *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*, AIR 1971 SC 2486 : 1972 Cr LJ 1720 : (1970) 3 SCC 746 , 739.

109. *Md Gulam Abbas v Md Ibrahim*, AIR 1978 SC 422 : 1978 Cr LJ 496 : (1978) 1 SCC 226 .

110. In Re *Ramlila Maidan Incident v Home Secretary, UOI*, (2012) 5 SCC 1 : 2012 Cr LJ 3516 (SC) : (2012) 2 SCC (cri) 241 .

111. *Ibid*.

112. *Ibid*.

113. *Govinda Chetti v Perumal Chetti*, (1913) 38 Mad 489.

114. *Gopi Mohun Mullik v Taramoni Chowdhrani*, (1879) 5 Cal 7 (FB); *Bradley v Jameson*, (1882) ILR 8 Cal 580; *Sheodin*, (1887) 10 All 115 .

115. *Usharani v Mongal*, 1970 Cr LJ 1298 .

116. *ME Supply Co v State of Bihar*, 1973 Cr LJ 143 .

117. *Ram Nath Chowdhry v Emperor*, (1907) ILR 34 Cal 897 (FB).

118. *Zila Parishad, Etawah v KC Saxena*, 1977 Cr LJ 1747 (All).

119. *Maula Bux Ansari v Ram Rup Sah*, 1983 Cr LJ 1215 (Pat).

120. *Purna Chandra v Saoget Ali Mallick*, AIR 1960 Cal 715 : 1960 Cr LJ 1445 .

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

C.—Urgent cases of nuisance or apprehended danger

[121][s 144A] Power to prohibit carrying arms in procession or mass drill or mass training with arms.—

(1) The District Magistrate may, whenever he considers it necessary so to do for the preservation of public peace or public safety or for the maintenance of public order, by public notice or by order, prohibit in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organising or holding of, or taking part in, any mass drill or mass training with arms in any public place.

(2) A public notice issued or an order made under this section may be directed to a particular person or to persons belonging to any community, party or organisation.

(3) No public notice issued or an order made under this section shall remain in force for more than three months from the date on which it is issued or made.

(4) The State Government may, if it considers necessary so to do for the preservation of public peace or public safety or for the maintenance of public order, by notification, direct that a public notice issued or order made by the District Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which such public notice or order was issued or made by the District Magistrate would have, but for such direction, expired, as it may specify in the said notification.

(5) The State Government may, subject to such control and directions as it may deem fit to impose, by general or special order, delegate its powers under subsection (4) to the District Magistrate.

***Explanation.*— The word "arms" shall have the meaning assigned to it in section 153- AA of the Indian Penal Code (45 of 1860).].**

[s 144A.1] CrPC (Amendment) Act, 2005 [*Clause (16)*].—

In order to curb the militant activities of certain communal organisations, a need was felt to strengthen the hands of State authorities for effectively checking communal tension and foster a sense of complete security in the minds of members of the public. This clause, therefore, inserted section 144A in the Code to enable the District Magistrates to prohibit mass drill (or training) with arms in public places. (*Notes on Clauses*).

121. New section 144A inserted by the CrPC (Amendment) Act, 2005 (25 of 2005) section 16 (commencement date is yet to be notified).

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

D.—Disputes as to immovable property

[s 145] Procedure where dispute concerning land or water is likely to cause breach of peace.—

(1) **Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.**

(2) **For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.**

(3) **A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.**

(4) **The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute:**

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

(5) **Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.**

(6)

(a) **If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of**

the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted there from in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub-section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.

[s 145.1] STATE AMENDMENT

Maharashtra.—*The following amendments are made by Maharashtra Act 1 of 1978, section 2 (w.e.f. 15-4-1978)*.

S. 145.—In its application to the State of Maharashtra—

(i) in section 145(1), for the words "Whenever an Executive Magistrate", substitute "Whenever in Greater Bombay, a Metropolitan Magistrate and elsewhere in the State, an Executive Magistrate".

(ii) for sub-section (10), substitute the following:—

"(10) In the case of an Executive Magistrate taking action under this section nothing in this section shall be deemed to be in derogation of his power to proceed under section 107. In the case of a Metropolitan Magistrate taking action under this section, if at any stage of the proceeding, he is of the opinion that the dispute calls for an action under section 107, he shall after recording his reasons, forward the necessary information to the Executive Magistrate having jurisdiction to enable him to proceed under that section."

[s 145.2] Scope.—

This is the last branch of the preventive jurisdiction of the Magistrate. It relates to disputes regarding possession (section 145), or right of use (section 147), of land or water or its boundaries, which are bound to be very keen and which too easily lend themselves to breach of the peace. The disputes do not affect the public or community at large; but between the disputants, they are fraught with consequences dangerous in themselves. The business of the Magistrate is not to go into questions of title, but to meet the urgency of the situation by maintaining the party in possession. The Magistrate can, therefore, call upon the parties to put in written statements in support of their claim to actual possession. The order is to be served as a summons. The Magistrate is to peruse the statements, hear the parties and weigh the evidence, in order to ascertain who was in possession at the date of the order.[122.] If possession has been wrongfully taken within two months of the police report or other information, or after that date and before the date of his order, the person so dispossessed is to be taken as the person in possession. When the subject-matter is liable to speedy and natural decay it may be sold, and the sale-proceeds can be dealt with as the Magistrate thinks fit. If the Magistrate is satisfied that no dispute exists, he can drop the proceedings. If he declares that one party is in possession, that party can be evicted only in due course of law, i.e., by a decree of the Civil Court on title. Where the Magistrate passed order restraining one party and declaring that the other party was in possession without discussing evidence and giving reasons, the High Court set aside the order observing that every order under section 145 CrPC should contain a decision on the point of possession and requires reasons there for.[123.] If a party to the proceeding dies his legal representatives can be brought on the record.

A Magistrate acting under this section ought to respect the decision of,[124.] and even interim injunction granted by, the Civil Court.[125.] Suit for specific performance was pending in Civil Court. The Magistrate was not competent to initiate proceedings under section 145 regarding dispute as to immovable property.[126.] He should not allow proceeding tantamount to encouraging defiance of the Civil Court's decree.[127.] The mere pending of a suit in a Civil Court does not however take away the jurisdiction of the Magistrate.[128.] But where a shop was attached in a proceeding under this section, and subsequently civil suit was filed for injunction, and Civil Court had not issued any orders with regard to the attached shop nor the plaintiff-petitioner could show that there was no more apprehension of breach of peace, it was held that the order attaching the property will continue till the matter is finally decided by the Civil Court.[129.]

If the Civil Court decides the question of possession, it would be binding on the criminal court and the Magistrate cannot proceed under section 145.[130.]

Where both the parties were admittedly co-owners of the plot in dispute, one of them was in possession of the plot, and had obtained an order of the Civil Court directing the parties to maintain *status quo*, parallel proceedings under this section by the other party, were held to be abuse of the process of the Criminal Court, and Magistrate's order attaching the property in dispute and appointing a receiver therefore was quashed.[131.]

The Supreme Court has observed that a civil suit normally prevents the invoking of the jurisdiction of Criminal Courts as laid down by the Supreme Court in *Ram Sumer Puri Mahant v State of UP*,[132.] but the ratio does not apply where there is no dispute about title, parties being co-owners and there is no partition. Where the dispute is not on the right to possession but on the question of possession, the Magistrate is empowered to take cognizance under section 145 CrPC. The proceedings under section 107 CrPC are for public peace and proceedings under section 145 CrPC relate to disputes regarding

possession concerning land, *etc*. Therefore, dropping of proceedings under section 107 CrPC cannot furnish ground for dropping proceedings under section 145 CrPC.

[s 145.3] "Magistrate" [*Sub-section (1)*].—

The inquiry is to be done by an Executive Magistrate.

[s 145.4] "Satisfied".—

It is essential for the assumption of jurisdiction by the Magistrate that he should be "satisfied" either from a police report or from other information which would include an application by the party dispossessed[133.] that there is a likelihood of a breach of the peace. The question whether on the materials before the Magistrate, he should initiate proceedings under this section or not is in his discretion. No hard and fast rule can be laid down as to the sufficiency of materials for his satisfaction. Where the Magistrate expressed his satisfaction on the basis of the facts set out in the application made before him and after he had examined the applicant on oath, but the Magistrate had failed to record in his preliminary order the reasons for his satisfaction, it was held by the Supreme Court that those facts were *prima facie* sufficient and were the reasons leading to his satisfaction.[134.] On failure of the Magistrate to mention the grounds for passing the order, it is liable to be set aside.[135.] The failure to record finding by the Magistrate vitiate the proceeding.[136.] When there is an application for summoning of witnesses, the Magistrate is required to exercise his discretion while deciding the application and is not bound to call witness in case he thinks it is not necessary for the determination of the question of possession on the date of passing of the preliminary order.[137.] The mere fact that there is a dispute concerning land is clearly not sufficient by itself to give him jurisdiction.[138.] But the Magistrate need not write in his preliminary order in so many words that he was satisfied from the police report that a dispute likely to cause breach of the peace existed; it is enough if he mentions the grounds on which he decided to pass the preliminary order.[139.]

[s 145.5] "Report of a police officer".—

The police report on which the Magistrate founds the initiatory order should contain a statement of facts from which he may be satisfied of the existence of a likelihood of a breach of the peace.[140.]

[s 145.6] "Dispute concerning land".—

These words are to be understood not quite literally, but as a dispute relating to actual possession.[141.] A dispute between two parties one of whom claims joint possession while the other claims exclusive possession over the disputed land and contests the opposite party's right, is within the section.[142.]

The dispute was with regard to the possession of the book stall on the railway station between the agent and the principal. It was held that an agent was an agent and the question of permissive possession and *locus standi* arose whether it was a case under section 144 or 145.[143.]

There was a dispute over the possession of land. Emergency proceedings were conducted under section 144. The finding regarding the possession recorded therein cannot be treated as evidence of possession in subsequent proceedings under section 145.[144.]

Standing trees will come within this expression.[145.]

Where a dispute arose between the parties over property and proceedings under sections 107 or 151 were initiated, it was held by the Supreme Court that it is wrong to contend afterwards that instead of a proceeding under sections 107 or 151, one under section 145 of CrPC should have been initiated, because it is the officer on spot who has to take decision as to what provisions should be resorted to according to prevailing circumstances.[146.]

[s 145.7] "Dispute".—

The essence and basis of the jurisdiction depends upon there being a dispute likely to create a breach of the peace. The term "dispute" means a reasonable dispute, a *bona fide* dispute, a dispute between parties who have each some semblance of right or supposed right. The Magistrate has jurisdiction to act under this section provided there is a dispute, i.e., both sides disagree on the question of actual possession. It would not be a dispute if one party claimed right to possession and the other party asserted actual possession.[147.] When the rights of the parties have once been determined by a Civil Court, there is no longer a "dispute" within the meaning of the section.[148.] The proceeding must be terminated once it is found that in view of the civil litigation the existence of the dispute of the nature contemplated under section 145 no longer survives, for that marks the end of the Magistrate's jurisdiction there under.[149.]

The pendency of a civil suit regarding a land dispute does not deprive the Magistrate to initiate proceedings under section 145 of CrPC if there exists a dispute over the possession of land and apprehension of breach of peace.[150.] Of course, if a final decree is passed or even an interim order is passed, the Criminal Court will respect the same and in such cases, it will not be proper to initiate proceedings under section 145.[151.]

In a civil suit relating to land, the Court had passed an order for maintenance of *status quo*. On the police report, Magistrate had initiated proceedings under sections 145 and 146. The order attaching the land and appointing a receiver under section 146 was not justified and the order was quashed.[152.]

It was held that in cases of disputes regarding immovable property, a party should not be permitted to litigate before a Criminal Court when, civil suit is pending in respect of the same subject-matter. As an order made under section 145 deals only with the factum of possession of the party as on a particular day, it confers no title to remain in possession of the disputed property. The order is subject to the decision of the Civil Court, as it is the proper forum to decide the question of title.[153.]

The term "dispute" includes a dispute relating to the right of performing religious service in a public temple where it is likely to cause a breach of the public peace.[154.] Where the dispute related to a mini bus, the Magistrate's order appointing Police Inspector as custodian of the disputed property under section 145 was held illegal as the dispute did not relate to immovable property.[155.]

[s 145.8] "Likely to cause a breach of the peace".—

It is enough that a dispute likely to cause a breach of the peace existed but there must be a likelihood of the breach of the peace,[156.] which likelihood must not be too remote.[157.] The term "likelihood" does not mean "imminence". [158.]It is "this likelihood with the consequent necessity for immediate action"[159.] which is the foundation of jurisdiction. The making of an order six months after the report of the police is bad.[160.] It is not necessary that the apprehension of breach of peace should continue or exist at the time of passing the final order under section 145(6).[161.] *Res judicata* does not apply in such cases.[162.]

[s 145.9] "Within his local jurisdiction".—

The "land or water" must be situated entirely within the local limits of the jurisdiction of the Magistrate taking action.[163.] If the land or water lies within the jurisdiction of more Magistrates than one, each one of them can take action only with respect to the portion or portions lying within the limits of his jurisdiction,[164.] though in doing so he may act upon the police report made by a police officer in another district.[165.]

[s 145.10] "Order in writing".—

The order needs necessarily to be in writing. It should be addressed to known individuals, and not be in the form of a public proclamation or citation.[166.] It must, firstly, set out grounds of the Magistrate's belief,[167.] and, secondly, call upon the parties concerned (a) to attend the Court, and (b) to put in statements in writing showing their respective claims to possession. It is meant to perform the same function, as is done by a notice to show cause under sections 107, 108, 109 and 110, or a conditional order under section 133. It forms as it were a charge-sheet for proceeding under this section. It must be clear, precise and full. The party against whom it is meant to operate must be able to gain from it a complete idea of the case he has to meet.[168.]

The order should state the information upon which the Magistrate has proceeded,[169.] should specify the property to which it relates[170.] and should be served personally on the parties affected by it.[171.] Where the Magistrate proceeds under section 145of CrPC without being satisfied as to the existence of a dispute likely to cause breach of peace he acts without jurisdiction and even the provision under section of 465 CrPC cannot cure such irregularity and such proceeding is liable to be quashed.[172.]

It was held that passing of a preliminary order was mandatory. It is the foundation for the exercise of jurisdiction by the Executive Magistrate.[173.]

[s 145.11] "Parties concerned in such dispute".—

This phrase indicates all persons claiming to be in possession at the time of the initial order under sub-section (1).[174.] It means not merely the actual parties to, but all persons who may be concerned, in the dispute, the object being to prevent a breach of the peace.[175.] The phrase includes a person who claims to be in possession of the disputed land, as agent to, or manager for, the actual proprietors who are not resident

within the appellate jurisdiction of the High Court,[176.] but does not include a receiver appointed by the High Court.[177.]

[s 145.12] "Actual possession".—

"Actual possession" means actual physical possession, i.e., the possession of the person who has his feet on the land, who is ploughing it, sowing it or growing crops on it, entirely irrespective of whether he has title or right to possess it. It is not the same as a right to possession nor does it mean lawful or legal possession. It may be that of a trespasser without any title whatever. The aim and object of the section is the maintenance and preservation of the public peace. Possession means lawful possession and not possession taken by force in defiance of law, nor that of a trespasser and wrongdoer.[178.] The intention of the Legislature is obviously to maintain the *status quo*.[179.] The question of title with respect to the property in dispute is not relevant when there is sufficient evidence regarding actual possession in the case. The Magistrate can, however, consider the question relating to title where such consideration is necessary to effectively decide the question of possession. The question of title, therefore, can be referred in proceedings under section 145 only incidentally.[180.]

[s 145.13] Joint possession.—

This section does not apply where two parties are in joint possession of the property in dispute, and one of them tries to evict the other so as to endanger the public peace.[181.] If the Magistrate finds that the parties were in joint possession of the disputed property, wherein one of the parties claimed exclusive possession while the other claimed joint possession, he must drop the proceedings. If he finds one of them to be in exclusive possession thereof, he shall have to pass an order under section 145(6) of CrPC.[182.] This section applies to a dispute between joint owners as to the right to collect rents[183.] or right to possession by the manager.[184.]

[s 145.14] Question of title and pendency of civil suit.—

The Magistrate need not go into the question of title, but should concern himself only with the question of possession.[185.] The question of title should in general be decided by the Civil Court.[186.] It was held by the Supreme Court that in passing an order under section 145, the Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course by law. The life of the said order is *co terminus* with the passing of a decree of a Civil Court. The foundation of his jurisdiction is an apprehension of the breach of the peace, the orders are thus merely police orders and decide no question of title.[187.]

Where a suit for a declaration of title to the property in question was pending before the Civil Court, it was held that any appropriate relief in the matter concerned could be obtained through the Civil Court itself and the Magistrate had no jurisdiction to entertain the petition under section 145.[188.]

The claim of one partner, even though in possession of partnership property, of being in possession over such property to the exclusion of the other so as to attract the

provisions of this section, cannot be countenanced. Where there was dissolution of partnership, but there was no settlement of accounts and no winding up of partnership business, it was held that under such circumstances, the partners continued in joint possession.[189.] Proceedings under section 145 can be initiated even where land is held by co-tenant or is under the possession of the co-sharers.[190.]

[s 145.15] "Land or water" [*Sub-section (2)*].—

Includes buildings, markets, fisheries,[191.] crops and other produce of land[192.] and the rents and profits of any such property. It includes the right of ferry.[193.] Moveable property as such would not ordinarily come within the purview of this section, unless it is in the shape of crops or other produce of land or rents and profits of the property in dispute. But when the dispute relates not merely to a factory building but also to valuable machinery, coal and other movables on the premises, the police officers appointed to take charge of the factory are entitled to retain for the time being the custody of the moveable property, subject to the final order of the Magistrate.[194.]

If the final order be not definite as regards land in dispute, then the order should be treated as without jurisdiction.[195.]

[s 145.16] "Crops or other produce of land".—

This expression means, according to the Calcutta High Court,[196.] "crops or other produce of land attached to the land, but not crops which have been severed" from the land and stored. It is not, according to the Madras High Court,[197.] restricted to crops still on the land.

[s 145.17] "Produce".—

Includes also a finished article or a semi-finished article made from raw material, e.g., molasses.[198.]

[s 145.18] Service of orders [*Sub-section (3)*].—

This sub-section lays down two essentials: (1) service of the order in the manner of a summons on the person affected; and (2) publication of the order at a conspicuous place near the subject of dispute. If either is left out, the proceedings are nullified,[199.] but if the parties are otherwise present, noncompliance of the above does not invalidate the proceedings.[200.]

[s 145.19] Inquiry [*Sub-section (4)*].—

The Code contemplates a determination of the question of possession without any reference to the merits of the respective claims of the disputing parties to a right to possess the subject of dispute. The inquiry is limited to the question as to who was in actual possession on the date of the preliminary order, irrespective of the rights of the

parties.[201.] The question of possession, moreover, has to be determined with reference to a specified point of time, namely, the date of the initial order or in the case of forcible dispossession, a date within two months next preceding the receipt of police report or information or before the date of such order. The inquiry means taking of evidence in the case. It does not mean local inspection and inquiry from persons present at the time.[202.] A decision influenced by observation made during local inspection is vitiated.[203.] Where the Magistrate is satisfied that there is no likelihood of a breach of the peace, he ought to drop the proceedings.[204.] Proceedings once dropped cannot be revived if there is no fresh material.[205.] He is not bound to give the parties an opportunity to establish the contrary,[206.] or even to take evidence,[207.] but if the Magistrate thinks it necessary, he can take further evidence.

Where there was neither police report nor any information with the Court that the loss of possession has taken place within the period contemplated by section 145(4) (*proviso)*, the Supreme Court said that the order of restoration could not be granted.[208.]

[s 145.20] "Without reference to the merits of the claims".—

The Magistrate is solely concerned with "the fact of actual possession". Evidence of title is admissible only to enable him to decide the question of actual possession, but proof of title is not proof of actual possession.[209.]

[s 145.21] "Peruse the statements so put in".—

This expression means to go critically through them.[210.] The Magistrate must consider the statements and give reasons for accepting or not accepting them.[211.] An order which does not show that the Magistrate had considered the statement is *ex facie* improper as not complying with the mandatory provision.[212.] Where the Magistrate had perused the affidavits filed by the parties but not the documents filed by them, it was held that section 145(4) was not complied with; hence, the final order was invalid.[213.]

[s 145.22] "Hear the parties".—

The expression means hear the evidence of the parties and arguments of counsel or pleaders appearing on their behalf, or arguments addressed by themselves.[214.] Passing an order under section 145(4) without hearing one of the parties, is invalid.[215.]

When there was failure on the part of the Magistrate to give an opportunity to a party to adduce evidence under section 145(4), the proceedings were held to be vitiated.[216.]

[s 145.23] Deemed possession [*Proviso*].—

The proviso refers to forcible and wrongful dispossession within two months next before the date of the police report or other information received by the Magistrate or after that date and before the date of preliminary order under sub-section (1). The crucial date under this proviso is the date of the preliminary order or the date of receipt of police report or other information. This proviso merely recites a circumstance under

which presumption of possession may be made in favour of one of the disputants. It does not debar the Magistrate from deciding the question of possession on other grounds also.[217.]

[s 145.24] "Forcibly and wrongfully dispossessed".—

The word "dispossessed" means to be out of the possession, removed from the premises, ousted, ejected or excluded. Even where a person has a right to possession but taking the law into his hands makes a forcible entry otherwise than in due course of law, it would be a case of both forcible and wrongful dispossession.[218.] Forcible dispossession means such dispossession which involves an element of use of force and power. The word "wrongful" means an act which is not legal, not right, is unjustified and unfit.[219.]

In a proceeding under section 145, the sporadic act of trespass on land by a party would not amount to possession in the eye of the law and would not lead to a conclusion that the other party has been dispossessed.[220.]

[s 145.25] Limitation.—

No period of limitation has been prescribed for making an application for implementation of the order of possession of land passed under section 145(4). Such application can be filed within a period of three years from the date of the order as provided in Article 137 of Limitation Act, 1963.[221.]

[s 145.26] Cancellation of order [*Sub-section (5)*].—

The essence and basis of the jurisdiction depends upon there being a dispute likely to create a breach of the peace. Hence, where it is shown that there is no such dispute, the Magistrate should hold his hands and not proceed further.[222.] Where existence of such dispute is challenged and evidence is led, the Magistrate must record a finding one way or the other.[223.]

The Supreme Court's decision in *RH Bhutani v Miss Mani J Desai*[224.] does not lay down the law that even if a plea is raised under sub-section (5) of this section, such a plea must be rejected once the Magistrate has arrived at the conclusion under sub-section (1) that there is an apprehension of a breach of the peace. A preliminary order is a temporary order, a tentative order and is subject to the peremptory force of sub-section (5).[225.]

[s 145.27] Declaration of party's entitlement to possession [*Sub-section (6)*].—

It was held by the Supreme Court that during the pendency of the proceedings under section 145, an order, if any, passed thereon does not affect the title of the parties to the disputed premises. No party can acquire a title or right with respect to the property in the custody of the receiver by coming over the property without the leave or consent of the receiver or the sanction of the Court.[226.]

[s 145.28] Limitation.—

The application under the sub-section was for restoration of possession. The Court recorded a finding that the applicant should have come for an order under section 145(6) within six months from the date of possession as provided in section 6 of the Specific Relief Act, 1963. The Supreme Court said that such finding was not tenable because the Specific Relief Act has no application to proceedings under section 145 of CrPC.[227.]

[s 145.29] Death of party [*Sub-section (7)*].—

This sub-section indicates that death of a party does not put an end to the proceedings; but the proceedings are to be carried on after making the legal representatives parties.

[s 145.30] Production of documents or summoning of witnesses [*Sub-section (9)*].—

This sub-section empowers the Magistrate, where he thinks fit, "at any stage" of the proceedings, on an application by either party, to summon "any witness" to attend before him or to produce any document or thing. The discretion should be exercised judiciously.[228.]

[s 145.31] Revision.—

The Patna High Court, in the majority decision of the Full Bench, has held that the finding of the Civil Court, after it has been incorporated by the Magistrate in his order, is revisable by the High Court in appropriate cases in exercise of its revisional jurisdiction.[229.]

[s 145.32] Evidentiary value of observations made in proceedings under sections 145 and 146—

The Supreme Court in *Surinder Pal Kaur v Satpal*[230.] held that the observations made in the proceedings drawn under section 145 CrPC do not bind the competent Court in a legal proceeding initiated before it. A decision given under section 145 CrPC has relevance in evidence to show one or more of the following facts: (a) that there was a dispute relating to a particular property; (b) that the dispute was between the parties; (c) that such dispute led to the passing of a preliminary order under section 145(1) CrPC or an order of attachment issued under section 146(1) CrPC; and (d) that the Magistrate found particular party or parties in possession or fictional possession of the disputed property.

[s 145.33] Sections 144 and 145.—

Section 144 is a wider and more general section than section 145. An order under it can be made under various circumstances including a danger of a breach of the peace, whereas section 145 is of limited scope and applies only when there is a danger of a

breach of the peace. The former section is discretionary; the latter mandatory. The latter provides for a thorough inquiry into the dispute as to possession of the parties which tends to a breach of the peace. Therefore, when the special condition of section 145 is fulfilled, section 144 yields to section 145 in the sense that when he finds that there is a real dispute tending to a breach of the peace, the Magistrate is bound to institute a proceeding under section 145 and inquire into the possession of the parties, irrespective of any order that he might have originally passed under section 144.[231.] Omission to use the word "emergency" in an order by the Magistrate did not vitiate the proceedings.[232.]

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122. *The State of Maharashtra v Kalabai Nathuji*, (1970) 72 Bom LR 899 .
123. *Sitanath Mohanty v Sesi*, 1993 Cr LJ 542 (Ori).
124. *Imambu v Hussenbi*, AIR 1960 Kant 203 : AIR 1959 Kant 203 : 1960 Cr LJ 1112 .
125. *Mirza Mohd Aziz v Safdar Husain*, AIR 1962 All 68 ; *Multani v Shah Abdu*, (1962) 2 Cr LJ 709 .
126. *Sheo Badan Singh v AP Singh*, 1990 Cr LJ 855 (All).
127. *Banamali Mahapatra v Bajra Nanela*, AIR 1964 Orissa 204 : 1964 Cr LJ 326 .
128. *Imambu v Hussenbi*, AIR 1960 Kant 203 : AIR 1959 Kant 203 : 1960 Cr LJ 1112 .
129. *Rewa Chand v State of MP*, 1992 Cr LJ 278 (MP).
130. *Venkatakrishnan v State of TN*, 1989 Cr LJ 1836 (Mad).
131. *Charan Singh v SDM, Jallandhar*, 1992 Cr LJ 671 (P&H).
132. *Ram Sumer Puri Mahant v State of UP,* AIR 1985 SC 472 : 1985 Cr LJ 752 .
133. *RH Butani v Mani Desai*, (1968) 71 Bom LR 83 : AIR 1968 SC 1444 .
134. *RH Butani, supra*.
135. *Shankarlal v Alhaz Khaja*, 1991 Cr LJ 1556 (Karn).
136. *Krishan Singh v Ramesh Kumar*, 1992 Cr LJ 1063 (J&K).
137. *Mohd Rafiq Mir v Gulam Mustafa Khan*, 1988 Cr LJ 1552 (J&K).
138. *Kulada Kinkar Roy v Danesh Mir,* (1905) ILR 33 Cal 33, 42; *Anesh Mollah v Ejaharuddi*, (1901) ILR 28 Cal 446; *HV Low and Co Ltd v Maharaja Sir Manindra Chandra Nandy*, (1924) ILR 3 Pat 809 : AIR 1925 Pat 33 .
139. *Altab Ali v Jagdish Chandra*, AIR 1961 Tripura 36 : 1961 Cr LJ 292 .
140. *Kulada Kinkar Roy v Danesh Mir*, (1905) ILR 33 Cal 33; *Dhanput Singh v Chatterput Singh*, (1893) ILR 20 Cal 513.
141. *Agni Kumar Das v Mantazaddin*, (1929) ILR 56 Cal 290 : AIR 1928 Cal 610 .
142. *Nandkeshwar Prasad Sahi v Sita Saran Sahi*, (1932) 12 Pat 87 : AIR 1932 Pat 366 .
143. *AH Wheler v State of Bihar*, 1988 Cr LJ NOC 6 (Pat).
144. *Rabindranath Sahu v Dayanidhi Sahu*, 1992 Cr LJ 876 (Ori).
145. *Mannarghat Mooppli Nair v Chandy*, (1957) Ker 646 .
146. *Ram Mehar Singh v State of NCT of Delhi*, 2012 Cr LJ 410 (SC) : (2011) 14 SCC 732 V.
147. *K Ibopishak Singh v Sanakhomba Singh*, 1986 Cr LJ 1110 (Gau).
148. *Doulat Koer v Rameswari Koeri*, (1899) ILR 26 Cal 625; *Kinja Behari Das v Khetra Pal Singh*, (1901) ILR 29 Cal 208; *Emperor v Ram Baran Singh*, (1906) ILR 28 All 406.

149. *Mangilal v Bangmal*, 1988 Cr LJ 1905 (MP).

150. *Jai Narain v State of UP*, 1993 Cr LJ 3687 (All).

151. *Dominic v State of Kerala*, 1987 Cr LJ 2033 (Ker).

152. *Ram Krishan Dass v Rameshwar*, 1988 Cr LJ 291 (P&H).

153. *Jhunamal v State of MP*, 1989 Cr LJ 82 : AIR 1988 SC 1973 : (1988) 4 SCC 452 .

154. *Pandurang Govind*, (1900) 24 Bom 527 : 2 Bom LR 84.

155. *Nightingale Engineering Industries Pvt Ltd v Sibpada De*, 1995 Cr LJ 1523 (Ori).

156. *Kesu v Moti Mollah*, (1899) 4 Cal WN 57.

157. *Uma Churn Santra v Beni Madhub Roy*, (1880) 7 CLR 352 .

158. *Kulada Kinkar Roy v Danesh Mir, supra*.

159. *Kunund Narain Bhoop*, (1878) ILR 4 Cal 650, 653; *Damodur Biddyadhur Mohapatro v Syamanund Dey*, ILR (1881) 7 Cal 385 , 387; *Kamal Kutty v Udayavarma Raja Valia Raja of Chirakkal*, (1912) ILR 36 Mad 275, 286.

160. *Anadilal Mukherji v Sukhchand Mandal*, (1931) ILR 58 Cal 388 : AIR 1930 Cal 715 ; *P Mannadha v Marappa Goundar*, 1969 Cr LJ 1410 : AIR 1969 Mad 411 (period of six months).

161. *RH Bhutani v Mani J Desai*, (1968) 71 Bom LR 83 SC : AIR 1968 SC 1444 : 1969 Cr LJ 13 .

162. *Buddhi v Gyana*, 1996 Cr LJ 616 (Raj.)

163. *Chellapathi Naidu v Subba Naidu*, (1929) ILR 52 Mad 241 : AIR 1928 Mad 1230 ; *Baliram v Dawalat Singh*, (1944) Nag 836.

164. *Korban Molla v Raja Sri Nath Roy*, (1905) 1 Cal LJ 329 .

165. *Ishan Chunder Dass v Garth*, (1902) 29 Cal 885 .

166. *Kumund Narain Bhoop*, (1878) ILR 4 Cal 650.

167. *Nittyanand Roy v Paresh Nath Sen*, (1905) 32 Cal 771 ; *P Mannadh v Marappa Goundar*, 1969 Cr LJ 1410 : AIR 1969 Mad 411 .

168. *Gobind Chandra Das*, (1893) 20 Cal 520 , 526; *Mohesh Sowar v Narain Bag*, (1900) ILR 27 Cal 981, 982.

169. *Manik v Azimuddi*, (1902) 6 Cal WN 923; *Jagomohan Pal v Ram Kumar Gope*, (1901) ILR 28 Cal 416.

170. *Martin*, (1904) 27 All 296 .

171. *Ahmed Chowdhry v Parbati Charan Roy*, (1908) 35 Cal 774 .

172. *Janaki Ramachandran v State*, 1989 Cr LJ 590 ; *Indira v Vasantha*, 1991 Cr LJ 1798 (Mad).

173. *Indira v Vasantha*, 1991 Cr LJ 1798 (Mad).

174. *Krishna Kamini v Abdul Jubbar*, (1903) ILR 30 Cal 155 (FB); *Nagarman v Rudmal*, (1937) Nag 288.

175. *Nathubhai Brijlal v Emperor*, (1909) 11 Bom LR 377 , 379; *Queen-Empress v Kuppayyar*, (1894) ILR 18 Mad 51; *Laldhari Singh v Sukdeo Narain Singh*, (1900) ILR 27 Cal 892; *Khobraji v Vijaya Singh Rao*, (1970) 74 Bom LR 595 : 1971 Cr LJ 996 .

176. *Dhondhai Singh v Follet*, (1903) ILR 31 Cal 48 (FB); *Bholanath Singh v Wood*, (1904) 32 Cal 287 .

177. *Dunne v Kumar Chandra Kisore*, (1902) ILR 30 Cal 593.

178. *Ambar Ali v Piran Ali*, (1928) ILR 55 Cal 826 : AIR 1928 Cal 344 ; *Agni Kumar Das v Mantazaddin*, (1929) ILR 56 Cal 290 : AIR 1928 Cal 610 ; *Narandas Tolaram v Bhag Singh*, 1968 Cr LJ 1136 .

179. *Rajendra Narain Roy v Mohammad Arzumand Khan Chowdhury*, (1905) 1 Cal LJ 331 , 333.

180. *Vijay Kumar v Neeraj Kumar*, 1990 Cr LJ 21 (J&K).

181. *Basanta Kumari Dasi v Mohesh Chandra Laha*, (1913) 40 Cal 982 ; *Beni Narain v Achraj Nath*, (1883) 5 All 607 ; *Dhani Ram v Bhola Nath*, (1902) PR No. 23 of 1902; *Kanhaya v Harimohan*, 1973

Cr LJ 1846 . **But see** *Ram Shanker Tewari v The State*, 1970 Cr LJ 770 .

182. *Urvashi v State of J&K*, 1989 Cr LJ NOC 147 (J&K).

183. *Sri Mohan Thakur v Narsing Mohan Thakur*, (1899) ILR 27 Cal 259.

184. *Bhaskari Kasavarayudu v Bhaskaram Chalapatriayudu*, (1908) 31 Mad 318.

185. *Jagannath Prasad v Basudeo*, AIR 1960 Pat 254 : 1960 Cr LJ 970 ; *Duana Moliko v Bhagbat Biso*, AIR 1967 Ori 110 : 1967 Cr LJ 1036 .

186. *Mallappa*, (1925) 28 Bom LR 488 ; *Onkar Nath v Ram Anjore*, 1973 Cr LJ 1885 .

187. *Bhinka v Charan Singh*, AIR 1959 SC 960 : 1959 Cr LJ 1223 .

188. *Mahant Ram Saran Dass v Harish Mohan*, (2001) 10 SCC 758 .

189. *RK Mehra v State of UP*, 1975 All LJ 23.

190. *Sachchidanand v State of UP*, 1987 Cr LJ 1366 (All).

191. *Caetano Colaco v Joas Rodrigues*, AIR 1966 Goa 32 (FB).

192. *Usharani v Mangal*, 1970 Cr LJ 1298 .

193. *Hurbullubh Narain Singh v Luchmeswar Prosad Singh*, (1898) ILR 26 Cal 188.

194. *Shrimati Prem Kaur v Benarsi Das*, (1933) 14 Lah 615.

195. *T Mahto v The State of Bihar*, 1972 Cr LJ 835 .

196. *Ramzan Ali v Janardhan Singh*, (1902) ILR 30 Cal 110.

197. *Krishnasami Aiyar*, (1902) 2 Weir 108.

198. *Lala Nihal Chand v Lala Jai Ram Dass*, (1929) 5 Luck 462 .

199. *Janu Manjhi v Maniruddin*, (1904) 8 Cal WN 590.

200. *Sukh Lal Sheikh v Tara Chand Ta*, (1905) ILR 33 Cal 68, 78 (FB); *Debi Prasad v Sheodat Rai*, (1907) 30 All 41 ; *Chinappudayan*, (1907) 30 Mad 548.

201. *RH Bhutani v Mani J Desai*, AIR 1968 SC 1444 : 71 Bom LR 83 : 1969 Cr LJ 13 ; *Abdul Mannan v Biswanath Paul*, 1986 Cr LJ 1098 (Cal); *Lophinoris Shangpling v Hamboy Shullai*, 2001 Cr LJ 2943 (SC), the petitioner was not in possession of the disputed property on the date of the preliminary order. The proceeding was held liable to be quashed. The proviso could not be invoked to entangle a dispute of farther date.

202. *Sahadat Khan v Taijuddi Sheikh*, (1919) ILR 46 Cal 1056; *Dyawappa Basgunda Patil*, (1915) 17 Bom LR 382 .

203. *Appayya Naika v State of Mysore*, AIR 1964 Kant 177 : 1964 Cr LJ 313 ; *Chando Sharma v Inderdeo Singh*, AIR 1964 Pat 239 : 1964 Cr LJ 534 .

204. *Manindra Chandra Nandi v Barada Kanta Chowdhry*, (1902) ILR 30 Cal 112; *Ramlal v Mangu*, AIR 1960 Raj 216 : 1960 Cr LJ 1138 ; *Samjid Ali v Matasin Ali*, (1962) 1 Cr LJ 271 .

205. *Jyotish Kotwal v Dwarka Prasad*, AIR 1967 Pat 309 : 1967 Cr LJ 1359 .

206. *Narasayya v Venkiah*, (1925) ILR 49 Mad 232 : AIR 1925 Mad 1252 .

207. *Suryanarayana v Ankineed Prasad Bahadur*, (1924) 47 Mad 713 : AIR 1924 Mad 795 .

208. *RC Patuck v Fatima A Kindasa*, AIR 1997 SC 2320 : 1997 Cr LJ 2756 : (1997) 5 SCC 334 .

209. *Panaganti Parthasarthy, Nayanim Gau v Pallikapu Venkatasami Reddy*, (1910) ILR 34 Mad 138; *Kali Kristo Thakur*, (1881) 7 Cal 46 ; *Raja Babu v Muddun Mohun Lall*, (1886) 14 Cal 169 .

210. *Sohan Mushar v Kailash Singh*, AIR 1962 Pat 247 ; *Mt Sarfi v Mt Sago*, AIR 1962 Pat 253 .

211. *Shah Jamilur Rahman v Abdul Aziz*, AIR 1960 Pat 240 : 1960 Cr LJ 843 ; *Arjun Singh v Singeshwar Chaudhary*, AIR 1960 Pat 513 : 1960 Cr LJ 1486 .

212. *Narayan Kutty Menon v Sekhara Menon*, AIR 1964 Ker 308 : 1964 Cr LJ 682 .

213. *Bishnudeo Das v Chandra Bhushan*, 1988 Cr LJ NOC 11 (Pat).

214. *Ghulam Sibitan v Mussammat Kaniz Khatton*, (1920) 5 PLJ 246 .

215. *Sarju Mahto v Bansraj Mahto*, 1988 Cr LJ NOC 12 (Pat).

216. *NA Ansary v Jackiriya*, 1991 Cr LJ 476 (Mad).

217. *Sheoraj Singh*, (1913) 11 ALJR 305.

218. *RH Bhutani v Mani J Desai*, (1968) 71 Bom LR 83 SC : AIR 1968 SC 1444 : 1969 Cr LJ 13 ; *Bai Jiba v Chandulal Ambalal*, (1925) 27 Bom LR 1353 : AIR 1926 Bom 91 .

219. *Vijay Kumar v Neeraj Kumar*, 1990 Cr LJ 21 (J&K).

220. *Sakadev v Margulu Sohu*, 1987 Cr LJ 758 (Ori).

221. *Shakuntala Devi v Chamku Mahto,* AIR 2009 SC 2075 : (2009) 3 SCC 310 : 2009 Cr LJ 1770 . *Shanti Kumar Panda v Shakuntala Devi,* AIR 2004 SC 115 : (2004) 1 SCC 438 , order of Magistrate under sections 145/146, legal proceedings commenced subsequent to the order before a competent Court, effect of the order stated.

222. *Gobind Chunder Moitra v Abdool Sayad*, (1881) ILR 6 Cal 835.

223. *Sankatha Singh v Rahmutullah*, 1973 Cr LJ 1091 .

224. *RH Bhutani v Miss Mani J Desai,* AIR 1968 SC 1444 : 1969 Cr LJ 13 : (1968) 71 Bom LR 83 .

225. *Gajraj v C Singh*, 1975 All LJ 99 (FB).

226. *Sadhuram Bansal v Pulin Behari Sarkar*, AIR 1984 SC 1471 : (1984) 3 SCC 410 .

227. *Shakuntala Devi v Chamru Mahto,* AIR 2009 SC 2075 : (2009) 3 SCC 310 : 2009 Cr LJ 1770 .

228. *Krishna Chandra v Benarasi*, 1973 Cr LJ 298 .

229. *Dewani Choudhary v Chature Manjhi*, 1972 Cr LJ 134 (FB), confirming *Raja Singh v Mahendra Singh*, AIR 1963 Pat 243 : 1963 Cr LJ 25 .

230. *Surinder Pal Kaur v Satpal,* (2015) 13 SCC 25 : AIR 2015 SC 2739 : 2015 Cr LJ 3821 : 2015 (1) Scale 376 .

231. *Shebalak Singh v Kamaruddin Mandal*, (1922) 2 Pat 94, 107 (FB); *Gobind Ram Marwari v Basanti Lal Marwari*, (1927) 7 Pat 269.

232. *Sheo Mangal Choudhary v The State of Bihar*, 1992 Cr LJ 34 (Pat).

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

D.—Disputes as to immovable property

[s 146] Power to attach subject of dispute and to appoint receiver.—

(1) If the Magistrate at any time after making the order under sub-section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof:

Provided **that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.**

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908):

Provided **that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate—**

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) may make such other incidental or consequential orders as may be just.

The Magistrate can attach the subject of dispute (1) if he considers the case to be one of emergency; or (2) if he decides that none of the parties was in possession; or (3) if he cannot decide which of them was in possession. The order of attachment remains in force until a competent Court decides the rights of the parties or until the Magistrate, being satisfied that there is no longer any likelihood of breach of the peace, withdraws it. The Magistrate can himself appoint a receiver of the property. If any Civil Court appoints a receiver subsequently, then the Magistrate will order handing over of the subject of dispute by his receiver to him and pass incidental or consequential order.

Notice to the opposite party is not necessary at the time of passing an order of attachment. Order can be passed by the Magistrate on seeing the material on record.[233.] Providing opportunity of hearing and prior notice are not prerequisite for valid attachment in case of emergency under section 146(1) of CrPC because such delay will defeat the purpose of avoiding imminent breach of peace.[234.] Where the

Magistrate attached the disputed property without recording a finding either that it was a case of emergency or that none of the parties was in possession or he was unable to find out as to who was in possession, it was held that the Magistrate had not come to any of the conclusions required under section 146(1) of CrPC.[235.]

When order for attachment of a shop was passed, the movable property lying in the shop could also be attached.[236.]

The finding of the Civil Court given under section 146, on a reference by a Magistrate regarding possession is final and cannot be challenged by way of appeal, review and revision.[237.]

When the order of attachment was passed on the ground of emergency, the Magistrate could not close the proceedings by consigning the file to record. He must conclude the proceedings initiated under section 145(1) by disposing of the matter on merits.[238.]

The Magistrate's jurisdiction does not end as soon as an attachment is made, and a receiver is appointed on the ground of emergency. It cannot be said that until the competent Court had determined the rights of the parties, he cannot interfere.[239.]

It has been held that the expression "until a competent Court has determined the rights of the parties thereto" did not put any limitation on the power of the Civil Court in such a suit to entertain and decide the question relating to the title to property merely because the dispute as to the title could not be decided by the Magistrate under section 145.[240.] Where in proceedings under section 145 of CrPC the disputed house was attached and subsequently a civil suit was filed with regard to the same property and temporary injunction was issued, the Supreme Court held that the moment a Civil Court issues an interim injunction or appoints a receiver of the disputed property pending the final decision, the order of attachment passed by the Magistrate comes to an end and it can be said that likelihood of breach of peace no longer exists.[241.]

[s 146.1] "Civil Court".—

The term "Civil Court" used in section 146(1) means any Court which has jurisdictional competence to decide the question of title or rights to the property or entitlement to possession based on the right or title though the Court is not necessarily a Civil Court. Further, the expression "until evicted there from in due course of law" in section 145(6) means the eviction of the party successful before the Magistrate consequent upon the adjudication of title or right to possession by a competent Court. That does not necessarily mean a decree of eviction.

It has been held that the word "emergency" meant a serious or dangerous situation or condition that called for immediate action.[242.] When a civil suit is going on with regard to possession of a piece of land and the Civil Court had passed an order directing the parties to maintain *status quo*, ordering attachment of the property by an Executive Magistrate under section 146(1), amounts to encroachment upon the jurisdiction of the Civil Court.

There was no occasion for a Magistrate to pass an order of attachment when the dispute between the parties was settled through arbitration and the parties had accepted the award.[243.]

[s 146.2] "Appointment of receiver.—

Where in a dispute over land, the Court had passed an *ex parte* decree in favour of one party and the other party had made an application for setting aside the decree, and an interim stay order had been passed, it was held that the appointment of receiver in such circumstances was not proper.[244.]

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233. *Sheo Mangal Choudhary v The State of Bihar*, 1992 Cr LJ 34 (Pat).
234. *Ganpat Singh v State of Rajasthan*, 1995 Cr LJ 616 (Raj).
235. *Bhrigunath v Parmeshwar*, 1996 Cr LJ 1552 (All).
236. *Rewachand v State of MP*, 1992 Cr LJ 278 (MP).
237. *Chandra Sekhar Singh v Siya Ram Singh*, AIR 1979 SC 1 : 1979 Cr LJ 13 .
238. *Jaswant Singh v State of Punjab*, 1988 Cr LJ NOC 67 (P&H).
239. *Keshavrao v Radheshyam*, 1991 Cr LJ 283 (MP).
240. *Bana Bhotroni v Bhadra Bhotra*, 1988 Cr LJ 787 (Ori).
241. *Dharampal v Ramshri*, AIR 1993 SC 1361 : 1993 Cr LJ 1049 .
242. *Tapan Baruah v Lakshmikanta Das*, 1988 Cr LJ NOC 31 (Gau).
243. *Brij Ratan Mehta v State of Rajasthan*, 2002 Cr LJ 4172 (Raj).
244. *Sua Lal v Kana*, 2003 Cr LJ 2273 (Raj).

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CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

D.—Disputes as to immovable property

[s 147] Dispute concerning right of use of land or water.—

Whenever an Executive Magistrate is satisfied from the report of a police officer or upon other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water within his local jurisdiction, whether such right be claimed as an easement or otherwise, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a specified date and time and to put in written statements of their respective claims.

***Explanation.*— The expression "land or water" has the meaning given to it in sub-section (2) of section 145.**

(2) The Magistrate shall then peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and, if possible, decide whether such right exists; and the provisions of section 145 shall, so far as may be, apply in the case of such inquiry.

(3) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right including, in a proper case, an order for the removal of any obstruction in the exercise of any such right:

***Provided* that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such receipt.**

(4) When in any proceedings commenced under sub-section (1) of section 145 the Magistrate finds that the dispute is as regards an alleged right of user of land or water, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1);

and when in any proceedings commenced under sub-section (1) the Magistrate finds that the dispute should be dealt with under section 145, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1) of section 145.

[s 147.1] "State Amendment

Maharashtra.—*The following amendments were made by Maharashtra Act 1 of 1978, section 3 (w.e.f. 15-4-1978)*.

S. 147.—In its application to the State of Maharashtra, in section 147(1), for the words "Whenever an Executive Magistrate" read "Whenever in Greater Bombay a Metropolitan Magistrate and elsewhere in the State, an Executive Magistrate."

Saving of proceedings pending before Executive Magistrate in Greater Bombay under Sections 145 to 147 of Act 2 of 1974.—If any proceedings under sections 145, 146 or 147 of the said Code are pending before any Executive Magistrate in Greater Bombay on the day immediately preceding the date of commencement of this Act, they shall be continued, heard and disposed of by that Magistrate, as if this Act had not been passed.

This section is an amplification of section 145. "It refers to any right of user (whether such right be claimed as an easement or otherwise) of land or water [as explained in section 145(2)]." Immoveable property, unlike every other species of property, can be enjoyed best by possession. We own it by possessing it. Another method of its beneficent enjoyment is to have the user of it. The user may even be by grant or custom. Disputes concerning the rights of user are apt to be as acrimonious as those regarding possession of land or water. And as they are impregnated with potentialities destructive of the public peace, they deserve to be speedily and summarily checked. The procedure at the inquiry is the same as that provided by section 145. If the inquiry shows that the right exists, the Magistrate may make an order prohibiting any interference with the exercise of the right, including in a proper case an order for removal of any obstruction to such user. If it appears that the right does not exist, an order may be made prohibiting the exercise of the right. In any event, the order ensures till a decision of a Civil Court is obtained. The section comes into operation only if the right is exercised within three months of the receipt of information or police report in cases of rights exercisable at all times of the year or is exercised at the last particular occasion or season of periodically recurring rights. It is only where the Magistrate finds existence of such right that the periodicity of user becomes relevant.

The Magistrate should record such evidence as the parties choose to tender before him; it is not permissible for the Magistrate to decide the dispute before him merely on the basis of affidavits filed by the parties.[245.]

[s 147.2] "Scope".—

This section is not limited in its terms to easements but relates to any dispute concerning the right of use of land or water.[246.] It does not enable a Magistrate to make a purely declaratory order. It only enables him to prevent arbitrary interruption by any person of rights actually enjoyed, which have been exercised by the public or by a person or a class of persons.[247.] The jurisdiction of the Magistrate to act under this section ceases as soon as a competent Civil Court has adjudicated upon the matter in dispute.[248.] Disputes as to question of title cannot be settled by proceedings under this section.[249.] Prohibitory order cannot be issued in the absence of a finding of continuous general user. Where there is a positive evidence of long user, inquiry may be unnecessary.[250.] It was held that in order to prevent hardship to any party, the Magistrate must be deemed to have the implied power to pass an interim order under section 147.[251.]

[s 147.3] Dispute.—

The right to worship in a particular place or temple must involve the right to use that particular place or temple for a particular purpose or in a particular manner. To deny such right to worship is denial of the right to use such place or temple. In such cases, the right to worship cannot be regarded as something entirely apart from the place of worship and, as such, it is a dispute falling within the ambit of this section.[252.] A dispute as to the right to use a mosque between persons claiming to be entitled to officiate as Kazi therein.[253.] In case of a dispute regarding the use of mosque, section 147 and not section 145 is applicable because there was no dispute regarding any land, boundaries thereof in order to attract section 145. Therefore, the Executive Magistrate ought to have proceeded in accordance with the provisions contained in section 147,[254.] or a dispute concerning the right to perform a religious ceremony in a mosque[255.] or a dispute as to the right to take a religious car in procession along a public way past the houses of the opponents,[256.] or a dispute as to the right to bury in a burial ground[257.] falls under this section. In the absence of express power under section 147 to pass interlocutory order, the Magistrate must be deemed to have the implied power to pass an interim order in order to prevent hardship to any party.[258.]

[s 147.4] "A dispute likely to cause a breach of the peace".—

It is a dispute likely to cause a breach of the peace that furnishes the foundation of jurisdiction to the Magistrate to proceed under this section.[259.] Proceedings under section 147 need not be dropped because of the pendency of a civil suit for title unless the Magistrate finds that there is no apprehension of the breach of peace.[260.]

[s 147.5] "Land or water".—

The expression is not necessarily restricted to private property.[261.] It does not include a privy.[262.]

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245. *Chinnubhai v Dhanyakumar*, (1971) 74 Bom LR 362 : 1971 Cr LJ 1597 ; *Punjabrao Laxmanrao Kawre v Janrao Balaji Kawre*, (1972) 74 Bom LR 581 .
246. *Guiram Ghosal v Lal Behari Das*, (1910) ILR 37 Cal 578.
247. *Maharaja of Burdwan v Chairman, Darjeeling Mun.*, (1879) 5 Cal 194 .
248. *Anya Shidya Patil*, (1927) 29 Bom LR 715 .
249. *Ghana Bhoi v Natha Bhoi*, 1980 Cr LJ 536 (Ori).
250. *Om Prakash v Saryung Prasad*, 1979 Cr LJ NOC 28 (Pat).
251. *Niranjan Behara v Laxmidhar Rana*, 1991 Cr LJ 1599 (Ori).
252. *Dhirendra Nath Sen v Hrishikesh Mukherji*, (1952) ILR 2 Cal 119 (FB) : AIR 1951 Cal 93 ; *Chinnubhai v Dhanyakumar*, (1971) 74 Bom LR 362 : 1971 Cr LJ 1597 .
253. *Kader Batcha v Kader Batcha Rowthan*, (1906) ILR 29 Mad 237.
254. *PPPA Thangal v VT Lakshadweep*, 1988 Cr LJ 1206 (Ker).

255. *Muhammad Musaliar v Kunji Check Musaliar*, (1887) 11 Mad 323.

256. *Bassappa*, (1925) 27 Bom LR 1058 : AIR 1925 Bom 536 ; *Amirkhan v Mahalingam Pillai*, (1928) ILR 51 Mad 174 : AIR 1927 Mad 985 .

257. *Abdul Khudus Sahib v Ashroo Sahib*, (1927) 51 Mad 522.

258. *N Behara v Laxmidhar Rana*, 1991 Cr LJ 1599 (Ori).

259. *Kali Kissen Tagore v Anund Chunder Roy*, (1896) ILR 23 Cal 557; *Rosik Lall Nundi v Kartikshaut*, (1874) 22 WR 48 .

260. *Sheo Nandan Singh v Thakur Prasad Singh*, 1976 Cr LJ 1781 (Pat).

261. *Amirkhan v Mahalingam Pillai*, (1928) ILR 51 Mad 174 : AIR 1927 Mad 985 .

262. *Shankar Sadashiv*, (1913) 15 Bom LR 329 ; *Hrishikesh Shukla v State of Jharkhand*, 2003 Cr LJ 761 (Jhar), when the wall, which was causing obstruction, had already been removed, an order of the magistrate about damage in respect of flow was held to be without jurisdiction because it was never in question.

The Code of Criminal Procedure, 1973

CHAPTER X MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

D.—Disputes as to immovable property

[s 148] Local inquiry.—

(1) Whenever a local inquiry is necessary for the purposes of section 145, section 146 or section 147, a District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under section 145, section 146, or section 147, the Magistrate passing a decision may direct by whom such cost shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion and such costs may include any expenses incurred in respect of witnesses and of pleaders' fees, which the Court may consider reasonable.

It is competent for a District Magistrate or Sub-Divisional Magistrate to depute any Magistrate subordinate to him to make local inquiry, to issue instructions for the purpose, and to provide for costs. The costs include expenses incurred in respect of witnesses and pleaders' fees. The report of the person so deputed becomes evidence in the case.

[s 148.1] "Local inquiry".—

The local inquiry should be restricted solely to some question relating to the feature of property about which the dispute has arisen; and it should not be directed to any matter which can be proved before the Magistrate by oral evidence, such as the question of actual possession.[263.] When proceedings are under section 145, the Executive Magistrate is not empowered to conduct local inspection himself by applying section 310.[264.]

[s 148.2] "Costs".—

The Magistrate can order payment of costs incurred by witnesses and pleaders' fees or other expenses; but he has no power to award an amount to a party for damages to his crops.[265.] Principles of natural justice require that a party should be heard before an adverse order is passed against it.[266.] Pleader's fee should be reasonable in the circumstances of the case.[267.]

[s 148.3] "Magistrate passing".—

A successor to the Magistrate who passed a decision under sections 145 to 147 cannot pass an order as to costs under this sub-section.[268] The Magistrate in a proceeding under section 146 after receiving a negative finding with regard to the fact of possession from the Sub-Judge proceeded on the spot and by making a spot inquiry passed a final order restoring the property in favour of one of the parties. It was held that such an order was without jurisdiction as the Magistrate was not competent under the law to inquire on the spot and pass the final order.[269]

Where a Magistrate has given his decision but has failed to make any order for costs, the High Court in revision has power to make an order for the payment of the costs of such proceedings.

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263. *Baikunt Kumar*, (1878) 3 CLR 134 , 136.
264. *Deo P Saha v Ravi Ravidas*, 1990 Cr LJ 823 (Pat).
265. *Prayag Mahaton v Govind Mahaton*, (1905) 32 Cal 602 .
266. *Lakhan Singh v Kishun Singh*, 1970 Cr LJ 1571 : AIR 1970 Pat 379 .
267. *Ibid*.
268. *Bagavandass v Muhammad Gani*, (1944) Mad 144.
269. *J Sampath Kumar v Subhashini*, 1986 Cr LJ 1632 (J&K).

The Code of Criminal Procedure, 1973

CHAPTER XI PREVENTIVE ACTION OF THE POLICE

[s 149] Police to prevent cognizable offences.—

Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

Preventive jurisdiction, under the Code, is classified under two broad heads. The first may be called magisterial action; and the second, police action. The magisterial preventive jurisdiction is dealt with in Chapters VIII and X. It is *quasi* -judicial and *quasi*-executive. Cases falling under the second head are purely executive. They fall into three categories: (1) prevention of cognizable offences (sections 149–151); (2) prevention of injury to public property (section 152); and (3) inspection of weights and measures (section 153). Unlike the first head, there is no judicial inquiry at all; and from the very urgency of the cases, the police have to act on their own initiative and of their own knowledge. The powers given are very wide indeed and their exercise is ordinarily summary.

Police officers have been armed with extensive powers to prevent commission of cognizable offences, i.e. offences for which they could arrest without a warrant. First of all, section 149 enables a police officer to prevent the commission of a cognizable offence (section 149). If the police officer receives information of a design to commit such an offence, he can either pass on the information to his superior police officer or to any other officer (section 150). If the commission of the offence cannot be otherwise prevented, he can forthwith arrest the person so designing (section 151). The maximum period of detention under section 151 can be for twenty-four hours only, unless it is authorised or required under any other section or any other law.

The Code of Criminal Procedure, 1973

CHAPTER XI PREVENTIVE ACTION OF THE POLICE

[s 150] Information of design to commit cognizable offences.—

Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty it is to 15 **prevent or take cognizance of the commission of any such offence.**

The Code of Criminal Procedure, 1973

CHAPTER XI PREVENTIVE ACTION OF THE POLICE

[s 151] Arrest to prevent the commission of cognizable offences.—

(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from the Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.

[s 151.1] State Amendment

Maharashtra.— *The following amendments were made by Mah. Act 7 of 1981, section 8 (w.e.f. 27-8-1980).*

S 151.—In its application to State of Maharashtra, in section 151—

(a) in sub-section (2), after the words "required or authorised" insert the words, brackets and figure "under sub-section (3) or"

(b) after sub-section (2) insert the following sub-section, namely:—

(3)(a) Where a person is arrested under this section and the officer making the arrest, or the officer in charge of the police station before whom the arrested person is produced, has reasonable grounds to believe that the detention of the arrested person for a period longer than twenty-four hours from the time of arrest (excluding the time required to take the arrested person from the place of arrest to the Court of a Judicial Magistrate) is necessary, by reason that—

(i) the person is likely to continue the design to commit, or is likely to commit, the cognizable offence referred to in sub-section (1) after his release; and

(ii) the circumstances of the case are such that his being at large is likely to be prejudicial to the maintenance of public order,

the officer making the arrest, or the officer in charge of the police station, shall produce such arrested person before the nearest Judicial Magistrate, together with a report in writing stating the reasons for a continued detention of such person for a period longer than twenty-four hours.

(b) Notwithstanding anything contained in this Code or any other law for the time being in force, where the Magistrate before whom such arrested person is produced is satisfied that there are reasonable

grounds for the temporary detention of such person in custody beyond the period of twenty-four hours, he may, from time to time, by order remand such person to such custody as he may think fit:

Provided that, no person shall be detained under this section for a period exceeding fifteen days at a time, and for a total period exceeding thirty days from the date of arrest of such person.

(c) When any person is remanded to custody under clause (b), the Magistrate shall, as soon as may be, communicate to such person the grounds on which the order has been made and such person may make a representation against the order to the Court of Session. The Sessions Judge may, on receipt of such representation, after holding such inquiry as he deems fit, either reject the representation, or if he considers that further detention of the arrested person is not necessary, or that it is otherwise proper and just so to do, may vacate the order and the arrested person shall then be released forthwith."

Arrest under section 151 is possible only if the person concerned is believed to have a design to commit a cognizable offence.[1.]

The conditions for exercise of the power of arrest by police and limitation on the period of detention have been expressly laid down in this section. Statutory guidelines were laid down by the Supreme Court to ensure that the power under this section is not abused. Section 151 cannot, therefore, be said to be either arbitrary or unreasonable or infringing fundamental rights under Articles 21 and 22 of the Constitution.[2.]

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1. *Jagdish Chander Bhatia v State*, 1983 Cr LJ NOC 235 (Del).
2. *Ahmed Noormohmed Bhatil v State of Gujarat,* AIR 2005 SC 2115 : (2005) 3 SCC 647 : 2005 Cr LJ 2157 . The cases in which guidelines were provided are: *DK Basu v State of WB,* AIR 1997 SC 610 : (1997) 1 SCC 416 ; *Joginder Kumar v State of UP,* AIR 1994 SC 1349 : (1994) 4 SCC 260 : 1994 Cr LJ 1981 .

The Code of Criminal Procedure, 1973

CHAPTER XI PREVENTIVE ACTION OF THE POLICE

[s 152] Prevention of injury to public property.—

A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

The one essential requirement of this section is that the attempt must be committed "in the view" of the police officer. The emergency arising here is not so great as the one arising under sections 149–151, though it certainly is more pressing than the one referred to in section 153.

The Code of Criminal Procedure, 1973

CHAPTER XI PREVENTIVE ACTION OF THE POLICE

[s 153] Inspection of weights and measures.—

(1) **Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.**

(2) **If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.**

The officer who can act under this section is the officer in charge of a police station, and the place searched should be within the limits of that station. All he can do is to seize false weights or measures if any are found and to report the seizure to the Magistrate having jurisdiction.

The Code of Criminal Procedure, 1973

CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 154] Information in cognizable cases.—

(1) **Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:**

[3.] **[*Provided* that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, [4.] [section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB], section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:**

***Provided further* that—**

(a) **in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, [5.] [section 376A, section 376AB section 376B, section 376C, section 376D, section 376DA, section 376DB], section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be:**

(b) **the recording of such information shall be videographed;**

(c) **the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.]**

(2) **A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.**

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

The information given to a police officer and reduced to writing as required by this section is known as the "first information". "First information report" is not mentioned in the Criminal Procedure Code, but these words are understood to mean information recorded under this section.[6.] It is an important document and may be put in evidence to support or contradict the evidence of the person who gave the information. The investigation under this Chapter proceeds on the first information.

When any information disclosing a cognizable offence is laid before the officer-incharge of a police station, he has no option but to register the case on the basis thereof.[7.]

[s 154.1] 2013 Amendment.—

The 2013 Amendment Act inserted a proviso through the Criminal Law (Amendment) Act, 2013, which is intended to make the law more sensitive to gender-equality.

The first proviso lays down that when information is given by a woman in relation to offences mentioned in the said proviso, such information shall be recorded by a woman police officer or any woman officer. The second proviso lays down that when an information relating to offences mentioned in the proviso is committed against a mentally or physically disabled person, such information shall be recorded at the residence of such person or at a place convenient to that person's choice in the presence of an interpreter or a social educator. It has been further provided that recording of such information shall be videographed and the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of section 164(5A).

In *Lalita Kumari v Government of UP*,[8.] a 5 member Bench of the Supreme Court reiterated that registration of FIR relating to sexual offence is mandatory without any more than a preliminary enquiry that it discloses a cognizable offence. It is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers, as well as by the competent court to which copies of each FIR is rquied to be sent. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in in that place, the word 'information' was substituted in the Codes 1882 and 1898, which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973.

[s 154.2] 2018 Amendment.—

Section 154 of the Code of Criminal Procedure, 1973 has been recently amended *vide* the Criminal Law (Amendment) Act, 2018. The 2018 Amendment Act has substituted the words "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" for the words "section 376A, section 376B, section

376C, section 376D" in section 154. The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of section 154.

[s 154.3] Object.—

The principal object of the first information report (FIR) from the point of view of the informant is to set the criminal law in motion, and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and bring to book the guilty. The FIR in a criminal case is extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The object of insisting upon prompt lodging of FIR is to obtain prior information regarding the circumstances in which crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses.[9.]

It does not constitute substantive evidence; it can, however, be used as a previous statement for the purpose of corroboration or contradiction of its maker under section 157 or section 145 of the Indian Evidence Act, 1872.[10.] It can by no means be utilised for contradicting or discrediting other witnesses.[11.]

[s 154.4] Evidentiary value and state of mind of person lodging FIR.—

The Supreme Court has thus spoken on this subject:

> The FIR gives information of the commission of a cognizable crime. It may be made by the complainant or by any other person knowing about the commission of such an offence. It is intended to set the criminal law in motion. Any information relating to the commission of a cognizable offence is required to be reduced to writing by the officer in charge of the police station which has to be signed by the person giving it and the substance thereof is required to be entered in a book to be kept by such officer in such form as the State Government may prescribe. It cannot be used as evidence against maker if he himself becomes an accused nor to corroborate or contradict other witnesses. It is not the requirement of law that the minutest details be recorded in the FIR lodged immediately after the occurrence. The fact of the state of mental agony of the person making the FIR who generally is the victim himself, if not dead, or the relations or associates of the deceased victim apparently under the shock of the occurrence reported has always to be kept in mind.[12.]

[s 154.5] FIR on statement of accused—Admissibility.—

The celebrated case on this point is *Aghnoo Nagesia v State of Bihar.*[13.] In that case, the accused, who had committed four murders, had gone to the police station with the murder weapon and on his statement, FIR was registered. The Supreme Court dissected the *fardbeyan* into 18 parts as inculpatory and exculpatory statements and held that all the inculpatory parts of the statements are hit by section 25 of the Evidence Act and were inadmissible in evidence. In a recent decision, the Supreme Court held that FIR recorded on the statement of the accused is not admissible as confession.[14.]

[s 154.6] Police duty to record information.—

When the petitioner approaches the police and prays for registration of FIR, the police has no option but to register it and thereafter start investigations.[15.]

Refusal to record an FIR on the ground that the place of crime does not fall within the territorial jurisdiction of the police station, amounts to dereliction of duty. Information about cognizable offence would have to be recorded and forwarded to the police station having jurisdiction.[16.] An FIR was refused to be recorded at the police station, but the Circle Inspector proceeded to the place of occurrence on receiving information about murder through a constable without making any entries in the police records and started investigation. Only then, he received the written report from the complainant after he returned to the village from the police station. The Supreme Court held that the written complaint could not be treated as an FIR as it would amount to a statement made during investigation and is hit by section 162 CrPC.

Section 154 is mandatory. The concerned officer is duty bound to register the case on the basis of the information disclosing a cognizable offence.[17.]

[s 154.7] Value of FIR.—

The FIR is the first version of the incident as received by the police. The statements in the FIR must naturally get their due weight.[18.]

The Supreme Court has observed that an FIR is not supposed to be an encyclopaedia of events which is expected to contain all the minute details of the prosecution case, it may be sufficient if the broad effects of the prosecution case are stated in the FIR.[19.] The fact that minute details are not mentioned should not be taken to mean the non-existence of the fact stated.[20.] FIR is not expected to contain all the details of the prosecution case; it may be sufficient if the broad facts of the prosecution case alone appear. Omission in the first statement of the informant is not fatal to the case. The impact of the omission has to be adjudged in the totality of the circumstances and the veracity of the evidence. Thus merely because the names of the accused persons are not mentioned in the FIR, it cannot be a ground to raise doubts about the prosecution case.[21.]

[s 154.8] FIR after inquest report.—

An FIR was recorded after inquest report. The question was whether the FIR had lost its authenticity. The Court said that such loss of authenticity was not a universal rule to be applied in all cases and under all circumstances. The Court explained the object of preparation of inquest report and its evidentiary value.[22.]

[s 154.9] Death of person lodging FIR.—

Where the person lodging the FIR died, the Supreme Court held that the contents of the FIR could be used for the purpose of corroborating or contradicting the person if he had been examined but not as substantive piece of evidence.[23.]

[s 154.10] FIR serves as early information—Effect of delay.—

The provisions as to an information report are enacted to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished and the report can be put in evidence when the informant is examined if it is desired to do so.[24.] It becomes necessary for the prosecution to satisfactorily explain the delay. Even a long delay can be condoned where the informant has no motive for implicating the accused.[25.]

[s 154.11] Investigation by CBI.—

The Supreme Court said in a case before it: "Though the investigation was conducted by the Central Bureau of Investigation (CBI), the provisions under Chapter XII of the Code would apply to such investigation. The "police" referred to in the Chapter, for the purpose of investigation, would apply to the officer/officers of the Delhi Police Establishment Act. On completion of the investigation, the report has to be filed by CBI in the manner provided in section 173(2) of the Code, with the exception that the Magistrate referred to in the section would be understood as a Special Judge when the offence involved is under the Prevention of Corruption Act, 1988.[26.]

[s 154.12] First cryptic message on telephone, subsequently detailed report.—

The prosecution witness gave to the police station information about murder on telephone. The head constable noted it though it was a cryptic report and also only for the purpose of visiting the scene of occurrence. He and the investigating officer did not say that it was a detailed report. The subsequent information was a detailed one and came to be recorded. The Court said that there was nothing to prevent it being treated as the first FIR.[27.]

A cryptic message recording an occurrence cannot be termed as a FIR. In order for a message or communication to be qualified to be an FIR, there must be something in the nature of a complaint or an accusation or at least some information of the crime given with the object of setting the police or criminal law in motion. It is not necessary that the FIR should contain the minutest detail or the names of offenders or the witnesses. But it must contain some information about the crime committed as also some information about the manner in which the cognizable offence was committed.[28.]

[s 154.13] FIR dictated by deceased.—

The injured person, before his death, himself dictated the FIR to the police. It was read over to him and he put his thumb impression on the same. Such report was held to be a dying declaration under section 32 of the Evidence Act.[29.]

[s 154.14] Where informant and person recording not produced and FIR not proved.—

When the prosecution has neither produced in evidence the person who made the first report in the *Thana* nor the person who wrote it out at the *Thana*, the first report cannot be referred to in evidence.[30.]

[s 154.15] Delay in forwarding FIR to Magistrate.—

Where the explanation for the delay was that the Court was closed because of an intervening holiday, the Court rejected it and said that Court holidays could not be an excuse. The requirement of law is that the FIR should reach the Magistrate without any undue delay. The explanation was neither convincing nor acceptable.[31.]

[s 154.16] Original FIR not produced.—

The original FIR could not be produced as registers relating to cognizable offences were destroyed after the lapse of two years. The prosecution witness duly produced evidence of this fact. The prosecution produced secondary evidence. It was held that no adverse presumption could be drawn against the prosecution for non-production of the original FIR.[32.]

[s 154.17] "Every information relating to the commission of a cognizable offence... shall be reduced to writing" [*Sub-section (1)*].—

A careful and accurate record of the "first information" has always been considered as a matter of the highest importance by the Courts in India, the object of the "first information" being to show what was the manner in which the occurrence was related when the case was first started. The Supreme Court has held that FIR is not substantive evidence.[33.] It cannot be preferred to the evidence given by the witness in Court.[34.] However, it can be used to corroborate or impeach the testimony of the person lodging it[35.] under sections 145, 157 and 158 of the Evidence Act. It can also be used under section 32(1) and section 8(j) and (k) of the Evidence Act. It is not necessary that the minutest details should find place in the FIR and it is sufficient if a broad picture is presented and revealed in the FIR. An FIR can be used to discredit the testimony of the maker of the report, but even if he gives entirely different version, the prosecution case cannot be thrown out.[36.] Where the names of a few assailants were not given in the FIR, it was held that only on this basis, it could not be said that the report was concocted and fabricated after consultation.[37.]

The word "information" means something in the nature of a complaint or accusation, or at least information of a crime, given with the object of putting the police in motion in order to investigate, as distinguished from information obtained by the police when actively investigating a crime.[38.] Such a document becomes valueless if drawn up by some person other than the proper informant. Where the first information which related to a charge of criminal conspiracy was drawn up by a police officer employed in the CID and settled by an attorney, it was held that it was of no value.[39.] If there is an information given first in point of time to the SHO from an authentic source relating to the commission of a cognizable offence, it is the "first information". Where the police Sub-Inspector performed the dual role of the first informant as well as the investigating officer, this sort of infirmity reflects on the credibility of the prosecution case. The Sub-Inspector, while recording the first information, did not disclose the source of his information. The first information lost its authenticity.[40.]

Where vague information about a murder, without mentioning the names of either the victim or accused, was given to the police by a person, who could neither be treated, nor his address was known, it was held that, it was just an information but could not be treated as an FIR.[41.] Where more than one report is filed, the first in order which persuaded the police machinery to start investigation is the FIR and the subsequent

reports are hit by section 161.[42.] Where, as soon as the police Sub-Inspector, on receipt of a telephonic message, was about to proceed to the place of occurrence, an eye-witness of the occurrence appeared at the police station, gave written version of the incident, on the basis of which the formal FIR under section 302 IPC was drawn up, it was held that the cryptic telephonic message did not amount to an FIR but the written report legally formed the FIR which was not hit by section 162 CrPC.[43.] Where a witness specifically claimed to have told about the incident to the police Sub-Inspector, who reduced it into writing, which was attested by another witness, but the FIR presented in the Court did not bear any attestation, and the Sub-Inspector having conceded that the FIR was written by the Head Constable, it was held that the circumstances probabilise the suppression of the earliest information and creation of another FIR so as to suit the exigencies of the case.[44.]

Where FIR regarding a non-cognizable offence is filed with the Magistrate and the Magistrate decides not to take cognizance of an offence or drop proceedings against some persons mentioned in the FIR, he must give a notice and hear the first informant before taking such a decision.[45.]

[s 154.18] Police officer duty bound to register FIR.—

The police officer has been held to be duty bound to register the case on receiving information of a cognizable offence. The reliability of information is not a condition precedent for registration. The complaint disclosed offences under sections 147, 148, 149, 448, 482, 323 and 395 IPC. The FIR was registered by excluding the offence under section 395. The Court said that the SHO had committed grave miscarriage of justice. The defence of speedy trial was not tenable in such a case.[46.]

Recently, section 166A has been inserted in the IPC (45 of 1860),[47.] whereby failure to record information in certain cases, has been made punishable. The said provision is as follows:

> [48.][**S 166A.—**Public servant disobeying direction under law- Whoever, being a public servant, —
>
> (a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or
>
> (b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or
>
> (c) fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973 (2 of 1974) in relation to cognizable offence punishable under section 326A, [49.][section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB], section E or section 509,
>
> shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.]

The above amendment to the IPC clearly makes it mandatory for the police officer to record information relating to the above-mentioned offences entailing prosecution and punishment to police officer who fails to act accordingly.

After the insertion of section 166A in the IPC, 1860, it becomes abundantly clear that the recording of FIR in relation to offences mentioned in clause (c) of section 166A of IPC, has been made mandatory. However, the matter with regard to cases relating to other offences, is in a nebulous state. The question whether section 154 makes it mandatory for police to record FIR in respect of cognizable offences or can the police hold some kind of preliminary investigation before recording FIR, came up for

consideration before the Supreme Court.[50.] There were conflicting views of the Supreme Court in its earlier decisions. After considering the divergent opinions in a large number of cases, the Bench referred the matter to a constitution Bench for clear enunciation of law.

On this issue of registration of FIR, the five-Judge Constitution Bench of Supreme Court has held that the language employed in section 154 is determinative factor of the legislative intent. A plain reading of section 154(1) of the Code provides that any information relating to the commission of cognizable offence, if given orally to an officer-in-charge of a police station shall be reduced into writing by him or under his direction. There is no ambiguity in the language of section 154(1) of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences.[51.] Explaining the proposition, P Sathasivam, CJI, speaking for the Bench, observed as follows:

> 44. Therefore, the context in which the word 'shall' appears in s. 154(1) of the Code, the object for which it has been used and the consequence that will follow from the infringement of the direction to register FIRs, all these factors clearly show that the word 'shall' used in s. 154(1) needs to be given its ordinary meaning of being of 'mandatory' character. The provisions of s. 154(1) of the Code, read in the light of the statutory scheme do not admit of statutory scheme do not admit of conferring any discretion on the officer-in-charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the Court need not call into it any other rules of construction.[52.]

Therefore, now a prior registration of FIR is essential for investigation. However, police investigation may start with registration of FIR, while in cases investigated by CBI, pre-investigation inquiry may lead to registration of FIR and thereafter regular investigation may begin.[53.]

Preliminary inquiry by police before registration of FIR is permissible if the information received does not disclose commission of a cognizable offence. But if the information given clearly mentions the commission of a cognizable offence then there is no other option but to register FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as whether the information is credible or not. These issues can be verified during investigation. Some illustrative cases have been noted by the Constitution Bench of Supreme Court where preliminary inquiry is permissible, such as (i) matrimonial/family disputes, (ii) commercial offences, (iii) medical negligence cases, (iv) corruption.[54.]

[s 154.19] Contents of FIR.—

There is no requirement of law that the names of all the witnesses be mentioned in the FIR. The evidence of a prosecution witness could not be discarded on the ground that her name was not mentioned in the FIR.[55.] It is not necessary that minute details of the occurrence should be mentioned in the FIR.[56.] The FIR is not supposed to contain graphic details, but names and identities of the assailants who were known to the informant could not be graphic details. The FIR was lodged within 3 hours but the names of the assailants were not mentioned which created a doubt about the truth of the version in FIR.[57.] Where only the skeleton facts were narrated in the FIR but they were found consistent with the statements of eye-witnesses in evidence, it was held that the omission of details became immaterial.[58.] An FIR need not contain an exhaustive account of the incident.[59.] FIR is not an encyclopaedia which is expected to contain all the details of the prosecution case. Omission as to the names of the assailants or the witnesses may not all the times be fatal to the prosecution, if the FIR is lodged without delay. Unless there are indications of fabrication, the court cannot

reject the prosecution case as given in the FIR merely because of omission.[60.] As regards the identity of the culprit, or nature of injuries suffered by the victims or names of culprits, was not treated as an FIR.[61.] It is not necessary for an FIR to be encyclopedic. The Court said in considering the effect of some omission in the FIR, the probable physical and mental condition of the informant cannot be ignored.[62.] The capacity of reproducing the things differs from person to person. Some people may have the ability to reproduce the things as it is, some may lack the ability to do so. Sometimes in the state of shock, they may miss the important details, because people tend to react differently when they come across a violent act. Merely because the names of the accused are not stated, and their names are not specified in the FIR that may not be a ground to doubt the contents of the FIR and the case of the prosecution cannot be thrown out on this count. The value to be attached to the FIR depends upon facts and circumstances of each case.[63.]

[s 154.20] Two FIRs in respect of same case.—

The Supreme Court has thus spoken about such a situation: Of course, the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. Apart from that, the report submitted to the Court by way of the subsequent FIR need be considered as an information submitted to the Court regarding the new discovery made by the police during investigation that persons not named in the first FIR were the real culprits. To quash the proceedings merely on the ground that final report had been laid in the first FIR is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed them. Even otherwise, the investigating agency is not precluded from further investigating in respect of an offence in spite of forwarding a report under sub-section (2) of section 173 on a previous occasion. This is clear from section 173(8) of the Code.[64.] Where the first FIR relating to the incident in question was dated 10 October 1990 and the accused was acquitted on the basis of the FIR relating to the same incident dated 13 October 1990, the Court said that it was not possible to ignore the prosecution story because the evidence produced at the trial has to be examined independently of both the FIRs.[65.]

[s 154.21] Right to copy of report and to submit substance to Superintendent of Police [*Subsections (2) and (3)*].—

The informant is, as of right, entitled to receive a copy of the information as recorded free of cost. If the information is not recorded by the police officer, the informant can approach the Superintendent of Police by sending him the substance of the information by post. Such officer can investigate the case himself or direct an investigation by his subordinate officer.

[s 154.22] Public Document.—

The FIR is a public document and an accused is entitled to have its certified copy. The denial of a copy will be against the principles of natural justice and violative of Article 21 of the Constitution.[66.]

[s 154.23] Jurisdiction.—

Where the FIR lodged at a police station shows that the crime was committed at a place which was out of the territorial jurisdiction of the police station, the investigating officer should forward the FIR to the proper police station. The Supreme Court also made this noteworthy observation that this does not mean that the wrong police station should refuse to take the report and make investigation.[67.]

[s 154.24] Invocation of writ jurisdiction for quashing FIR.—

The Court does not interfere with investigation unless there are compelling reasons for doing so. An order staying arrest is to be sparingly granted, indeed, in rarest of rare cases.[68.]

It has been held by the Supreme Court that in the criminal justice system, the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by police is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. Courts ordinarily do not interfere in the matters of investigation. In very exceptional cases, where the Court finds the police officer has exercised his investigatory powers in breach of statutory provisions, the Court may intervene to protect the personal or property rights of the citizens.[69.]

[s 154.25] Use of sting operation as tool of investigation.—

A matter relating to sting operation came up before a three-Judge Bench of the Supreme Court. The appellants undertook a sting operation in which a Minister was alleged to have been seen on video receiving money purportedly meant to be bribe. The sting operators along with others were charged under section 12 of Prevention of Corruption Act, 1988, and section 120 IPC. The sting operators sought quashing of charge on the ground that the sting operation was a journalistic exercise to expose corruption. It was held by the Supreme Court that a crime does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Any such principle would be abhorrent to our criminal jurisprudence. At the same time, the criminal intent behind commission of the act which is alleged to have occasioned the crime will have to be established before liability of the person charged with the commission of crime can be adjudged.[70.]

However, on the use of the sting operation, the Supreme Court stated thus:

> 14. Thus, sting operations, conducted by the law enforcement agencies themselves in the above jurisdictions have not been recognised as absolute principles of crime detection and proof of criminal acts. Such operations by the enforcement agencies are yet to be experimented and tested in India and legal acceptance thereof by our legal system is yet to be answered.[71.]

[s 154.26] Delhi Special Police Establishment Act.—

A preliminary inquiry against the member of a Special Police Force is permissible on the basis of an anonymous complaint alleging corrupt practice by him. There was no need for FIR. The process of investigation could be initiated immediately on receipt of

complaint. Whether to do so or not depends upon the facts brought forth in the complaint.[72.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .
3. Ins. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 13 (w.e.f. 3-2-2013).
4. Subs. by Act 22 of 2018, section 11(i), for "section 376A, section 376B, section 376C, section 376D" (w.r.e.f. 21-4-2018).
5. Subs. by Act 22 of 2018, section 11(ii), for "section 376A, section 376B, section 376C, section 376D" (w.r.e.f. 21-4-2018).
6. *Manmohan Ghosh*, (1931) 58 Cal 1312 ; *Shyam Deogharia*, (1953) 33 Pat 122.
7. *State of Haryana v Ch Bhajan Lal*, AIR 1992 SC 604 : 1992 Cr LJ 527 ; *Mundrika Mahto v State of Bihar*, (2002) 9 SCC 183 : AIR 2002 SC 2042 : 2002 Cr LJ 2810 , where the case diary showed that *fardbeyan* was recorded earlier than the inquest, the Court said that the inquest could not be treated as FIR.
8. AIR 2014 SC 187 : (2014) 2 SCC 1 .
9. *Meghaji Godadji Thakore v State of Gujarat*, 1993 Cr LJ 730 (Guj) : (1992) 2 Guj LR 1347; *Bhagwan Singh v State of MP*, (2002) 4 SCC 85 : 2002 SCC (Cri) 736 , the object is only to set the criminal law in motion.
10. *Hasib v State of Bihar*, AIR 1972 SC 283 : 1972 Cr LJ 233 ; *Damodar Prasad v State of Maharashtra*, AIR 1972 SC 622 : 1972 Cr LJ 451 : (1972) 1 SCC 107 ; *Apren Joseph v State of Kerala*, AIR 1973 SC 1 : 1973 Cr LJ 185 ; *State of Orissa v Dwari Behera*, 1976 Cr LJ 262 (Ori); *Behudhar Routra v Maheshwar Sahu*; 1991 Cr LJ 220 (Ori); *Rajeshwar v State of Madras*, 1992 Cr LJ 661 (Mad); *Kumar Prasad alias Sunder Lal v State of MP*, 1992 Cr LJ 718 (MP).
11. *DR Bhagare v State of Maharashtra*, AIR 1973 SC 476 : 1973 Cr LJ 680 : (1973) 1 SCC 537 ; *Damodar Prasad v State of Maharashtra*, *Ibid; Mitter Sen v UP*, AIR 1976 SC 1156 : 1976 Cr LJ 857 ; *Kapil Singh v State of Bihar*, 1990 Cr LJ 1248 ; *Prafulla Bora v State of Assam*, 1988 Cr LJ 428 (Gau); *Nisar Ali v State of UP*, AIR 1957 SC 366 : 1957 Cr LJ 550 .
12. *Bijoy Singh v State of Bihar*, AIR 2002 SC 1949 : 2002 Cr LJ 2623 : (2002) 9 SCC 147 ; *State of Gujarat v Anirudhsing*, AIR 1997 SC 2780 : 1997 Cr LJ 3397 : (1997) 6 SCC 514 , FIR is not substantive piece of evidence, it can be used to corroborate or contradict the maker but not other witnesses, the FIR lodged by one Reserve Police Officer was not allowed to be used to corroborate statement of another officer that the accused confessed to him. The Court **relied on** *Meharaj Singh (L/Nk) v State of UP*, (1994) 5 SCC 188 : 1994 SCC (Cri) 1391 : 1995 Cr LJ 457 .
13. *Aghnoo Nagesia v State of Bihar,* AIR 1966 SC 119 : 1966 Cr LJ 100 .
14. *Brajendrasingh v State of Madhya Pradesh*, AIR 2012 SC 1552 : (2012) 4 SCC 289 : (2012) 2 SCC (Cri) 409 .
15. *Munna Lal v State of HP*, 1992 Cr LJ 1558 (HP); *State of Haryana v Bhajan Lal*, 1992 Cr LJ 527 : AIR 1992 SC 604 : 1990 (2) Scale 1066 ; *Murugan v State*, AIR 2009 SC 72 : (2008) 16 SCC 40 , victim suffered serious injuries on various parts of the body, he was unconscious, recording of complaint from an eye-witness by constable, not improper.

16. *State of AP v Punati Ramulu*, AIR 1993 SC 2644 : 1993 Cr LJ 3684 .
17. *Ramesh Kumari v State (NCT of Delhi)*, AIR 2006 SC 1322 : (2006) 2 SCC 677 .
18. *Kalyan v State of UP*, (2001) 9 SCC 632 : AIR 2001 SC 3976 : 2001 Cr LJ 4677 : 2001 (6) Scale 556 : JT 2001 (8) SC 200 . *Ram Ratan v State of UP*, 2002 Cr LJ 2688 (All), the FIR was held to be admissible in evidence as a corroborative piece of evidence.
19. *State of Madhya Pradesh v Chhaakki Lal*, AIR 2019 SC 381 .
20. *Dharmendra Singh v State of UP*, 1998 Cr LJ 2064 ; *State of UP v Krishna Master*, AIR 2010 SC 3071 : (2010) 12 SCC 324 : 2010 Cr LJ 3889 , omission to state in the FIR the motive for the crime, not an omission of an important fact, much importance could not be attached to it particularly when the report was filed by a villager.
21. *Mukesh v State for NCT of Delhi,* AIR 2017 SC 2161 : 2017 Cr LJ 4365 (SC).
22. *Sambhu Das v State of Assam*, AIR 2010 SC 3300 : (2010) 10 SCC 374 .
23. *Harkirat Singh v State of Punjab*, AIR 1997 SC 3231 : (1997) 11 SCC 215 : 1997 Cr LJ 3954 .
24. *Emperor v Khwaja Nazir Ahmed*, (1945) 47 Bom LR 245 : (1945) 26 Lah 1 : 71 IA 203; *Thulia Kali*, AIR 1973 SC 501 : 1972 Cr LJ 1269 ; *Badhna Kharia v State of Assam*, 1988 Cr LJ 1412 (Gau).
25. *Mukesh v State for NCT of Delhi,* AIR 2017 SC 2161 : 2017 Cr LJ 4365 (SC).
26. *Hemant Dhasmana v CBI*, (2001) 7 SCC 536 : AIR 2001 SC 2721 : 2001 Cr LJ 4190 : JT 2001 (6) SC 473 : 2001 (5) Scale 312 ; *Nanjaiah v State of Karnataka*, 2002 Cr LJ 3289 (Kant), a case of brutal registered only when the Court took a serious view of the matter, a case for CBI inquiry not made out.
27. *Vikram v State of Maharashtra*, AIR 2007 SC 1893 : (2007) 12 SCC 332 : 2007 Cr LJ 3193 .
28. *Patai v State of UP*, 2010 (3) Cr LJ 2815 : AIR 2010 SC 2254 : (2010) 4 SCC 429 .
29. *Dharam Pal v State of UP*, AIR 2008 SC 920 : (2008) 17 SCC 337 : 2008 Cr LJ 1016 .
30. *State v Gajraj*, (1952) 2 Raj 910 : AIR 1953 Raj 66 ; *Ramesh Kumar v The State (Delhi Admn)*, 1990 Cr LJ 255 (Del); *State of MP v Surbhan*, AIR 1996 SC 3345 : 1996 Cr LJ 3199 , an FIR cannot be used as a substantive evidence or for corroborating the statement of a third party. It can be used either for corroborating or contradicting the statements of the maker of the FIR.
31. *State of Rajasthan v Teja Singh*, AIR 2001 SC 990 : 2001 Cr LJ 1176 . *Ramesh v State of MP*, AIR 1999 SC 3759 : 1999 Cr LJ 4603 : (2000) 1 SCC 243 , arrest of the accused persons on the basis of the FIR and the intervening public holiday became the cause of delay, explanation satisfactory. *State of Haryana v Tak Singh*, AIR 1999 SC 1742 : (1999) 4 SCC 682 , the FIR was lodged with 21/2 hours of the occurrence, the copy sent to the *illaqua* Magistrate which was 20 km away within 5 hours, sufficient promptness. *Harpal Singh v Devinder Singh*, AIR 1997 SC 2914 : (1997) 6 SCC 660 : 1997 Cr LJ 3561 , delay in lodging FIR with the Magistrate, the Supreme Court said, should not be viewed with unrealistic angle, delay of 4 hours, the FIR could not be labeled as cooked up for that reason alone. *Jai Hari Bera v State of Bihar*, 2003 Cr LJ 2188 (Jhar), 2 days delay (unexplained) in sending FIR to the Magistrate, indicates unfairness in investigation and chances of false implication due to enmity, conviction set aside.
32. *Dharampal v State of UP*, AIR 2008 SC 920 : (2007) 1 SCC 250 .
33. *The State of Bombay v Rusi Mistry*, AIR 1960 SC 391 : 1960 Cr LJ 532 .
34. *George v State of Kerala*, AIR 1960 Ker 142 : 1960 Cr LJ 589 ; *Sahadevan Rajan v State of Kerala*, 1992 Cr LJ 2049 (Ker).
35. *Aghnoo v State of Bihar*, AIR 1966 SC 119 : 1966 Cr LJ 100 .
36. *Barkau v State of UP*, 1993 Cr LJ 2954 (All).
37. *Baderi v State*, 1996 Cr LJ 1928 (Del).
38. *Gansa Oraon v King Emperor*, AIR (1923) 2 Pat 517 .

39. *Peary Mohan Das v D Weston*, (1911) 16 Cal WN 145; *Jayantibhai Lalubhai Patel v State of Gujarat*, 1992 Cr LJ 2377 (Guj) : (1992) 1 Guj LR 723.

40. *Rajeshwar v State of TN*, 1992 Cr LJ 661 (Mad).

41. *Raj Mandal Thakur v State of Bihar*, 1993 Cr LJ 1090 (Pat).

42. *Vijay Shankar v State of MP*, 1989 Cr LJ NOC 151 .

43. *Marudha Pandiyan v State of TN*, 1993 Cr LJ 1594 (Mad).

44. *Karuppiah v State of TN*, 1993 Cr LJ 1688 (Mad).

45. *Bhagwant Singh v Commissioner of Police*, 1985 Cr LJ 1521 : AIR 1985 SC 1285 .

46. *Lallan Chaudhary v State of Bihar*, AIR 2006 SC 3376 : (2006) 12 SCC 229 .

47. Ins. by the Criminal Law (Amendment) Act, 2013, section 3 (w.e.f. 3-2-2013).

48. Ins. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 3 (w.e.f. 3-2-2013).

49. Subs. by Act 22 of 2018, section 2, for "section 376B, section 376C, section 376D" (w.r.e.f. 21-4-2018).

50. *Lalita Kumari v Government of UP*, AIR 2012 SC 1515 : 2012 (3) Scale 152 : (2012) 4 SCC 1 .

51. *Lalita Kumari v State of UP*, AIR 2014 SC 187 : (2014) 2 SCC 1 [Five-Judge Constitution Bench].

52. *Ibid*, para 44 at p 208 (of AIR).

53. *Samaj Parivartan Samudaya v State of Karnataka*, AIR 2012 SC 2326 : (2012) 7 SCC 407 : (2012) 7 SCC (Cri) 365 (Three-Judge Bench).

54. *Lalita Kumari v State of UP*, AIR 2014 SC 187 : (2014) 2 SCC 1 : 2014 Cr LJ 470 (SC) [Five-Judge Constitution Bench]; **Also see** *Doliben Kantilal Patel v State of Gujarat*, AIR 2013 SC 2640 : (2013) 9 SCC 447 .

55. *Bhagwan Singh v State of MP*, (2002) 4 SCC 85 : 2002 Cr LJ 2024 .

56. *State of UP v Harban Sahai*, (1998) 6 SCC 50 : 1998 (3) Scale 178 : JT 1998 (3) SC 443 , the fact that only *lathis* were mentioned and not any other instrument could not be used to rule out other instruments. Prompt and early report of the occurrence and particularly one which contains vivid details creates an assurance of truth. *Motilal v State of UP*, AIR 2010 SC 281 : (2010) 1 SCC 581 : 2010 Cr LJ 1937 , every minute detail about the incident need not be found in the FIR.

57. *K Ashokan v State of Kerala*, (1998) 3 SCC 570 : AIR 1998 SC 1974 : 1998 Cr LJ 2834 : JT 1998 (2) SC 23 : 1998 (1) Scale 713 , there were interpolations in the list of the miscreants submitted by the investigating officer two days after. Benefit of doubt.

58. *Ram Gopal v State of Rajasthan*, AIR 1998 SC 2598 : (1998) 6 SCC 441 : 1998 Cr LJ 4006 . *Rajendra Mahton v State of Bihar*, AIR 1998 SC 1546 : (1998) 9 SCC 315 : 1998 Cr LJ 1254 , omission of reference to a lighted lamp at the place of the incident, trial Court held not justified in using that omission against other witnesses who were not responsible for the omission. *Dukhmochan Pandey v State of Bihar*, (1997) 8 SCC 405 : AIR 1998 SC 40 : 1998 Cr LJ 66 , FIR lodged by eye-witnesses, some embellishments were held to be not sufficient to reject the entire prosecution case. *Anil Kumar v State UP*, AIR 2003 SC 1596 : (2003) 3 SCC 569 , the name of the accused not mentioned because the person lodged had not seen him, not fatal.

59. *Om Prakash v State of Uttaranchal*, 2003 Cr LJ 483 (SC) : (2003) 1 SCC 648 .

60. *Motiram Padu Joshi v State of Maharashtra,* AIR 2018 SC 3245 : (2018) 9 SCC 429 : LNIND 2018 SC 332 .

61. *Ravishwar Manjhi v State of Jharkhand*, AIR 2009 SC 1262 : (2008) 16 SCC 561 .

62. *Avimireddy Venkata Ramana v PP, HC of AP*, AIR 2008 SC 1603 : (2008) 5 SCC 368 : 2008 Cr LJ 2038 .

63. *Latesh v State of Maharashtra*, AIR 2018 SC 659 : 2018 (3) SCC 66 : LNIND 2018 SC 36 .

64. *Kari Choudhary v Sita Devi*, AIR 2002 SC 441 at p 443 : (2002) 1 SCC 714 : 2002 Cr LJ 923 .
65. *Sarwan Singh v State of Punjab*, (2003) 1 SCC 240 : AIR 2002 SC 3652 : JT 2002 (8) SC 114 : 2002 (7) Scale 351 .
66. *Jayat Bhai Lalu Bhai Patel v State of Gujarat*, 1992 Cr LJ 2377 (Guj) : (1992) 1 Guj LR 723.
67. *Satvinder Kaur v State (Govt of NCT) of Delhi*, AIR 1999 SC 3596 : (1999) 8 SCC 728 .
68. *Satya Pal v State of UP*, 2000 Cr LJ 569 (All—FB).
69. *Manohar Lal Sharma v Principal Secretary*, AIR 2014 SC 666 : (2014) 2 SCC 532 : 2014 Cr LJ 1015 [Three-Judge Bench].
70. *Rajat Prasad v CBI*, (2014) 6 SCC 495 : (2014) 3 SCC (Cri) 79 : 2014 Cr LJ 2941 (SC) [Three-Judge Bench].
71. *Ibid*, para 14 at p 2946 (of CrLJ).
72. *Shashikant v CBI*, AIR 2007 SC 351 : (2007) 1 SCC 630 : 2007 Cr LJ 995 .

The Code of Criminal Procedure, 1973

CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 155] Information as to non-cognizable cases and investigation of such cases.—

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

The previous section dealt with information relating to the commission of a cognizable offence: this section deals with information relating to a non-cognizable offence.

[s 155.1] Sub-section (1).—

The police officer receiving information of a non-cognizable offence must enter the substance of it in a book kept in such form as the State Government may prescribe and then refer the informant to the Magistrate. The "book" is the diary kept.

The word "offence" includes an intended offence or offence imminently likely to take place.[73.]

[s 155.2] Non-cognizable case, investigation after Magistrate's order [*Sub-section (2)*].—

A police officer must not investigate a non-cognizable case without an order of a Magistrate. There is no section empowering a police officer to make a report in such a case without the orders of a Magistrate.[74.] The provisions of this sub-section cannot be rendered nugatory by rendering police report as a valid report under section 190(1) (b) of the Code.[75.]

[s 155.3] "Without the order of a Magistrate having power to try such case".—

The order must be of a Magistrate having power to try the case or commit it for trial.

[s 155.4] Powers of investigation after order [*Sub-section (3)*].—

When the police officer receives an order from the Magistrate to investigate a non-cognizable case, he may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as in cognizable cases.

[s 155.5] Where one out of more offences, cognizable [*Sub-section (4)*].—

This sub-section permits the police, where during investigation into a cognizable offence a non-cognizable offence is also disclosed, to investigate into the latter offence without the orders of a Magistrate.[76.] Where a complaint concerning an offence in marriage comprised of one cognizable and one non-cognizable offence, and was filed not by the aggrieved party but by someone else, its rejection on that ground was held by the Supreme Court to be not proper. The Court said that in such cases, the police could under section 155(4) investigate the non-cognizable offence also as if it was also a cognizable offence irrespective of the fact as to who filed the complaint.[77.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .
73. *Gulabsingh v State*, (1961) 64 Bom LR 274 : AIR 1962 Bom 263 .
74. *King Emperor v Sada*, (1901) 3 Bom LR 586 : 26 Bom 150, 156 (FB); *Bahabal Shah v Tarak Nath Chowdhry*, (1897) 24 Cal 691 ; *Podan v State of Kerala*, (1962) 1 Cr LJ 339 ; *Lalchand*, (1964) 2 Cr LJ 115 .
75. *Abdul Halmi v State of West Bengal*, AIR 1961 Cal 257 : 1961 Cr LJ 496 .
76. *Pravin Chandra Mody v State of Andhra Pradesh*, AIR 1965 SC 1185 : (1965) 2 Cr LJ 250 .
77. *State of Orissa v Sharat Chandra Sahu*, AIR 1997 SC 1 : (1996) 6 SCC 435 .

The Code of Criminal Procedure, 1973

CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 156] Police officer's power to investigate cognizable case.—

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

In the case of a cognizable offence, the police may hold an investigation irrespective of any order of the Court. Courts have no control in such cases over the investigation, or over the action of the police in holding such investigation.[78.]

[s 156.1] Investigation of cognizable offence [*Sub-section (1)*].—

This sub-section enables the police to investigate cognizable offences committed beyond their local jurisdiction. See sections 181, 182 and 183.

Where a resident of Kerala had committed embezzlement in United Arab Emirates, it was held that the Kerala police had powers to investigate an offence committed by an Indian citizen outside India without prior sanction of the Government of India. It was further held that the proviso to section 188 CrPC does not bar the cognizance of such an offence or issuing warrants *etc*, at a pre-inquiry stage, without prior sanction of the Government of India.[79.]

[s 156.1.1] *Private funding of investigation.*—

A statutory investigating agency cannot be directed to obtain financial assistance from private parties for meeting the expenses of investigation. The Supreme Court said:

> The official investigation has to be totally extricated from any extraneous influence. The police investigation should necessarily be with the fund supplied by the State. It may be

possible for a rich complainant to supply any amount of fund to the police for conducting investigation into his complaint. But a poor man cannot afford to supply any financial assistance to the police. Somebody who incurs the cost of anything would normally secure its control also. In our Constitutional scheme, the police and other statutory investigating agencies cannot be allowed to be hackneyed by those who can afford it. All complaints shall be investigated with equal alacrity and with equal fairness irrespective of the financial capacity of the person lodging the complaint.[80.]

[s 156.2] Order of investigation [*Sub-section (3)*].—

This sub-section empowers a Magistrate to order a police inquiry in a case where the Magistrate does not himself issue process at once.[81.] The word "Magistrate" mentioned in section 156(3) means Judicial Magistrate who is competent to take cognizance of a cognizable offence and not Executive Magistrate.[82.] The Magistrate after he has acted under Chapter XV cannot proceed under Chapter XII.[83.] This sub-section enables a Magistrate to order the investigation of an offence of which he may have taken cognizance under section 190. He may do so even before the examination of the complainant.[84.] Thus, the Magistrate is not bound to take cognizance of the offence on receiving a complaint and he may, without taking cognizance direct investigation of the case by the police under sub-section (3) of this section.[85.] Under section 156(3) at the pre-cognizance stage even after a charge-sheet or a closure report is submitted but once cognizance is taken and the accused person appears pursuant thereto, he would be bereft of any competence to direct further investigation either *suo motu* or acting on the request or prayer of the complainant/informant.[86.]

The power under section 156(3) of the Code can be exercised by the Magistrate even before he takes cognizance provided the complaint discloses commission of a cognizable offence. Thus, where the complaint did not disclose commission of a cognizable offence, the order directing investigation was held liable to be quashed.[87.]

The Supreme Court[88.] reiterated that the power to direct investigation under section 156(3) is different from that under section 202(1). The three-Judge Bench was seized of 3 questions—

(i) Whether discretion of the Magistrate to call for a report under Section 202 instead of directing investigation 156(3) is controlled by any defined parameters?

(ii) Whether in the course of investigation in pursuance of a direction under Section 202, the Police Officer is entitled to arrest an accused?

It was held that "the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under Para 120.6 in *Lalita Kumari*[89.] may fall under Section 202. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case.

In a case, the appellants approached the High Court even before the stage of issuance of process and challenged the order passed by the Magistrate under section 156(3) of CrPC. The Supreme Court held that the order requiring investigation by the police, cannot be said to have caused an injury of irreparable nature which, at this stage, requires quashing of the investigation. The stage of cognizance would arise only after the investigation report is filed before the Magistrate. Therefore, filing of the petitions

under Article 227 of the Constitution of India or under section 482 of CrPC were held premature.[90.]

The Supreme Court has held that though the power of the investigating agency is large and expansive, and the Courts have a minimum role in this regard, there are inbuilt provisions in the code to ensure that investigation of a criminal offence is conducted keeping in mind the rights of an accused to a fair process of investigation. The mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day-to-day basis and the power of Court under section 172(2) and the plenary power of High Courts under Article 226 of the Constitution are adequate safeguards to ensure a fair conduct of investigation.[91.]

The Supreme Court has held that our criminal justice system provides safeguards of a fair trial by doing justice to all, the accused, the society and a fair chance to prove the case to the prosecution. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, the Court is to be deeply cautions and ensure that despite such an attempt, the determinative process is not subverted.[92.]

In a subsequent case, the Supreme Court considered registration of FIR to be necessary. The Court said:[93.]

> Any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3). If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

A Magistrate has no power under section 156(3) to direct the CBI to conduct investigation into any offence.[94.] The primary responsibility for conducting investigation into offences in cognizable cases vests in the in-charge police officer. Section 156(3) of the Code empowers a Magistrate to direct such officer in-charge of the police station to investigate any cognizable case over which such Magistrate has jurisdiction. Though a Magistrate under section 156(3) can only direct an officer in charge of a police station to conduct such investigation and not a superior police officer, nevertheless, when such an order is passed, any police officer, superior in rank of such officer, can as well exercise the power to conduct an investigation, and all such investigations would then be deemed to be the investigation conducted by the officer in charge of a police station. However, the Magisterial power cannot be stretched under section 156(3) beyond directing the officer in charge of police station to conduct the investigation. A Magistrate cannot direct CBI to conduct investigation in exercise of his powers under section 156(3) of the Code.

It has been held that where incriminating materials seized in raids are not maintained in regular course of business, they have no evidentiary value against third parties and no case is made out to direct investigation against any of the persons named in these documents.[95.]

[s 156.3] Power of special judge to refer complaint under section 156(3).—

Section 190 of the CrPC permits anyone to approach the Magistrate with a complaint. The special judge, being a criminal court has been conferred power to take cognizance of offences. In relation to a complaint under the Prevention of Corruption Act, 1988, the

words "special judge" has to be read wherever the expression "Magistrate" has been used by virtue of the principle of legislation by incorporation therefore the special judge has powers under section 5 of the Prevention of Corruption Act, 1988, to refer a complaint to vigilance for institution of case and investigation.[96.]

[s 156.4] Magistrate's order for registration of case and investigation.—

A complaint was filed before the Magistrate which disclosed a cognizable offence. The Magistrate issued direction to the police to register the case and investigate it. The Supreme Court held that the direction was not illegal.[97.] The Magistrate has to apply his mind to the allegations in the complaint. He may at once take cognizance or order that the case be sent to the police station for being registered and investigated. The order of the Magistrate has necessarily to indicate the application of mind.[98.] A Magistrate can direct the police to register the FIR. There was held to be no illegality in it. The police should record the FIR, even if no such direction was given by the Magistrate, because the police officer could take further steps contemplated in Chapter XII of the Code only thereafter.[99.]

In *Hemant Yashwant Dhage v State of Maharashtra,*[100.] it was held that to enable the police to start investigation, it is open to the Magistrate to direct the police to register an FIR and even where a Magistrate does not do so in explicit words but directs for investigation under section 156(3) of the Code, the police should register an FIR. Because section 156 falls within Chapter XII of the Code which deals with powers of the police officers to investigate cognizable offences, the police officer concerned would always be in a better position to take further steps as contemplated in Chapter XII once FIR is registered in respect of the concerned cognizable offence.

A Magistrate can invoke powers under sub-section (3) at pre-investigation stage, whereas powers under section 202 can be invoked after taking cognizance and before issuance of process.[101.]

[s 156.5] Services of sniffer dog.—

The services of a sniffer dog may be used for purposes of investigation. But its faculties cannot be taken as evidence for establishing the guilt of the accused.

[s 156.6] Revision.—

Revision against the order of Magistrate under section 156(3) directing the police to register the case and investigate is maintainable.[102.]

[s 156.7] Difference between investigation envisaged under sections 156 and 202.—

The Supreme Court said in a case[103.] that section 156 falls in Chapter XII. It deals with the power of police officers in the matter of investigation of cognizable offences. Section 202 which is contained in Chapter XV refers to the power of a Magistrate to direct an investigation by a police officer. But they are investigations of a different type.

In the former case, the Magistrate orders investigation but does not take cognizance of the offence. Under the latter chapter, the position is that once the Magistrate has taken cognizance of the offence, he has to follow the provisions of Chapter XV. An investigation under section 202 is of limited nature. It is intended just only to enable the Magistrate to decide whether he is to proceed further after taking cognizance.[104.]

[s 156.8] Interference in investigation under writ jurisdiction.—

Initiation of investigation is in the domain of the executive. It is up to investigating agencies to decide about it. The Courts of first instance can act under CrPC, exercise control on an on-going investigation, but it is not advisable to interfere with it under writ jurisdiction. Directions for investigation cannot be given by the Supreme Court in the exercise of writ jurisdiction where statutory remedies are available. Even if the allegations touch the matters of public interest, the Supreme Court cannot be an appropriate forum for seeking initiation of investigation. Only on exhaustion of ordinary remedies, proceedings can be brought before the High Court.[105.] The Supreme Court further observed that the High Court in the exercise of its power under Article 226 of the Constitution can always issue appropriate directions at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by an investigating officer *mala fide*. This is to be done in the rarest of rare cases, i.e., where a clear case of abuse of power and non-compliance with statutory provisions has been made out. Even in such cases, the Court cannot direct what is to be done and how it is to be done. A direction cannot be issued on the basis of allegations made in an anonymous letter without forming *prima facie* opinion that they reveal the commission of a cognizable offence. Before any such direction is issued the institution against which the allegations were made was held entitled to an opportunity of being heard. The anonymous petition asking directions for investigation was sent directly in the name of the judge. The investigation was sought against an institution against which no police complaint was lodged. The Court said that the petition ought not to be heard. Inherent powers and the power to issue writs separate in different fields. In a PIL, the litigant must disclose his identity. Anonymous letter cannot be entertained as a PIL. Such petition is not to be entertained by the judge himself for setting the law in motion. Roster should not be by passed.[106.]

High Courts have extraordinary power to stay investigation or trial of criminal cases. But this power should be exercised sparingly with due care. Use of such power carries with it the responsibility to expeditiously dispose of the case. Therefore, the Supreme Court directed the High Court to dispose of such cases as early as possible preferably within six months from the date of passing of the stay order.[107.]

In *Youth Bar Association of India v UOI,*[108.] the Supreme Court heard a PIL seeking a direction to the Centre and all states that each and every FIR registered in police stations must be uploaded on the official websites as early as possible and preferably within 24 hours from the time of registration. The Supreme Court issued the following guidelines—

(a) An accused is entitled to get a copy of the FIR at an earlier stage than as prescribed under section 207 of the CrPC.

(b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a FIR can submit an application through his representative/agent/parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such

fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within 24 hours.

(c) Once the FIR is forwarded by the police station to the concerned Magistrate or any special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under section 207 of the CrPC.

(d) The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under Protection of Children from Sexual Offences Act (POCSO) and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within 24 hours of the registration of the FIR so that the accused or any person connected with the same can download the FIR and file appropriate application before the Court as per law for redressal of his grievances. It may be clarified here that in case there are connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to 48 hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.

(e) The decision not to upload the copy of the FIR on the website shall not be taken by an officer below the rank of Deputy Superintendent of Police or any person holding equivalent post. In case, the States where District Magistrate has a role, he may also assume the said authority. A decision taken by the concerned police officer or the District Magistrate shall be duly communicated to the concerned jurisdictional Magistrate.

(f) The word "sensitive" apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive.

(g) If an FIR is not uploaded, needless to say, it shall not be per se a ground to obtain the benefit under section 438 of the CrPC.

(h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

(i) The competent authority referred to hereinabove shall constitute the committee, as directed hereinabove, within eight weeks from today.

(j) In cases wherein decisions have been taken not to give copies of the FIR regard being had to the sensitive nature of the case, it will be open to the accused/his authorised representative/parokar to file an application for grant of certified copy before the Court to which the FIR has been sent and the same shall be provided in quite promptitude by the concerned Court not beyond three days of the submission of the application.

(k) The directions for uploading of FIR in the website of all the States shall be given

effect from 15 November 2016.

[s 156.9] Court monitored investigations.—

When a Court monitors a criminal investigation, it is the responsibility and duty of the Court to see that the investigation is being carried out in the right direction and the officers, who are entrusted with the task are not intimidated or pressurized by any person, however high he may be. Considerable responsibility and duty is cast on the Court when it monitors a criminal investigation. People have trust and confidence when Court monitors a criminal investigation and the Court has to live up to that trust and confidence. Any interference, by anybody, to scuttle a Court monitored investigation would amount to interfering with the administration of justice. Courts, if they have to serve the cause of justice, must have the power to secure obedience to its orders to prevent interference with proceedings and to protect the reputation of legal system, its components and its personnel.[109.]

A Constitutional Court monitored investigation is nothing but the adoption of a procedure of a "*continuing mandamus*" which traces its origin, like PIL, to Article 32 of the Constitution and is our contribution to jurisprudence.[110.]

In an investigation monitored by Court, the monitoring ends once the investigation is complete and charge-sheet is filed.[111.]

The Constitutional Courts have powers to direct CBI investigation, but has cautioned that this extraordinary power must be exercised sparingly and not as a matter of routine or merely because a party has levelled some allegations against police, but in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national or international ramifications or where such order is necessary for doing complete justice.[112.]

[s 156.10] Order as to need for arrest.—

Every Magistrate while passing an order under section 156(3) should also "examine the advisability of including in his order an incidental direction as to whether the power of arrest by the police for the purpose of that investigation should be controlled by saying that the police will not make arrest for the purpose of investigation without first obtaining a warrant for the arrest from the Magistrate".[113.]

[s 156.11] Narcotic Drugs and Psychotropic Substances Act.—

The offences under NDPS Act, 1985, are to be investigated in accordance with the special procedure under the Act and the executive police will not be able to embark upon a separate investigation under section 156 CrPC.[114.]

[s 156.12] Delhi Special Police Establishment Act, 1946.—

Allegations were made against police personnel. The Court said that the interest of justice would be better served if the case is registered and investigated by an independent agency like CBI.[115.]

1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .
78. *Emperor v Nazir Ahmed*, (1944) 47 Bom LR 245 : (1945) 26 Lah 1 : 71 IA 203.
79. *Mohd Sajeed v State of Kerala*, 1995 Cr LJ 3313 (Ker).
80. *Navinchandra N Majithia v State of Meghalaya*, (2000) 8 SCC 323 : 2000 Cr LJ 4600 (SC).
81. *Harbhajan Singh v State of MP*, 2002 Cr LJ 3332 (MP), Magistrate can order investigation where he is not satisfied that the complaint could be directly entertained.
82. *Bateshewar Singh v State of Bihar*, 1992 Cr LJ 2122 (Pat).
83. *Isah Nasya v Emperor*, (1926) ILR 54 Cal 303 : AIR 1928 Cal 24 .
84. *Emperor v Vishwanath*, (1906) 8 Bom LR 589 ; *Bateshewar Singh v State of Bihar*, 1992 Cr LJ 2122 (Pat).
85. *Kanak Singh v Balabhadra Singh*, 1988 Cr LJ 579 (Guj).
86. *Amrutbhai Shambhubhai Patel v Sumanbhai Kantibhai Patel,* AIR 2017 SC 774 : [2017] 2 MLJ (Crl) 45 : LNIND 2017 SC 646 .
87. *Tilaknagar Industries Ltd v State of AP*, AIR 2012 SC 521 : (2011) 15 SCC 571 .
88. *Ramdev Food Products Pvt Ltd v State of Gujarat*, (2015) 6 SCC 439 : AIR 2015 SC 1742 : 2015 Cr LJ 2382 : 2015 (3) Scale 622 .
89. *Lalita Kumari v Govt of UP*, (2014) 2 SCC 1 : AIR 2014 SC 187 : 2014 Cr LJ 470 : JT 2013 (14) SC 399 : 2013 (13) Scale 559 .
90. *HDFC Securities Ltd v State of Maharashtra,* AIR 2017 SC 61 : LNIND 2016 SC 602 .
91. *VK Sasikala v State Rep. By Superintendent*, AIR 2013 SC 613 : (2012) 9 SCC 771 .
92. *Dayal Singh v State of Uttaranchal*, AIR 2012 SC 3046 : (2012) 8 SCC 263 : (2012) 3 SCC Cri) 838 .
93. *Suresh Chand Jain v State of MP*, AIR 2001 SC 571 : (2001) 2 SCC 628 .
94. *CBI v State of Rajasthan*, AIR 2001 SC 668 : 2001 Cr LJ 968 : (2001) 1 Ker LT 563 .
95. *Common Cause (A Registered Society) v UOI*, AIR 2017 SC 540 .
96. *Anosh Ekka v State*, 2010 Cr LJ 259 (Jhar); *AR Antulay v Ramdas Srinivas Naik*, AIR 1984 SC 718 : (1984) 2 SCC 500 , Foll.
97. *Madhu Bala v Suresh Kumar*, AIR 1997 SC 3104 : (1997) 8 SCC 476 : 1997 Cr LJ 3757 .
98. *Ram Babu Gupta v State of UP*, 2001 Cr LJ 3363 (All—FB).
99. *Mohd Yousuf v Afaq Jahan*, AIR 2006 SC 705 : (2006) 1 SCC 627 : 2006 Cr LJ 788 .
100. *Hemant Yashwant Dhage v State of Maharashtra*, (2016) 6 SCC 273 : AIR 2016 SC 814 : 2016 Cr LJ 1270 : 2016 (2) Scale 271 .
101. *Rameshbhai Pandurao Hedau v State of Gujarat*, AIR 2010 SC 1877 : (2010) 4 SCC 185 : 2010 Cr LJ 2441 .
102. *Sabir v Jaswant*, 2002 Cr LJ 4563 (All).
103. *Suresh Chand Jain v State of MP*, AIR 2001 SC 571 : (2001) 2 SCC 628 : 2001 Cr LJ 954 . *Dilawar Singh v State of Delhi*, AIR 2007 SC 3234 : (2007) 12 SCC 641 : 2007 Cr LJ 4709 ,

investigation under section 202 is of limited nature, it is intended only for helping the Magistrate to decide whether there is a sufficient ground for him to proceed further.

104. *Mohd Yousuf v Afaq Jahan*, AIR 2006 SC 705 : (2006) 1 SCC 627 : 2006 Cr LJ 788 .

105. *Kunga Nima Lepcha v State of Sikkim*, AIR 2010 SC 1671 : (2010) 4 SCC 573 : 2010 Cr LJ 2411 .

106. *Divine Retreat Centre v State of Kerala*, AIR 2008 SC 1614 : (2008) 3 SCC 542 : 2008 Cr LJ 1891 .

107. *Imtiaz Ahmad v State of Uttar Pradesh*, AIR 2012 SC 642 : (2012) 2 SCC 688 .

108. *Youth Bar Association of India v UOI*, (2016) 9 SCC 473 : AIR 2016 SC 4136 .

109. *Rajeshwar Singh v Subrata Roy Sahara*, AIR 2014 SC 476 : (2014) 14 SCC 257 .

110. *Manohar Lal Sharma v Principal Secretary*, AIR 2014 SC 666 : (2014) 2 SCC 532 ; *Vineet Narayan v UOI*, AIR 1998 SC 889 : (1998) 1 SCC 226 ; *MC Mehta v UOI*, AIR 2008 SC 180 : (2008) 1 SCC 407 —Ref.

111. *Sushila Devi v State of Rajasthan*, (2014) 1 SCC 269 : 2014 Cr LJ 64 (SC).

112. *Doliben Kantilal Patel v State of Gujarat*, AIR 2013 SC 2640 : (2013) 9 SCC 447 .

113. *Masuriyadin v Addl Sessions Judge*, 2002 Cr LJ 4292 (All).

114. *State of HP v Vidya Devi*, 1993 Cr LJ 3556 (HP—FB). *Munna v State*, 2002 Cr LJ 4274 (All) if investigating officers conducting investigation of offences under the NDPS Act are careless and slack, the trade, conveyance or sale and possession of narcotic substances without a valid licence would go on. It would the nation's morrow. Conduct of such investigating officers needs serious scrutiny by the top customs authority.

115. *Ramesh Kumari v State (NCT of Delhi)*, AIR 2006 SC 1322 : (2006) 2 SCC 677 : 2006 Cr LJ 1622 .

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[s 157] Procedure for investigation.—

(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

***Provided* that—**

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer-in-charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case:

116. **[*Provided further* that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.]**

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer-in-charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section, and in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

The section requires that immediate intimation of every complaint or information preferred to an officer in charge of a police station of the commission of a cognizable offence shall be sent to the Magistrate having jurisdiction.[117.] The object of this provision is obvious, and it involves more than a mere technical compliance with the law. The Magistrate is primarily responsible for the condition of the district as regards repressible crime, and he is not at liberty to divest himself of that responsibility or to relax that supervision over crime which the law intends that he should exercise.

It has been held that issuing of "Letter Rogatory" by a Court is only to seek judicial assistance from judicial authorities in a foreign country for investigation and collection of evidence and the accused has no right to be heard at this stage as *audi alteram partem* does not apply during the course of investigation.[118.]

[s 157.1] Delay in forwarding report to Magistrate—"Forthwith".—

The meaning of the expression "forthwith" was explained by the Supreme Court[119.] : The expression "forthwith" used in section 157(1) would undoubtedly mean within a reasonable time and without any unreasonable delay. In cases where the date and time of the lodging of the F.I.R. is questioned, the report becomes more relevant. But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated, or the accused is entitled to be acquitted on this ground.[120.]

[s 157.2] Magistrate to note time and date of receipt.—

The Magistrate is under a duty on receiving copies of FIRs, particularly those relating to heinous crimes, such as murder, to note the date and time of receipt.[121.]

[s 157.3] "Investigation".—

Investigation includes all proceedings under the Code for the collection of evidence conducted by a police officer or by any person other than a Magistrate, who is authorised by the Magistrate in this behalf.[122.] The object of investigation is to find out whether the alleged offence have in fact been committed, and, if so, who have committed them.[123.] There cannot be an inquiry without registering a criminal case.[124.]

In an investigation resorting to scientific evidence like taking of finger prints, is not always necessary. Thus, when the ocular evidence indicating the participation of the accused in the crime was found to be trustworthy and the one inspiring confidence, it was held that an omission of the investigating agency to resort to scientific methods would not vitiate the prosecution, more so when there was a possibility of the finger prints having been meddled with.[125.]

In a case where there is no eye-witness and which is based entirely on circumstantial evidence such as blood stains and fingerprints, scientific methods can come to the aid of investigating agencies. Thus, in a case where the only evidence to connect the accused with the crime was that he was searching for the address of the deceased and one witness escorted the accused to the house of the deceased where the accused was seen talking to the deceased some hours before her death, the Supreme Court observed that use of scientific methods and advanced scientific collection of evidence should be encouraged.[126.]

The commencement of an investigation is subject to two conditions—(1) the police officer should have reason to suspect the commission of a cognizable offence and (2) he has to satisfy himself, subjectively, as to the existence of sufficient grounds for embarking on investigation.[127.]

[s 157.4] Stay of Investigation due to Show Cause Notice.—

The Supreme Court has held that issuance of show-cause notice to investigating agency by the High Court does not necessarily mean that further investigation cannot be done.[128.]

[s 157.5] Investigation of injury of accused.—

The investigating officer is under a duty to find out the cause of injury sustained by an accused person in the course of the same transaction in which some of the members of the prosecution party sustained injuries.[129.]

[s 157.6] Judicial interference in investigation.—

Judicial interference in a case at the stage of investigation is not called for. But even so the investigation agency cannot be given the latitude of protracting the conclusion of the investigation without any limit of time.[130.]

Where an investigation by the local police was in progress and the High Court issued a direction under a writ petition for a fresh and further investigation by an agency other than the local police, the Supreme Court held that the High Court overstepped its jurisdiction. Consequently, the power of the local police to carry on further investigation under section 173(8) was not affected.[131.]

[s 157.7] Safeguards for rape victims.—

The CrPC (Amendment) Act, 2008, has inserted a further proviso in the section which seeks to safeguard the interest of the rape victims. It provides that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice. Such recording of statement has to be conducted, as far as practicable, by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .

2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

116. Ins. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 11 (w.e.f. 31-12-2009).

117. *Om Prakash v State of New Delhi*, AIR 1974 SC 1983 : (1971) 3 SCC 413 : 1974 Cr LJ 1383 .

118. *UOI v WN Chadha*, AIR 1993 SC 1082 : 1993 Cr LJ 859 : (1993) Supp 4 SCC 260.

119. *Alla China Apparao v State of AP*, (2002) 8 SCC 440 : 2003 Cr LJ 7 .

120. *Jafel Biswas v State of West Bengal*, AIR 2019 SC 519 .

121. *Bijoy Singh v State of Bihar*, (2002) 9 SCC 147 : AIR 2002 SC 1949 : 2002 Cr LJ 2623 .

122. *Manmohan Ghosh v Emperor*, (1931) ILR 58 Cal 1312 : AIR 1931 Cal 745 .

123. *Kari Chaudhary v Sita Devi*, (2002) 1 SCC 714 : AIR 2002 SC 441 : 2002 Cr LJ 923 : (2002) 1 CHN (Supp) 108.

124. *Mohindro v State of Punjab*, AIR 2001 SC 2989 : 2001 Cr LJ 2587 : (2002) 1 SCC 149 .

125. *Appukuttan v State of Kerala*, 1989 Cr LJ 2362 (Ker).

126. *Prakash v State of Karnataka*, 2014 Cr LJ 2503 (SC) : (2014) 12 SCC 133 .

127. *State of Haryana v Ch Bhajan Lal*, AIR 1992 SC 604 : 1992 Cr LJ 527 .

128. *Directorate of Enforcement Guru Swarup v Srivastava*, (2006) 6 SCC 350 : (2006) 3 SCC (Cri) 211 .

129. *Kashiram v State of MP*, (2002) 1 SCC 71 : AIR 2001 SC 2902 . *Dharminder v State of HP*, (2002) 7 SCC 488 : AIR 2002 SC 3097 : 2002 Cr LJ 4302 : JT 2002 (6) SC 410 : 2002 (6) Scale 183 , investigation of injuries caused to the accused and the plea of self-defence.

130. *Mahendra Lal Das v State of Bihar*, (2002) 1 SCC 149 : AIR 2001 SC 2989 : 2001 Cr LJ 2587 .

131. *Rajesh v Ramdeo*, (2001) 10 SCC 759 .

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The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 158] Report how submitted.—

(1) Every report sent to a Magistrate under section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in that behalf.

(2) Such superior officer may give such instructions to the officer-in-charge of the police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

This provision is mandatory in nature.[132.] Delay in despatch of FIR is not always fatal to the prosecution.[133.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

132. *Ahmad Nabi v State of UP*, 1987 (1) Crimes 85 (All).

133. *Roop Chand v State*, 1988 Cr LJ 1655 (Del).

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 159] Power to hold investigation or preliminary inquiry.—

Such Magistrate, on receiving such report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided in this Code.

On receiving a police report, the Magistrate may dismiss the case if there is no sufficient ground for investigation or he may proceed under this section.

An inquiry under this section can be made only on the submission of a police report, i.e., a report made before the completion of the police investigation; if a complaint is made to the Magistrate, he is bound to proceed under section 200.[134.] But the Magistrate cannot under this section suspend a police investigation which has already commenced and direct a Magisterial inquiry.[135.]

The section is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to section 157(1), and it is in those cases that, if he thinks fit, he can choose the second alternative of proceeding himself or deputing any subordinate Magistrate to hold a preliminary inquiry.[136.]

[s 159.1] "Preliminary inquiry".—

An inquiry includes every inquiry other than a trial under this Code, by a Magistrate or a Court.[137.]

1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

134. *Lokenath v Sanyasi*, (1903) ILR 30 Cal 923; *Abdul Rahman v Emperor*, (1909) ILR 32 All 30.

135. *Pancham Singh v The State*, AIR 1967 Pat 416 : 1967 Cr LJ 1677 .

136. *SN Sharma v Bipen Kumar*, AIR 1970 SC 786 : 1970 Cr LJ 764 : (1970) 1 SCC 653 ; *VS. Kulkarni v SB Sali Gaud*, 1979 Cr LJ (NOC) 120 (Kant).

137. *Vide*, section 2. clause (g).

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 160] Police officer's power to require attendance of witnesses.—

(1) Any police-officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:

Provided **that no male person** [138.] **[under the age of fifteen years or above the age of sixty five years or a woman or a mentally or physically disabled person] shall be required to attend at any place other than the place in which such male person or woman resides.**

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.

[s 160.1] Criminal Law (Amendment) Act, 2013.—

Under the proviso to sub-section (1) of section 160, a privilege had been given to a person under the age of 15 years and a woman that they shall not be required to attend at any place other than their place of residence for recording their statement during investigation. Now under the present amendment, this privilege has also been extended to a person above 65 and a person mentally or physically disabled.

COMMENT

This section authorises a police officer making an investigation under this Chapter to require the attendance before himself of any person (within certain limits), who appears to be acquainted with the circumstances of the case, but no male under 15 years or woman shall be required to attend at any place other than the place in which such male or woman resides.

What is stated with reference to police officials under section 160(1) proviso applies to the Army and the Army Officers under the Armed Forces (Special Powers) Act of 1958. Therefore, whenever the army officials have to deal with a woman, under the said Act, as an offender, the woman cannot be taken to the Army Camp for interrogation and

cannot be requisitioned by the Army Officials for attendance at any place other than the woman's residence as provided under section 160(1).[139.]

[s 160.2] "By order in writing, require the attendance before himself".—

The order requiring the attendance of a person must be in writing.

[s 160.3] "Of any person being within the limits of his own or any adjoining station".—

This section does not authorise a police officer to require the attendance of an accused person with a view to his answering the charge. The intention of the Legislature seems to have been only to provide a facility for obtaining evidence and not for procuring the attendance of the accused, who may be arrested at any time, if necessary, without a warrant.[140.] Where the name of the sole eye-witness, who was relied upon, was given in the FIR and his statement was corroborated by medical evidence, ballistic expert, recovery of gun and other circumstances, the delay in recording his statement by the investigating officer, having been sufficiently explained, it was held that the delay did not matter in this case.[141.]

[s 160.4] Acquainted with facts and circumstances of the case.—

The police repeatedly questioned the family members of the accused at their house or by calling them at the police station. This was done because the police had reasonable ground to believe that the family members knew about the whereabouts of the accused. The Court said that this being part of the process of investigation, could not *per se* be considered as harassment or torture or violation of Article 21.[142.]

[s 160.5] "Such person shall attend".—

A person who fails to comply with the order of the police may be prosecuted for disobedience under section 174 of the IPC.[143.]

[s 160.6] Payment of expenses to witness [*Sub-section (2)*].—

Reasonable expenses of witnesses to attend at places other than their residence may be paid.

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .

2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

138. Subs. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 14, for "under the age of fifteen years or woman" (w.e.f. 3-2-2013).

139. *Niloy Datta v Dist Mag*, 1991 Cr LJ 2933 (Gau).

140. *Queen Empress v Saminada Chetti*, (1883) ILR 7 Mad 274 (FB).

141. *Ganpat Ram v State of Rajasthan*, 1995 Cr LJ 1466 (Raj) : 1995 (1) WLC 281 .

142. *Sube Singh v State of Haryana*, AIR 2006 SC 1117 : (2006) 3 SCC 178 : 2006 Cr LJ 1242 .

143. *Queen-Empress v Jogendra Nath Mukerjee*, (1897) ILR 24 Cal 320.

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 161] Examination of witnesses by police.—

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records:

[144.] [*Provided* that statement made under this sub-section may also be recorded by audio-video electronic means:]

[145.] [*Provided further* that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, [146.][section 376A, section 376AB, section 376B, section 376C, section 376D, section 376 DA, section 376DB], section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.]

[s 161.1] Criminal Law (Amendment) Act, 2013.—

Under sub-section (3) of section 161, a second proviso has been inserted on the recommendation of Justice JS Verma Committee that the statement of a woman, who has been victim of offences enumerated in the proviso shall be recorded by a woman police officer or any woman officer. This has been done to protect a victim woman from the embarrassment of narrating the sexual acts before a male police officer.

[s 161.2] Criminal Law (Amendment) Act, 2018.—

Section 161 of the Code of Criminal Procedure has been recently amended *vide* the Criminal Law (Amendment) Act, 2018. The 2018 Amendment Act has substituted the words "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" for the words "section 376A, section 376B, section 376C, section 376D" in section 161. The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of section 161.

COMMENT

Under this section, a police officer making an investigation can examine the person acquainted with the facts of the case, and reduce the statement made by such person into writing. There should not be a long delay on the part of the investigating authorities in recording statements. In a case where there was an unexplained delay for 10 days, and there were some contradictions as well, the Supreme Court opined that though the contradictions by themselves might not have much significance, yet, considered in the light of the delay in the examination, the evidence became suspect.[147.] The investigating officer, however, should be specifically asked about such delay and the reasons therefor.[148.] Where belated examination of the victim of an offence was unexplained, it was held to throw doubt on the veracity of the prosecution case.[149.] When the delay is properly explained, it may not have any adverse impact upon the probative value of a particular eye-witness.[150.] Where the person resided in Dubai, and not within the limits of the police station or the adjoining station, the investigating officer could not avail benefit of this section.[151.] It is well settled that delay of a few hours by itself in recording the statement of the informant does not amount to serious infirmity, unless there is material to suggest that investigating agency had deliberately delayed in order to afford an opportunity to the maker to set up a case of his own choice.[152.]

Where evidence of the victims of a communal riot was found cogent, clear, truthful and convincing, it was held that delay in their examination by police under section 161 CrPC did not affect their credibility.[153.]

[s 161.3] "May examine orally any person supposed to be acquainted with the facts ... of the case".—

No oath or affirmation is required in an examination under this section. It is not obligatory to reduce to writing the statement of the person examined.

[s 161.4] "Any person".—

The words "any person" in this section, which must be read in conjunction with section 162, include any person who may subsequently be accused of the crime in respect of which the investigation is made by the police officer.[154.]

[s 161.5] "Such person shall be bound to answer truly all questions relating to such case".—

It is obligatory on a person examined in the course of a police investigation to answer all questions put to him other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

The word "truly" used after the word "answer" indicates that the person examined is legally bound to state the truth. A person who gives false information in answer to such questions can be prosecuted under the provisions of sections 202 and 203 of the IPC.[155.]

[s 161.6] Narco analysis test.—

Compulsory exposure to narco analysis test would be violative of Article 20(3) of the Constitution. A person cannot be deprived of his protection against self-incrimination.[156.]

[s 161.7] Recording of statements [*Sub-section (3)*].—

This sub-section prohibits the making of precis of a statement of a witness or merely recording that one witness corroborates another. The statement, if recorded, must be recorded as made[157.] and should not be in indirect form of speech. The writing should be a record in the first person.[158.]

[s 161.8] Substance of interrogation.—

The substance of interrogation recorded by the investigating officer cannot be regarded as a statement of a witness recorded under section 161. It cannot be used for contradicting the witness at the trial under section 162.[159.] The expression "statement" does not include interpretation of the statement by the investigating officer or its gist. Direction to supply gist is unsustainable.[160.]

[s 161.9] Relevant fact not mentioned in section 161 statement.—

Where a relevant fact was not mentioned in the statement of the witness under section 161 but was deposed before the Court in his testimony, the Court said that this would not be a ground for rejecting his evidence if it is otherwise creditworthy and acceptable. An omission on the part of a police officer cannot take away the nature and character of the evidence.[161.] The significance of the omission would depend upon the fact whether the specific question relating to the omitted matter was put to the witness or not.[162.]

[s 161.10] Statement recorded in some other case.—

In reference to the statement of a witness recorded in the course of investigation in some other case, it was held by the Supreme Court that the Court could summon the case diary of such other case under section 91 for the purpose of contradicting the witness. Restrictions envisaged under section 172(2) and (3) do not apply to use of

such case diary. Restrictions envisaged under section 162 CrPC and those under section 145 Evidence Act, would certainly apply.[163.]

[s 161.11] Re-recording of statement after transfer to another investigating agency.—

The statement of a witness in the case of a dowry death was recorded. The case was then transferred to the CID. It was held that the investigating officer who took over the investigation could record fresh statements of the witness. It was not tenable to say that he ought to have relied upon the statement recorded by the earlier investigating officer.[164.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

144. Ins. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 12 (w.e.f. 31-12-2009).

145. Ins. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 15 (w.e.f. 3-2-2013).

146. Subs. by Act 22 of 2018, section 12, for "section 376A, section 376B, section 376C, section 376D" (w.r.e.f. 21-4-2018).

147. *Balakrishna Swain v State of Orissa*, AIR 1971 SC 804 : 1971 Cr LJ 670 .

148. *Ranbir v State of Punjab*, AIR 1973 SC 1409 : 1973 Cr LJ 1120 : (1971) 2 SCC 330 .

149. *Ramsingh v State of MP*, 1989 Cr LJ NOC 206 (MP); *Brij Nandan Rai v State of Bihar*, 1922 Cr LJ 942 (Pat).

150. *Jodha Khoda Rabari v State of Gujarat*, 1992 Cr LJ 3298 (Guj).

151. *Washeshwer Nath Chaddha v State*, 1993 Cr LJ 3214 (Del).

152. *Raj Mangal Thakur v State of Bihar*, 1993 Cr LJ 1090 (Pat).

153. *Paresh Kalyan Das Bhavsar v Sadiq Yakubbhai*, AIR 1993 SC 1544 : 1993 Cr LJ 1857 : (1993) 3 SCC 95 .

154. *Pakala Narayana Swami v Emperor*, (1939) 66 MIA 66 : 41 Bom LR 428 : 18 Pat 234 : AIR 1939 PC 47 ; *Velu Viswanathan v State Etc.*, 1971 Cr LJ 725 .

155. *Sankaralinga Kone*, (1900) 23 Mad.

156. *Selvi v State of Karnataka*, AIR 2010 SC 1974 : (2007) 2 SCC 764 : 2007 Cr LJ 1674 .

157. *Sudhir Kumar Mandal v The King*, (1950) ILR 2 Cal 343.

158. *Bommabayina Ramaiah v State of Andhra Pradesh*, AIR 1960 AP 160 .

159. *Narayan Chetanram Chaudhary v State of Maharashtra*, (2000) 8 SCC 457 : 2000 Cr LJ 4640 .

160. *State NCT of Delhi v Ravikant Sharma*, AIR 2007 SC 1135 : (2007) 2 SCC 764 : 2007 Cr LJ 1674 .

161. *Alamgir v State (NCT) of Delhi*, (2003) 1 SCC 21 : AIR 2003 SC 282 : 2003 Cr LJ 456 : JT 2002 (9) SC 347 : 2002 (8) Scale 373 .

162. *Jaswant Singh v State of Haryana*, AIR 2000 SC 1833 : 2000 Cr LJ 2212 .

163. *State of Kerala v Babu*, AIR 1999 SC 2161 : 1999 Cr LJ 3491 : (1999) 4 SCC 621 .

164. *Uday Chakraborty v State of WB*, AIR 2010 SC 3506 : (2010) 7 SCC 518 : 2010 Cr LJ 3862 .

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[s 162] Statements to police not to be signed: Use of statements in evidence.—

(1) **No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:**

Provided **that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.**

(2) **Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.**

Explanation.—**An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.**

The principle embodied in this section is wholesome. It ensures that no statement made to the police which is reduced to writing and signed by the person who makes it and that no such statement or any record of such a statement, whether in a police diary or otherwise or any part of such statement or record shall be used for any purpose other than those stated in the section.[165.] They may be used by the accused or by the prosecution to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872, and when it is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. It means that statements made to the police can

be used for contradicting a prosecution witness in the manner indicated in section 145 of the Evidence Act.[166.] They cannot be used for corroboration of the evidence of a witness in Court.[167.] In a murder case, the Sessions Judge used and relied upon the case-diary statements for corroboration of prosecution version, it was held that statements given to the police during investigation cannot be used as substantive evidence, they can only be used for raising suspicion against credibility of the witness.[168.] Such a statement cannot be used for contradicting the statement of another person. The limited use of such a statement is to contradict the maker of it.[169.] It was observed that the practice of the investigating officer himself recording a dying declaration ought not to be encouraged.[170.] However, such a dying declaration is not altogether excluded. It may be used depending upon its veracity.[171.] Statements to the police are not admissible in any inquiry or trial but they can certainly be the basis of an order for preventive detention.[172.] A statement made by a witness to the police cannot be brought on record even if it were beneficial to the accused.[173.] Merely taking a specimen of a handwriting does not amount to giving of a statement so as to be hit by section 162 of the CrPC.[174.]

If an investigating officer obtains the signature of a witness on his recorded statement, the evidence of the witness is not thereby rendered inadmissible. It merely puts the Court on caution and may necessitate an in-depth scrutiny of such an evidence.[175.]

When two different persons make reports about the commission of an offence at two different places, one earlier in point of time than the other, the later report is not a statement made to a police officer in the course of investigation but is an independent FIR and can therefore be used in evidence by the prosecution.[176.]

Evidence in regard to test identification parades held at the instance of the police and under their active supervision is inadmissible in evidence under this section. If after arranging the test identification parade, the police completely obliterate themselves and the *panch* witnesses thereafter explain the purpose of the parade to the identifying witnesses and the process of identification is carried out under their exclusive direction and supervision, the statements involved in the process of identification would be statements made by the identifiers to the *panch* witnesses and would be outside the purview of this section.[177.] Distinguishing *Ramkishan Mithanlal's* case in *Yusufalli v State of Maharashtra*,[178.] it was held that when the police officers set the stage for the drama, in which the complainant and the accused appellant were the actors, and hid themselves and took no part in it, neither the complainant nor the accused could be regarded as having made a statement to a police officer as contemplated by section 162.

The provisions of this section provide a valuable safeguard to the accused and denial thereof may be justified only in exceptional circumstances.[179.] The provisions of section 162 CrPC cannot be defeated merely by supplying the copy of only one statement of a witness when in fact his statement has been recorded more than once during investigation. The right guaranteed to an accused under section 162 is total and absolute. No exception can be taken to it by the prosecution.[180.]

The protection under section 162 CrPC is granted to the accused and that protection is unnecessary in any proceeding other than an inquiry or trial in respect of the offence under investigation and hence the bar created by the section is a limited bar. It has no application, e.g., in a civil proceeding or in a proceeding under Article 32 or 226 of the Constitution and a statement made before a police officer in the course of an investigation can be used as evidence in such proceeding provided it is otherwise relevant under the Evidence Act. Therefore, even a statement made before a police officer during investigation can be produced and used in evidence in a writ petition

under Article 32, provided it is relevant under the Evidence Act and section 162 cannot be urged as a bar against its production or use.[181.]

[s 162.1] "No statement made by any person to a police officer" [*Sub-section (1)*].—

The prohibition contained in the section relates to all statements made during the course of an investigation. A statement of a witness recorded by the police during the inquest under section 174 of the Code will be within the inhibition of this section.[182.] This prohibition cannot be set at naught by the police officer not himself recording the statement of the person but having it in the form of a communication addressed by the person concerned to the police officer.[183.] The members of the Railway Police Protection Force are not police officers.[184.]

The notes on a site plan prepared by the investigating officer in accordance with the various situations pointed out to him by witnesses are statements recorded by the police officer in the course of investigation and are hit by section 162. These notes can be used only for contradicting the witnesses in accordance with the provisions of section 145 of the Evidence Act. Therefore, where this was not done and the witnesses were never confronted and contradicted with this record, the notes on that site plan cannot be used to contradict the account given by the witnesses in the Court in regard to the distances from which they saw the occurrence.[185.]

The words "any person" include a person who was not accused at the time of making the statement, but became so thereafter.[186.] Similarly, a customs officer is not a police officer and therefore confession made to him is admissible.[187.]

Generally speaking, statements of a confessional nature made by an accused whilst in police custody, cannot be used for any purpose. Certain kinds of statements, which come within section 27 or section 32(1) of the Indian Evidence Act, may be proved as against the persons making them.[188.] Statement of the accused pointing out the place of recovery of the dead body in a murder case is held to be not hit by section 162 CrPC, but is relevant and admissible under section 27 of the Indian Evidence Act, 1872. Moreover, action of the accused leading the Executive Magistrate and pointing him out the place, where the dead body was buried, is admissible as conduct under section 8 of the Indian Evidence Act.[189.] The evidence of a witness at a trial may be shown to be inconsistent with his previous statements. This may be done by producing his previous statements which have been reduced into writing and which are contradictory of the witness's evidence in Court.[190.] The principle is that a witness who makes inconsistent statements is unreliable and his evidence shall be ignored.[191.]

[s 162.2] "In the course of an investigation" [*Sub-section (1)*].—

This phrase imports that the statement has to be made not only after the investigation has started, but as a step in, or in conscious prosecution of, the investigation itself.[192.] Where the police officer, after registering a case obtaining the FIR, proceeded to the spot in the course of investigation, any statement recorded by him there will be hit by this section.[193.] Where a report sent by an eye-witness reached the police station only after the investigation had already begun, the Supreme Court said that it could not be regarded as an FIR. It could be regarded as a statement recorded under section 162 and as such inadmissible in evidence. The failure of the prosecution to produce such report was immaterial, particularly when it would not have helped the prosecution in any manner because names of assailants were not disclosed in it.[194.] Dying

declaration recorded by a police officer during investigation is admissible in evidence.[195.]

[s 162.3] "Any such statement" [*Sub-section (1)*].—

The words "any such statement" cover not only written statements but oral statements as well.[196.] A rough sketch map prepared by the Sub-Inspector on the basis of a statement made to him by witnesses during the course of investigation and showing the place where the deceased was hit and also the places where the witnesses were at the time of the incident was held to be inadmissible under section 162 for it was in effect nothing more than the statement of the Sub-Inspector what the eyewitnesses told him and would be no more than a statement made to the police during investigation.[197.]

[s 162.4] "Any part of such statement or record, be used for any purpose" [*Sub-section (1)*].—

The statement can be used for the purpose of contradiction. Contradiction means the setting up of one statement against another and not the setting up of a statement against nothing at all. If a witness in Court says, "I saw *A* running away," he may be contradicted by his statement to the police "I did not see *A* running away." But the Explanation makes it clear that a significant omission may in the particular context amount to contradiction. Whether it does or not will be a question of fact.

Where no question has been put to the witness with reference to his statement made to the police during investigation, his statement cannot be used later even for drawing any adverse inference regarding the evidence of the witness.[198.]

[s 162.5] Proviso. [*Sub-section (1)*]—

This proviso refers to the case where the statement has been recorded.

If the statements of the persons examined as witnesses by the police are destroyed, the accused is robbed of his statutory means of cross-examination and thereby denied the opportunity of effectively cross-examining prosecution witnesses, and the evidence of such witnesses is not admissible and proper for consideration as it does not satisfy the requirements of section 138 of the Indian Evidence Act.[199.] Where the statements are never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused.[200.] If the statement of the prosecutrix has been recorded by the investigating officer during the course of investigation, non-supply of a copy of the statement to the accused would amount to denial of his statutory right.[201.]

[s 162.6] "If duly proved" [*Sub-section (1) proviso*].—

The words indicate that if the accused wishes to rely on anything in the previous statement of a witness to the police, he must prove it in the ordinary way. If the witness admits this in cross-examination, it will of course be sufficient; if he denies the contradiction and the police officer who took it down is called by the prosecution, the

previous statement of the witness on the point may be proved by him; if he is not called by the prosecution, the Court would no doubt itself in most cases call him, or if the accused is calling evidence in support of his defence, it may be worth his while to call the police officer himself.[202.] Unless the statement is duly proved, the evidence given in Court cannot be contradicted by it under section 145 Evidence Act.[203.]

[s 162.7] "May be used. . . to contradict such witness" [*Sub-section (1) Proviso*].—

Such statement cannot be used for any purpose except to contradict a prosecution witness.[204.] The statement of a witness under section 161 CrPC cannot be used as substantive evidence.[205.] It cannot be used for the purpose of contradicting a defence witness,[206.] or a Court witness,[207.] or for corroborating the statements made by a prosecution witness in Court.[208.] Where it was argued that the information about communal riot and violence was already with the police, hence any subsequent report is hit by section 162 CrPC, the Supreme Court held that even assuring it to be so, the statement of that nature (as in the report) could be used to contradict the reporter and for corroboration of other witnesses and the material discrepancy could be taken note of.[209.]

A statement made by a witness for the prosecution before the police during the investigation naming the accused as one of the rioters, cannot be used to corroborate the evidence given by that witness during the trial in favour of the prosecution.[210.]

Where a statement was recorded as a dying declaration but the person making it survived and appeared as a witness, the Supreme Court said that his declaration, if made before a Magistrate, could be used to corroborate or contradict his testimony.[211.]

[s 162.8] "Or to affect the provisions of section 27 of that Act" [*Sub-section (2)*].—

The section does not affect the provisions of section 27 of the Indian Evidence Act and therefore information leading to the discovery of a fact made to the police and admissible under section 27 of the Indian Evidence Act, is not rendered inadmissible under this section.

The provisions of sub-section (2) of this section in so far as they relate to section 27 of the Evidence Act, 1872, do not offend against Article 14 of the Constitution of India. The distinction between persons in custody and persons not in custody in the context of admissibility of statements made by them concerning the offence charged is a real distinction between the two classes and the distinct rules about admissibility of statements made by them are not hit by the Article.[212.]

Where an axe was recovered as a result of the statement of an accused person and his signature was taken on the recovery memo, it was held that this did not vitiate the seizure or the testimony of the recovery witnesses in the Court. This section does not apply to proceedings under section 27 of the Evidence Act.[213.] The omission to send to the chemical examiner the blood-stained earth collected from the place of the incident was held not to have vitiated the investigation.[214.]

[s 161.9] Section 162, and section 165, Evidence Act.—

The ban imposed by section 162 of the CrPC is sweeping and wide. But, at the same time, the powers of the Court under section 165 of the Evidence Act to put any question to any witness are also couched in wide terms...a narrow and restrictive construction should be put upon the prohibition in section 162 CrPC, so as to confine the ambit of it to the use of statements by witnesses by parties only to a proceeding before the Court. This will reconcile or harmonise the two provisions and also serve the ends of justice. Therefore, section 162 CrPC does not impair the special powers of the Court under section 165 Indian Evidence Act.[215.]

[s 162.9.1] [*Explanation.—*

The Joint Committee added the Explanation in order to clarify whether an omission to state a fact or circumstance in the statement made to the police will amount to contradiction and, if so, under what circumstances such omission may amount to contradiction. Reference in this connection should be made to the previous state of law as decided in *Tahsildar Singh v State of UP*.[216.] Where an omission by a witness in his statement to the police was not put to the investigating officer, it was held that the defence could not exploit an omission in its favour unless it was put to the investigating officer, who recorded the statement.[217.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

165. *Tellu v State*, 1988 Cr LJ 1063 (Del).

166. *Hazari Lal v State (Delhi Administration)*, AIR 1980 SC 873 : 1980 Cr LJ 564 ; *MS Reddy v State Inspector of Police*, 1993 Cr LJ 558 (AP).

167. *Sat Paul v Delhi Administration*, AIR 1976 SC 294 : 1976 Cr LJ 295 : (1976) 1 SCC 727 ; *Rameshwar Singh v State of J&K*, AIR 1972 SC 102 : 1972 Cr LJ 15 ; *Prakash Sen v State*, 1988 Cr LJ 1275 .

168. *Chinamma v State of Kerala*, 1995 Cr LJ 1711 (Ker) : 1995 (2) All LT Cr 469.

169. *Jodha Khoda Rabari v State of Gujarat*, 1992 Cr LJ 3298 (Guj).

170. *Dalip Singh v State of Punjab*, 1979 Cr LJ 700 : AIR 1979 SC 1173 .

171. *Harej Ali v State of Assam*, 1981 Cr LJ 1745 (Gau); *Jamiruddin Molla v State of WB*, 1991 Cr LJ 356 (Cal).

172. *V Vellanai Pandian v Collector & Dist Magistrate of Tirunelveli Dist*, 1984 Cr LJ 68 (Mad).

173. *Ismail Amir Shaikh v State of Maharashtra*, 1985 Cr LJ 273 (Bom).

174. *State of UP v Boota Singh*, AIR 1978 SC 1770 : 1978 CLR (SC) 557 : (1979) 1 SCC 77 .

175. *State of UP v MK Anthony*, AIR 1985 SC 48 : 1985 Cr LJ 493 : (1985) 1 SCC 505 .

176. *Maganlal v King-Emperor*, (1946) ILR Nag 126 : AIR 1946 Nag 173 ; *Ram Singh v State of Punjab*, 1992 Cr LJ 805 (P&H).

177. *Ramkishan Mithanlal Sharma v The State of Bombay*, (1954) 57 Bom LR 600 : AIR 1955 SC 104 : 1955 Cr LJ 196 .

178. *Yusufalli v State of Maharashtra*, AIR 1968 SC 147 : 1968 Cr LJ 103 .

179. *Noor Khan v State of Rajasthan*, AIR 1964 SC 286 : 1964 (1) Cr LJ 167 .

180. *Dalla v State of Rajasthan*, 1988 Cr LJ 42 (Raj) : 1987 (2) WLN 226 .

181. *Khatri v State of Bihar*, AIR 1981 SC 1068 : (1981) 2 SCC 493 .

182. *Razik Ram v JS Chouhan*, AIR 1975 SC 667 , at p 684 : (1975) 4 SCC 769 .

183. *Kali Ram v State of Himachal Pradesh*, AIR 1973 SC 2773 , 2780 : 1974 Cr LJ 1 : (1973) 2 SCC 808 .

184. *Hari Rachu Kanadi v The State of Maharashtra*, (1971) 73 Bom LR 891 .

185. *Jit Singh v State of Punjab*, AIR 1976 SC 1421 : 1976 Cr LJ 1162 : (1976) 2 SCC 836 .

186. *Narayana Swami v Emperor*, AIR 1939 PC 47 ; *Mahabir Mandal v State of Bihar*, AIR 1972 SC 1331 : 1972 Cr LJ 860 : (1972) 1 SCC 748 ; *State of UP v Vyas Tewari*, 1981 Cr LJ 38 : AIR 1981 SC 835 .

187. *Fr Mario Pires v Director of Enforcement, New Delhi*, 1982 Cr LJ 461 (Goa); *Padmeswar Baruah v State of Assam*, 1984 Cr LJ 1661 (Gau).

188. *Satish Chandra Seal v Emperor*, (1944) 2 Cal 76 : AIR 1945 Cal 137 ; *Safi Mohd Hussain v State of UP*, 1992 Cr LJ 1755 (All); *Public Prosecutor v PN Rao*, 1993 Cr LJ 2789 (AP).

189. *Vasudevan v State of Kerala*, 1993 Cr LJ 3151 (Ker).

190. *Dayabhai Chhaganbhai Thakker v State of Gujarat*, AIR 1964 SC 1563 : 1964 (2) Cr LJ 472 .

191. *Fazlur Rahman v Emperor*, (1946) 2 Cal 339 : AIR 1947 Cal 192 .

192. *Tika Ram v The State*, (1957) 1 All 479 : AIR 1957 All 755 : 1957 Cr LJ 1200 .

193. *Sat Kumar v State of Haryana*, AIR 1974 SC 294 : 1974 Cr LJ 345 : (1974) 3 SCC 643 ; *Ram Singh v State of Punjab*, 1992 Cr LJ 805 (P&H); *Ganesh Gogoi v State of Assam*, AIR 2009 SC 2955 : (2009) 7 SCC 404 , FIR was filed after commencement of investigation, it was hit by section 162, no value could be attached to it.

194. *B Subba Rao v PP, HG of AP*, AIR 1997 SC 3427 : 1997 Cr LJ 4072 : (1997) 11 SCC 478 .

195. *Najjam faroqui v State of WB*, 1992 Cr LJ 2574 (Cal).

196. *Thimmappa v Thimmappa*, (1928) ILR 51 Mad 967 (FB) : AIR 1928 Mad 1028 , overruling *Venkatasubbiah*, (1924) 48 Mad 640.

197. *Tori Singh v State of UP*, AIR 1962 SC 399 : (1962) 1 Cr LJ 469 .

198. *Dandu Lakshmi Reddy v State of AP*, AIR 1999 SC 3255 at 3259 : 1999 Cr LJ 4287 : (1999) 7 SCC 69 : (1999) 7 SCC 65 ; *Vijender v State of Delhi*, (1997) 6 SCC 171 : (1997) 3 JT 131 , statements taken in investigation, allowed to be used to contradict the maker. *Harkirat Singh v State of Punjab*, AIR 1997 SC 3231 : (1997) 11 SCC 215 : 1997 Cr LJ 3954 , statement during inquest proceeding, not allowed to be used as substantive evidence.

199. *Baliram Tikaram v Emperor*, (1945) Nag 151.

200. *Kotayya v King Emperor*, (1946) 74 IA 65 : (1948) Mad 1 : 49 Bom LR 508.

201. *Dharmarajan v State*, 2002 Cr LJ 2571 (Ker).

202. *Emperor v Vithu*, (1924) 26 Bom LR 965 : AIR 1924 Bom 510 .

203. *Labh Singh v Emperor*, (1924) 6 Lah 24 : AIR 1925 Lah 337 ; *Azimuddy v Emperor*, (1926) 54 Cal 237 : AIR 1927 Cal 398 ; *Madari Sikdar v Emperor*, (1927) ILR 54 Cal 307 : AIR 1927 Cal 514 ; *Emperor v Ibrahim*, (1927) ILR 8 Lah 605 : AIR 1928 Lah 17 ; *Emperor v Shaikh Usman*, (1927) 29 Bom LR 1581 : ILR 192852 Bom 195 : AIR 1928 Bom 23 ; *Narayana*, (1932) 56 Mad 231.

204. *Hamidulla v State of Gujarat*, 1988 Cr LJ 981 (Guj); *Fateh Singh v State*, 1995 Cr LJ 96 .

205. *Jadumanikhanda v State of Orissa*, 1993 Cr LJ 2701 (Ori).

206. *Ganga*, (1929) 4 Luck 726 .

207. *Tahsildar Singh v The State of Uttar Pradesh*, AIR 1959 SC 1012 : 1959 Cr LJ 1231 ; *Shakila Khader v Nausher Gama*, AIR 1975 SC 1324 : 1975 (2) SCC 175 .

208. *Jhari Gope v Emperor*, (1928) 8 Pat 279 : AIR 1929 Pat 268 .

209. *Paresh Kalyandas Bhavsar v Sadiq Yakubbhai Jamadar*, AIR 1993 SC 1544 : 1993 Cr LJ 1857 : (1993) 3 SCC 95 .

210. *Sahdeo Gosain v Emperor*, (1944) FCR 223 : AIR 1944 FC 38 .

211. *Ramprasad v State of Maharashtra*, AIR 1999 SC 1969 : 1999 Cr LJ 2889 : (1999) 5 SCC 30 ; *Vinay D Nagar v State of Rajasthan*, AIR 2008 SC 1558 : (2008) 5 SCC 597 .

212. *State of UP v Deoman Upadhayaye*, AIR 1960 SC 1125 : 1960 Cr LJ 1504 .

213. *State of Rajasthan v Teja Ram*, AIR 1999 SC 1776 : 1999 Cr LJ 2588 : (1999) 3 SCC 507 .

214. *State of UP v Harban Sahai*, (1998) 6 SCC 50 : 1998 SCC (Cr) 1412.

215. *Raghunandan v State of UP*, AIR 1974 SC 463 at p 467 : 1974 Cr LJ 453 : (1974) 4 SCC 186 .

216. *Tahsildar Singh v State of UP*, AIR 1959 SC 1012 , at p 1026 : 1959 Cr LJ 1231 .

217. *Prem alias Santosh v State of Maharashtra*, 1993 Cr LJ 1608 (Bom) : 1993 (2) Bom CR 252 ; *Mohd Aman v State of Rajasthan*, AIR 1997 SC 2960 : 1997 Cr LJ 3567 : (1997) 10 SCC 44 , list of stolen articles was not given in the FIR, it was subsequently submitted, hit by section 162. The Trial Court was not justified in including that statement as an exhibit. *Jaswant Singh v State of Haryana*, 2000 Cr LJ 2212 (SC) : AIR 2000 SC 1833 : JT 2000 (4) SC 114 : 2000 (3) Scale 42 : (2000) 4 SCC 484 , the eye-witness was the wife of one of the deceased persons. There were omissions in her testimony. The Supreme Court said that in view of the concurrent finding that the omissions were not contradictions in the particular context, no interference was called for. *Periasami v State of TN*, 1997 Cr LJ 219 : (1996) 6 SCC 457 , recital in inquest report of the time of death as 10 p.m. instead of a.m. held to be not material. *Harpal Singh v Devinder Singh*, 1997 Cr LJ 3561 (SC) : AIR 1997 SC 2914 : JT 1997 (6) SC 10 : 1997 (4) Scale 459 : (1997) 6 SCC 660 , informant's FIR, on subsequent interrogation, the police elicited more details from him, his evidence could not be thrown overboard for that reason.

The Code of Criminal Procedure, 1973

CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 163] No inducement to be offered.—

(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act, 1872 (1 of 1872).

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will:

***Provided* that nothing in this sub-section shall affect the provisions of subsection (4) of section 164.**

The section prohibits a police officer or a person in authority from offering or making any inducement, threat, or promise as is mentioned in section 24 of the Evidence Act.[218.] But a police officer or other person shall not prevent by any caution any person from making any statement which he may be disposed to make of his own free will. A caution, however, is necessary and imperative in cases falling under section 164(4) of the Code.

[s 163.1] "Police officer".—

This expression has been given an extended meaning in cases decided under section 25 of the Evidence Act. It has been held that the term "police officer" is not to be read in a technical sense but in its more comprehensive and popular meaning.[219.] Thus, a police patel is a police officer,[220.] but a Village Magistrate is not.[221.]

[s 163.2] "Person in authority".—

This expression finds place in section 24 of the Evidence Act. The test whether a person is a person in authority would seem to be, has the person authority to interfere with the matter; and any concern or interest in it would be sufficient to give him that authority.[222.]

Provisions of section 161 and this section emphasise the fact that a police officer is prohibited from beating or confining persons with a view to procure them to make a statement.[223.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

218. *Atma Ram*, AIR 1966 SC 1736 ; *The State of Andhra Pradesh v Venu Gopal*, AIR 1964 SC 33 : (1964) 1 Cr LJ 16 .

219. *The Queen v Hurribole Chunder Ghose*, (1876) ILR 1 Cal 207.

220. *Bhima*, (1892) 17 Bom 485.

221. *Queen Empress v Sama Papi*, (1883) ILR 7 Mad 287.

222. *Navroji Dadabhai*, (1872) 9 BHC 358.

223. *Atma Ram*, AIR 1966 SC 1736 ; *The State of Andhra Pradesh v Venu Gopal*, AIR 1964 SC 33 : (1964) 1 Cr LJ 16 .

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[s 164] Recording of confessions and statements.—

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

[224.] [*Provided* that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

***Provided further* that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.]**

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B. Magistrate."

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

[225] **[(5A) (*a*) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, [226] [section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB], section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:**

Provided **that if the person making the statement is temporarily or permanently mentally or physically disabled, the magistrate shall take the assistance of an interpreter or a special educator in recording the statement:**

Provided further **that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.**

(*b*) A Statement recorded under clause (*a*) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.]

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

[s 164.1] State Amendments

Andaman and Nicobar Islands and Lakshadweep Islands (U.T.).—*The following amendments were made by Regulation No. 1 of 1974, section 5 (w.e.f. 30-3-1974).*

S 164(1).—In its application to the Union Territories of Andaman and Nicobar Islands and Lakshadweep Islands after section 164(1), insert the following:—

(1-A) Where, in any island, there is no Judicial Magistrate for the time being, and the State Government is of opinion that it is necessary and expedient so to do, that Government may after consulting the High Court specially empower any Executive Magistrate (not being a police officer), to exercise the powers conferred by sub-section (1) on a Judicial Magistrate and thereupon reference in section 164 to a Judicial Magistrate shall be construed as reference to the Executive Magistrate so empowered.

[s 164.2] CrPC (Amendment) Act, 2008 [*Clause (13)*].—

This clause amends section 164 relating to recording of confessions and statements. It provides that any confession or statement made may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence (*Notes on Clauses).*

[s 164.3] Criminal Law (Amendment) Act, 2013.—

Some important amendments have been inserted in section 164 by the above mentioned Act. These amendments have been carried out on the recommendations of the Justice JS Verma Committee, which submitted its report on 23 January 2013.

Clause (a) of sub-section (5A) empowers the Judicial Magistrate to record the statement of the victim of offences enumerated in the clause as soon as the offence is brought to the notice of the police.

Two provisos have been appended to clause (a) of sub-section (5A) which lay down the procedure in case of the victim being temporarily or permanently physically or mentally disabled and for video graphing of the said recording.

Clause (b) of sub-section (5A) lays down that the statement of the victim so recorded shall be as a statement in lieu of the examination-in-chief, without the need for recording the same at the time of trial, so that the maker of the statement can be cross-examined on such statement.

[s 164.4] Criminal Law (Amendment) Act, 2018.—

Section 164 of the Code of Criminal Procedure has been recently amended *vide* the Criminal Law (Amendment) Act, 2018. The 2018 Amendment Act has substituted the words "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" for the words "section 376A, section 376B, section 376C, section 376D" in section 164. The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of section 164.

COMMENT

[s 164.5] Scope.—

This section is not exhaustive and does not limit the generality of section 21 of the Evidence Act as to the relevancy of admission.[227.] The effect of this section, when read with sections 24, 25, 26 and 29 of the Evidence Act, is that (1) a confession made by an accused person to a police officer is inadmissible in evidence; (2) if a person in police custody desires to make a confession, he must do so in the presence of a Magistrate (but not before a police officer having Magisterial power); (3) a Magistrate shall not record it unless he is, upon inquiry from the person making it, satisfied that it is voluntary; (4) when the Magistrate records it, he shall record it in the manner provided for in this section; and (5) only when so recorded the confession becomes relevant and admissible in evidence.[228.] The statement can be recorded only by a Judicial Magistrate.[229.] Compliance of the requirements of the section is a *sine-qua-non* for recording a confession.[230.]

Omission to comply with the mandatory provisions, one of such being as incorporated in sub-section (4) of section 164 is likely to render the confessional statement inadmissible. The words "shall be signed by the person making the confession", are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not disputed by the accused but in cases where the making of the statement itself is in controversy, the omission to get the signature is fatal. No reliance can therefore be placed on the judicial confession of A-4. If a part of confession is excluded under any provision of law, the entire confessional statement in all its parts, including the admission of minor incriminating facts must be excluded unless proof of it is permitted by some other section, such as section 27 of the Evidence Act. Where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all.[231.]

A Magistrate has the discretion to record or not to record a confession. If he elects to record it, this section requires him to comply with four provisions, e.g., (1) it should be recorded and signed in the manner provided in section 281 and then forwarded to the Magistrate concerned, (2) he should give a statutory warning that the accused is not bound to make a confession, (3) he should be first satisfied that it is being made voluntarily, and (4) he should add memorandum at the foot of the confession.[232.]

[s 164.6] Confession to unauthorised person.—

The Supreme Court has stated that it is not necessary that a confession should be made to an authorised person only. The Court said: Any person to whom a confession has been made can give evidence of it in the Court regarding confession. If the confession made to a Magistrate, same it has to be recorded in the manner prescribed by law. If it is made to any other person, the Court has to consider whether evidence of that person can be believed, and this depends upon the credibility of the witness giving the evidence in the Court.[233.]

The Cuttack High Court elaborately discussed this section in *Bala Mathi v State of Orissa*.[234.]

[s 164.7] Authority for recording confession.—

The authority under the Act which enjoys the power of recording confessions and statements is only a Judicial Magistrate. A police officer cannot exercise this power even if the authority to do so has been conferred on him outside the Code.[235.] The fact that the Chief Judicial Magistrate, who recorded the statement, had not nominated the Judicial Magistrate of the *Taluk* where the accused was locked up in sub-jail to record statements and instead had nominated another judicial Magistrate for the purpose, was held to be not sufficient to vitiate the recording of the confession.[236.]

[s 164.8] Who has right to ask for recording of his statement.—

A person who is neither an accused person nor sponsored by the investigating agency has been held to have no *locus standi* to apply to the Magistrate to record his statement under the section.[237.]

The above decision has been relied upon and followed by the Supreme Court in a recent decision wherein, it was held that the recording of statement under this section is to be only of the persons produced by the police. Where, any person appears before the Magistrate independently of his own volition, the statement of that person recorded without any attempt to identify him, is of no credence.[238.]

Where a Magistrate recording confession exhaustively dealt with the statutory prescription under section 164 of the Code and there was absolutely no flaw in the recording of statement and it was not contradicted by any of the prosecution witness, it was held that such confession can be accepted by the Court. Non-recovery of the weapon allegedly used by accused would not vitiate the confession.[239.]

[s 164.9] Statement.—

The Privy Council has ruled that a statement made under this section can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement (section 157 of the Indian Evidence Act). The statement made by an approver under this section does not amount to corroboration in material particulars which the Courts require in relation to the evidence of an accomplice. An accomplice cannot corroborate himself: tainted evidence does not lose its taint by repetition. Apart from the suspicion which always attaches to the evidence of an accomplice, it is unsafe to rely implicitly on the evidence of a man who has deposed on oath to two different stories.[240.] The Supreme Court[241.] has approved the following observations of the Nagpur High Court in *Parmanand v. Emperor*[242.] as lying down the law correctly: "If a statement of a witness is previously recorded under section 164, it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded under section 164 will not be sufficient to discard it.[243.] The Court, however, ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon." In *Ram Kishan v Harmit Kaur*,[244.] the Supreme Court has said: A statement under section 164 is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. In *Balak Ram's* case, the Supreme Court laid down that statements of witnesses recorded under the present section should be approached with caution because such witnesses feel tied to their previous statement and prosecution for perjury is the price for freedom to depart from the earlier version.[245.] A statement recorded by the police during investigation is not at all admissible. The proper procedure is to confront the witnesses with the contradictions when they are examined and then ask the investigating officer regarding those contradictions.[246.]

If while conducting identification proceedings, the Magistrate transgresses the limits and records other statements which may have a bearing in establishing the guilt of the accused, this must be done by him strictly conforming to the provisions of this section.[247.]

[s 164.10] "May...record any confession or statement".—

This clause authorises the Magistrate to record the statement of a person or his confession, no matter whether he possesses jurisdiction in the case. If he does not possess such jurisdiction, sub-section (6) of section 164 CrPC will apply. If the

Magistrate is himself a witness in the case, it is not proper on his part to record the statement of a prosecution witness under section 164.[248.]

The statements recorded under this section are not substantive evidence and cannot be made use of except to corroborate or contradict the witness.[249.]

A "confession" is an admission made at any time by a person charged with an offence, stating or suggesting the inference that he has committed the offence.[250.]

The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to authorise a conviction, then it is an admission.[251.]

Notwithstanding the use of the word "may", all confessions should be recorded. "Recording" means writing down the confession and not merely filing a written confession written by the accused while in the police custody and admitted by him to be correct when read over to him by the Magistrate.[252.] A confession made to a Magistrate and not recorded by him cannot be proved at the trial of the person making the confession by tendering the oral evidence of the Magistrate.[253.]

[s 164.11] "In the course of an investigation under this Chapter...or at any time afterwards before the commencement of the inquiry or trial".—

A confession under this section must be either in the course of an investigation under Chapter XII or after it has ceased and before the commencement of an inquiry or trial. If the confession be made before a Magistrate having jurisdiction to deal with the matter, it will be the commencement of a trial or inquiry under Chapter XIII and treated as a confession under section 281, whether or not the case be still under the investigation of the police.[254.]

The accused can himself appear before a Magistrate, instead of being produced by the police, and pray for recording of his confession. But unless the Magistrate has reason to believe that an investigation has commenced and the person praying for recording of his confession is concerned in the case, the Magistrate cannot record the confession on his mere asking. Where the Magistrate is not aware that the person appearing is doing so because of an investigation, he should inform the police about it so that the police may take steps required under Chapter XII.[255.]

[s 164.12] Warning to accused [*Sub-section (2)*].—

The present section imposes statutory obligation on the Magistrate to warn the accused, before recording his confession that he is not bound to make it and that if he does so, it may be used as evidence against him.[256.] The confession could not be rejected simply because the Magistrate used the expression "evidence" instead of "confession" while warning the accused before recording his confession.[257.] It is necessary for the Magistrate to ask the accused person all the questions prescribed by section 164(3).[258.]

In recording a judicial confession, the safeguards provided for the benefit of the accused in section 164 have to be complied with in better spirit and not in routine or mechanical manner.[259.] The same procedure has to be followed by the Customs

authorities in recording the confessional statement of the accused persons. Non-compliance of the mandatory provisions of this section renders the statement inadmissible.[260.] Failure to convey the caution invalidates the confession and renders it inadmissible in evidence.[261.]

There was refusal by the accused persons to make any confessional statement. Remanding them to police custody was held to be not justified. The possibility of coercion, threat or inducement to the accused to compel them to make a confession could not be ruled out. One of them was not cautioned that if he made any confession, it would be used against him and on that basis, he might be sentenced to death or imprisonment for life. Both of them made exculpatory statements. The Court said that no reliance could be placed on statements taken in violation of section 164.[262.]

[s 164.13] "Reason to believe that it was made voluntarily".—

Confessional statement must be shown to have been voluntarily made. Question intended to be put under sub-section (2) of section 164 CrPC should not be allowed to become a matter of a mere casual and mechanical inquiry. Magistrate should be fully satisfied that it is in fact and in substance voluntary.[263.]

There is no requirement that the Magistrate should make a separate statement of reasons for believing that the confession was made voluntarily. It was sufficient that his statement was recorded in the memorandum. It was further held that it was illegal for the Trial Court to compare the confessional statement with the record of accused's statement in the police case diary.[264.]

If the confession is properly recorded and is otherwise free from any infirmity, it cannot be discarded merely on the ground that it was recorded not in the open Court but in the chamber.[265.]

[s 164.14] Police influence.—

The fact that a person was produced from police custody before the Magistrate for recording confession, could not by itself discredit the confession. A Magistrate is not to record the confession until the lapse of such time, as he thinks necessary, to extricate the accused's mind completely from fear of the police and to give the confession in his own way telling the Magistrate the true facts. In *State of Maharashtra v Damu*,[266.] there was an interval of about a month between the period when the accused was removed from police custody to judicial custody and the recording of the confession.

The fact that the sub-jail in which the accused was interred was located adjacent to the police station was held to be not sufficient to infer that there was police influence on the mind of the accused.[267.]

[s 164.15] Consequence of unwillingness to confess [*Sub-section (3)*].—

This sub-section guarantees that police pressure is not brought on the person who is unwilling to make a confession. Where the accused was in judicial custody for two days prior to the giving of confession, it was held that the period was sufficient to shed fear or influence of the police, if any, and therefore the confession could be made

voluntarily by the accused.[268.] Interval between preliminary questioning and recording of confession need not necessary be of 24 hours duration.[269.] A confession was held not to be rejected merely because the Magistrate had failed to assure the accused that he would not be sent back to the police custody in the event of his failure to make confession.[270.] Recording of a confession in jail instead of the Court house where it could have been ordinarily recorded is an irregularity. In the circumstances of the case, it was held that the irregularity did not affect the voluntary character of the confession.[271.] In a murder trial, the Court put certain questions to the witnesses and finding that they did not stick to the statements made by them under sections 161 and 164 of the CrPC and were probably giving false evidence, rebutted them and threatened that they would be prosecuted for perjury. It was held that in such circumstances, the principle of fair trial had been abandoned. As the witnesses had resiled from their earlier statements, the accused could not be convicted on the basis of those statements.[272.]

[s 164.16] Mode of recording confession [*Sub-section (4)*].—

The confession should be recorded in a manner provided by section 281 and shall be signed by the person making the confession. The Magistrate shall then make the memorandum at the foot of such confession. The Magistrate cannot merely sign a printed instruction supplied to him. This will be violative of this sub-section.[273.] Where confession was not recorded in the language in which it was made but it was voluntarily and correctly recorded and no prejudice was caused to the accused, it was held that the confession was valid. Irregularity, if any, is curable under section 533 of the Code.[274.] The entire confession must be brought on record. The Court may reject part of it.[275.] Confession must be shown to be voluntary before it can be acted upon.[276.] For judging the reliability of a confession, the Court should carefully examine it and compare it with the rest of the evidence in the light of the surrounding circumstances and probabilities of the case.[277.] Where confession was found rejectable, convictions based on them could not be sustained.[278.]

The certificate of the Magistrate appended to the statement was that it was made voluntarily though he failed to record the fact whether there was any pressure on her to give the statement. The Court said that the defect was cured as the Magistrate stated in his evidence before the Court that he had asked the question, and nobody was present in the room. The Court approved the statement as having been recorded in keeping with the prescribed procedure.[279.]

[s 164.17] "Signed".—

Requirement of obtaining signature of the person making the confession is mandatory.[280.] But the omission to obtain signature would not make the statement inadmissible as it is a defect which is curable under section 463.[281.]

[s 164.18] "The Magistrate shall make a memorandum".—

A statement of a witness recorded under section 164 in a form which is not proper necessarily mean that the witness was threatened or that his evidence, given in the Court is less believable.[282.]

[s 164.19] Powers of recording Magistrate [*Sub-section (5)*].—

This sub-section lays down the manner in which a statement is to be recorded; sub-section (4) refers to the manner in which a confession is to be recorded. Administering of oath is barred in the recording of a confessional statement by the clear provision of sub-section (5) of the section. The confession should be recorded in the manner provided for recording the statement of an accused and not in the manner provided for recording of evidence by administering an oath. If it is so recorded, it loses its character of a confessional statement in so far as the maker is concerned.[283.]

In case where the Magistrate has to perform the duty of recording a statement under this section, he is under an obligation to elicit all information which the witness wishes to disclose. The witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose. Hence, the Magistrate should ask the witness explanatory questions and obtain all information in relation to the said case.[284.]

[s 164.20] Administration of oath.—

An oath was administered to the accused while recording his confession. The Court held this to be not proper. Taking of the statement of an accused an oath is prohibited.[285.]

[s 164.21] Evidentiary value against co-accused.—

The statement of an accused person recorded under the section was not treated as an evidence against another accused person charged with the same crime particularly when it was a self-exculpatory statement.[286.]

[s 164.22] Source of knowledge police.—

The source through whom the investigating officer came to know that the accused was willing to make the statement was held to be not relevant.[287.]

[s 164.23] Retracted confession.—

The Supreme Court has laid down that it is not an inflexible rule of practice or prudence that in no circumstances, can conviction be based without corroboration on a retracted confession. However, such corroboration is required not as a rule of law but only as a rule of prudence.[288.]

[s 164.24] Magistrate not disclosing his identity.—

Where a Magistrate while recording a confession did not specifically tell the accused that he was a Magistrate, it was held that such a confession is inadmissible as being not in compliance with the strict formalities required under this section.[289.] It was held

that free legal aid must be provided to the accused produced for recording a statement. Recording of confession without providing the indigent accused with legal aid was held to be violative of Article 21 of the Constitution.[290.]

However, in the case of *Ajmal Kasab*,[291.] the Supreme Court held that to say that any failure to provide legal aid to the accused at the beginning, or before his confession is recorded, would inevitably render the trial illegal is stretching the point to unacceptable extremes. The true test is whether or not the confession is voluntary. Thus, it was held that any failure to read out the right of the accused to be represented by a lawyer and the right against self-incrimination or failure to provide legal aid at the pre-trial stage does not vitiate the trial.

[s 164.25] Comparison of hand writing.—

In an investigation by CBI, specimen signature and handwriting of the accused were taken for examination by expert. The procedure was held to be proper. The report of the expert could be used as evidence against the accused.[292.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

224. Subs. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 13 for the proviso (w.e.f. 31-12-2009). The proviso, before substitution, stood as under:

"Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.".

225. Ins. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 16 (w.e.f. 3-2-2013).

226. Subs. by Act 22 of 2018, section 13, for "section 376A, section 376B, section 376C, section 376D" (w.r.e.f. 21-4-2018).

227. *Barindra Kumar Ghose v Emperor*, (1909) ILR 37 Cal 467.

228. *The King v Saw Min*, (1939) Ran 97 : AIR 1938 Rangoon 383 .

229. *Ashim Das v State of Assam*, 1987 Cr LJ 1533 (Gau).

230. *Mahabir Singh v State of Haryana*, AIR 2001 SC 2503 : 2001 Cr LJ 3945 : (2001) 7 SCC 148 , precautions as to assuring voluntariness were not observed. *Gulam Hussain Shaikh Chougule v S Reynolds*, AIR 2001 SC 2930 : (2002) 1 SCC 155 : (2001) 134 ELT 3 , requirements not complied with.

231. *Dhanajaya Reddy v State of Karnataka*, AIR 2001 SC 1512 : 2001 Cr LJ 1712 : (2001) 4 SCC 9 .

232. *Ram Chandra Palai v The State of Orissa*, (1956) 1 All 236 : AIR 1956 SC 298 ; *Dhaneshwar Mallik v Orissa*, 1992 Cr LJ 1711 (Ori) : 1991 (II) Ori LR 68 .

233. *Sasi v State of Kerala*, (2000) 10 SCC 360 .

234. *Bala Mathi v State of Orissa*, (1951) Cut 65.

235. *CCE v Duncan Agro Industries*, AIR 2000 SC 2901 : (2000) 120 ELT 280 : 2000 Cr LJ 4035 : (2000) 7 SCC 53 .

236. *State of Maharashtra v Damu, Gopinath Shinde*, AIR 2000 SC 1691 : 2000 Cr LJ 2301 : (2000) 6 SCC 269 .

237. *Jogendra Nahak v State of Orissa*, AIR 1999 SC 2565 : 2000 Cr LJ 3976 : (2000) 1 SCC 272 .

238. *Ajay Kumar Parmar v State of Rajasthan*, AIR 2013 SC 633 : (2012) 12 SCC 406 .

239. *Md Jamiluddin Nasir v State of West Bengal*, AIR 2014 SC 2587 : (2014) 7 SCC 443 : 2014 Cr LJ 3589 (SC).

240. *Bhuboni Sahu v The King*, (1949) 51 Bom LR 955 : 76 IA 147.

241. *Ram Charan v State of UP*, (1968) 3 SCR 354 : 1968 Cr LJ 1473 : AIR 1968 SC 1270 .

242. *Parmanand v. Emperor*, AIR 1940 Nag 340 .

243. *State of Orissa v Ghanashyam Mohanty*, 1987 Cr LJ 1008 (Ori); *Henry Westmuller Ronerts v State of Assam*, AIR 1985 SC 823 : (1985) Cr LJ 1079 : (1985) 3 SCC 291 .

244. *Ram Kishan v Harmit Kaur*, AIR 1972 SC 468 : 1972 Cr LJ 267 : (1972) 3 SCC 280 .

245. *Balak Ram v State of UP*, AIR 1974 SC 2165 , 2174 : 1974 Cr LJ 1486 : (1975) 3 SCC 219 .

246. *Podda Narayana v State of Andhra Pradesh*, AIR 1975 SC 1252 , at p 1256 : 1975 Cr LJ 1062 : (1975) 4 SCC 153 .

247. *Harnath Singh v State of Madhya Pradesh*, AIR 1970 SC 1619 : 1970 Cr LJ 1422 .

248. *Niranjan Khatu v State of Orissa*, 1990 Cr LJ 2790 (Ori). *Lokeman Shah v State of WB*, AIR 2001 SC 1760 : 2000 Cr LJ 3196 : (2001) 5 SCC 235 , the Supreme Court explained the test of finding out whether a statement amounts to confession or not. *State of AP v Shaik Mazhar*, AIR 2001 SC 2427 : 2001 Cr LJ 3287 , the effect of delay in recording the statement of the prosecution witness to whom the extra-judicial confession was made by the accused. *Dhanajaya Reddy v State of Karnataka*, AIR 2001 SC 1512 : 2001 Cr LJ 1712 , when any part of the confessional statement is excluded under any provision of law, the entire confessional statement must be excluded except where proof a truncated statement is permitted by some other provision of law.

249. *State of Delhi v Shri Ram Lohia*, AIR 1960 SC 490 ; *Sunil Kumar v State of MP*, AIR 1997 SC 940 : 1999 Cr LJ 1183 : (1997) 10 SCC 570 , the statement of an injured witness was recorded by the Magistrate as a dying declaration, he survived, the statement was treated as one recorded under section 164. It could be used for corroboration or contradiction.

250. *Stephen's Digest on the Law of Evidence*.

251. *Ram Singh v State*, AIR 1959 All 518 .

252. *Ram Baran Shukla v Emperor*, (1933) ILR 55 All 426 : AIR 1933 All 356 .

253. *Nazir Ahmad* (No. 2), (1936) 38 Bom LR 897 : 17 Lah 629 PC; *Abbas Khan v Muhammad Ali*, (1933) 56 All 302 : AIR 1934 All 300 (FB); *Pedda Obigadu v Pullasi Pedda*, (1921) ILR 45 Mad 230 : AIR 1922 Mad 40 .

254. *Sat Narain Tewari v The Emperor*, (1905) 32 Cal 1085 .

255. *Mahabir Singh v State of Haryana*, AIR 2001 SC 2503 : (2001) 7 SCC 148 ; *Mohammad Gausuddin v State of Maharashtra*, 2003 Cr LJ 2994 (Bom) relevancy of the confession.

256. *Emperor v Tukaram*, (1932) 35 Bom LR 234 : 57 Bom 336 (FB).

257. *MA Antony v State of Kerala*, AIR 2009 SC 2549 : (2009) 6 SCC 220 .

258. *State of Punjab v Harjagdev Singh*, AIR 2009 SC 2693 : (2009) 16 SCC 91 ; *Surendra Koli v State of UP*, AIR 2011 SC 970 : (2011) 4 SCC 80 , the Magistrate repeatedly told the accused that he was not bound to make the statement as it could be read against him, the Court said that the provisions of the section were complied with.

259. *Babubhai Udesinh Parmar v State of Gujarat*, AIR 2007 SC 420 : (2006) 12 SCC 268 : 2007 Cr LJ 786 .

260. *Asstt Collector of Central Excise v Duncun Agro Industries Ltd*, 1992 Cr LJ 231 (AP) : 1992 (57) ELT 545 AP.

261. *Emperor v Gulabu*, (1913) ILR 35 All 260; *Baldeomushar*, (1946) 25 Pat 391; *Kehar Singh v State (Delhi Admn.)*, 1989 Cr LJ 1 : AIR 1989 SC 683 ; *Karnataka v KS. Ramdas*, 1976 Cr LJ 228 (Kant).

262. *Rabindra Kumal Pal v Republic of India*, AIR 2011 SC 1436 : (2011) 2 SCC 490 .

263. *Ayyub v State of UP*, AIR 2002 SC 1192 : (2003) 3 SCC 510 .

264. *Ammini v State of Kerala*, AIR 1998 SC 260 : (1998) 2 SCC 301 : 1998 Cr LJ 481 .

265. *Abed Ali v State of WB*, 1988 Cr LJ 354 (Cal). *Lokeman Shah v State of WB*, AIR 2001 SC 1760 : 2001 Cr LJ 2196 : (2001) 5 SCC 235 , a confession can be the basis of a conviction even if uncorroborated, if it is otherwise true and reliable.

266. *State of Maharashtra v Damu*, (2000) 6 SCC 269 : AIR 2000 SC 1691 : 2000 Cr LJ 2301 .

267. *Ibid*

268. *Shankaria v Rajasthan*, 1978 Cr LJ 1414 : AIR 1978 SC 1399 : (1978) 4 SCC 453 ; *State of WB v Dulal Hazra*, 1987 Cr LJ 857 (Cal).

269. *Harbans Singh Bhan Singh v State of Punjab*, AIR 1957 SC 637 : 1957 Cr LJ 1014 .

270. *Nakula Chandra Aich v State of Orissa*, 1982 Cr LJ 2158 (Ori).

271. *Hemraj Devilal v State of Ajmer*, AIR 1954 SC 462 : 1954 Cr LJ 1313 .

272. *Ram Chander v State of Haryana*, 1981 Cr LJ 609 : AIR 1981 SC 1036 .

273. *Badri v State of Uttar Pradesh*, 1973 Cr LJ 1478 .

274. *State of MP v Dayaram*, 1981 Cr LJ 1688 : AIR 1981 SC 2007 : 1981 Supp SCC 14 .

275. *State of Orissa v Suruji Dei*, 1976 Cr LJ 938 (Ori).

276. *Iswar Behera v State of Orissa*, 1976 Cr LJ 611 (Ori).

277. *Davendra Prasad Tiwari v State of UP*, 1978 Cr LJ 1614 : AIR 1978 SC 1544 .

278. *State of Orissa v Susanta Kumar Dey*, 1979 Cr LJ NOC 52 (Ori) : 1978 Cr LJ 125 (SC)—Rel. on.

279. *Ram Singh v Sonia*, AIR 2007 SC 1218 : (2007) 3 SCC 1 : 2007 Cr LJ 1642 .

280. *Dhanajaya Reddy v State of Karnataka*, AIR 2001 SC 1512 : 2001 Cr LJ 1712 : (2001) 4 SCC 9 .

281. *State of TN v Nalini*, 1999 Cr LJ 3124 : AIR 1999 SC 2640 : (1999) 5 SCC 253 .

282. *Ram Charan v State of UP*, AIR 1968 SC 1270 : 1968 Cr LJ 1473 .

283. *Akanman Bora v State of Assam*, 1988 Cr LJ 573 (Gau).

284. *R Shaji v State of Kerala*, AIR 2013 SC 651 : (2013) 14 SCC 266 .

285. *Babubhai Udesing Parmar v State of Gujarat*, AIR 2007 SC 420 : (2006) 12 SCC 268 : 2007 Cr LJ 786 .

286. *State of TN v J Jayalalitha*, AIR 2000 SC 1589 : (2000) 5 SCC 440 .

287. *State of Maharashtra v Damu*, AIR 2000 SC 1691 : 2000 Cr LJ 2301 : (2000) 6 SCC 269 .

288. *Ram Chandra Prasad Sharma v State of Bihar*, AIR 1967 SC 349 : 1967 Cr LJ 409 ; *Hem Chandra Nayak v State of Assam*, 1989 Cr LJ 2058 (Gau). *KI Pavunny v Asst. Collector (HQ) Central Excise Collectorate*, (1997) 1 Ker LT 489 , acting on retracted confession. *State of Rajasthan v Bhup Singh*, (1997) An LT 588, mode of recording dying declaration. *Parmananda Regu v State of Assam*, AIR 2004 SC 4197 : (2007) 7 SCC 779 : 2004 Cr LJ 4197 , the expression "corroboration of material particulars" does not imply that there should be meticulous examination of the entire material particulars. It is enough that there is broad corroboration in conformity with the general trend of the statement.

289. *Sanatan Badchat v The State*, (1952) Cut 620 : AIR 1953 Ori 149 .

290. *State of Assam v Rabindra Nath Guha*, 1982 Cr LJ 216 (Gau).

291. *Mohammad Ajmal Mohammad Amir Kasab v State of Maharashtra*, AIR 2012 SC 3565 : 2012 Cr LJ 4770 : JT 2012 (8) SC 4 : 2012 (7) Scale 553 : (2012) 9 SCC 1 .

292. *Rabindra Kumar Pal v Republic of India*, AIR 2011 SC 1436 : (2011) 2 SCC 490 .

The Code of Criminal Procedure, 1973

CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[293.] [s 164A] Medical examination of the victim of rape.—

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:—

- **(i) the name and address of the woman and of the person by whom she was brought;**
- **(ii) the age of the woman;**
- **(iii) the description of material taken from the person of the woman for DNA profiling;**
- **(iv) marks of injury, if any, on the person of the woman;**
- **(v) general mental condition of the woman; and**
- **(vi) other material particulars in reasonable detail.**

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay, forward the report to the investigation officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation.—For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in section 53.]

[s 164A.1] CrPC (Amendment) Act, 2005 [*Clause (17)*].—

This clause seeks to insert new section 164A in the Code to provide for a medical examination of the victim of rape by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner by any other registered medical practitioner (*Notes on Clauses*).

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

293. New section 164A inserted by the CrPC (Amendment) Act, 2005 (25 of 2005), section 17. Enforced w.e.f. 23-6-2006 *vide* Notfn. No. SO 923(E), dated 21-6-2006.

The Code of Criminal Procedure, 1973

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[s 165] Search by police officer.—

(1) Whenever an officer in-charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in-charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

[s 165.1] Sub-section (1).—

This section now authorises a general search on the chance that something might be found. But the officer acting under this sub-section or sub-section (3) must record in writing his reasons for the making of a search, and under sub-sections (1) and (3), the thing shall be specified as far as possible. The provisions of this section are mandatory and not directory and its requirements must be complied with before a police officer can validly institute a search of the nature mentioned in this section.[294.] Where the provisions of section 100 and this section are contravened, the search can be resisted by the person whose premises are sought to be searched.[295.] But, even if the search be illegal, it does not justify any obstruction or other criminal acts against the person conducting the search, after search and seizure are complete.[296.]

[s 165.2] Seizure without witnesses.—

If seizure is effected at a place where no witness was available nor facilities regarding weighing the contraband articles, *etc*. were available, the officer can prepare the seizure *mahazar* at a later stage as and when facilities are available. There should be justifiable and reasonable grounds to do so.[297.]

[s 165.3] "Within the limits".—

The officer has no power to make a search beyond the local limits of his own circle. But in certain cases, a search within the limits of another police station is now authorised [see section 166(3)].

[s 165.4] Illegality in search and seizure.—

It has been held that an illegality in search and seizure by the investigating officer does not vitiate the seizure unless it has caused prejudice to the accused. Evidence of seizure cannot be discarded merely because the witness was not from the same locality.[298.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

294. *New Swadeshi Mills of Ahmedabad v SK Ratton*, (1967) 9 Guj LR 364.

295. *Radha Kishen v State of UP*, AIR 1963 SC 822 : (1963) 1 Cr LJ 809 .

296. *Shyam Lal Sharma, etc. v State of Madhya Pradesh*, AIR 1972 SC 886 : 1972 Cr LJ 638 : (1972) 1 SCC 764 .

297. *Khet Singh v UOI*, 2002 Cr LJ 1832 : (2002) 4 SCC 380 .

298. *State of MP v Paltan Mauah*, AIR 2005 SC 733 : (2005) 3 SCC 169 : 2005 Cr LJ 918 .

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CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 166] When officer in charge of police station may require another to issue search warrant.—

(1) An officer in-charge of a police station or a police officer not being below the rank of Sub-Inspector making an investigation may require an officer in-charge of another police station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in-charge of another police station to cause a search to be made under subsection (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in-charge of a police station or a police officer making any investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station in accordance with the provisions of section 165, as if such place were within the limits of his own police station.

(4) Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer in-charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 100, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in sub-sections (1) and (3) of section 165.

(5) The owner or occupier of the place searched shall, on application, be furnished free of cost with a copy of any record sent to the Magistrate under sub-section (4).

[s 166.1] ***Sub-sections (3) and (4).—***

These two sub-sections give power in certain circumstances to an officer in charge of one police station to search or cause to be searched places within the local limits of another police station.

Where narcotic drugs were first recovered from Bombay, and then one of the accused led the police party including two other persons to Vapi in Gujarat and a huge quantity was recovered there, and the two persons accompanying the party were made recovery witnesses, the High Court held that merely taking two witnesses from Bombay could not vitiate the investigation and the recovery-memo and the statement of the two witnesses could be relied upon [section 166(3)].[299.]

A search and seizure in the area of another police station was not vitiated because information was submitted to the other police station and also because by virtue of section 114, Evidence Act, 1872, there is presumption that all official acts are deemed to be performed regularly.[300.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .

2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

299. *Dr Rohit Desai v State of Maharashtra*, 1993 Cr LJ 2730 (Bom).

300. *Ronny v State of Maharashtra*, AIR 1998 SC 1251 : (1998) 3 SCC 625 ; *Manish Dixit v State of Rajasthan*, AIR 2001 SC 93 : 2001 Cr LJ 133 : (2001) 1 SCC 596 .

The Code of Criminal Procedure, 1973

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[301.][s 166A] Letter of request to competent authority for investigation in a country or place outside India.—

(1) Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter.

(2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

(3) Every statement recorded or document or thing received under sub-section (1) shall be deemed to be the evidence collected during the course of investigation under this Chapter.

[s 166A.1] Letters rogatory.—Evidence gathered in violation of the terms of letters rogatory would render the proceedings improper and unfair because it could result in miscarriage of justice.[302.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

301. Sections 166A and 166B added by the CrPC (Amendment) Act, 1990. (Act 10 of 1990) section 2 (w.r.e.f. 19-2-1990).

302. *J Jayalalitha v State*, 2002 Cr LJ 3026 (Mad).

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[303.][s 166B] Letter of request from a country or place outside India to a Court or an authority for investigation in India.—

(1) Upon receipt of a letter of request from a Court or an authority in a country or place outside India competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to an offence under investigation in that country or place, the Central Government may, if it thinks fit,—

(i) forward the same to the Chief Metropolitan Magistrate or Chief Judicial Magistrate or such Metropolitan Magistrate or Judicial Magistrate as he may appoint in this behalf, who shall thereupon summon the person before him and record his statement or cause the document or thing to be produced; or

(ii) send the letter to any police officer for investigation, who shall thereupon investigate into the offence in the same manner,

as if the offence had been committed within India.

(2) All the evidence taken or collected under sub-section (1), or authenticated copies thereof or the thing so collected, shall be forwarded by the Magistrate or police officer, as the case may be, to the Central Government for transmission to the Court or the authority issuing the letter of request, in such manner as the Central Government may deem fit.]

These two provisions were introduced by section 2 of the Criminal Procedure (Amendment) Act, 1990 (Act X of 1990) in order to facilitate the on-going investigation in the matter of kickbacks and commission paid by a foreign gun-factory, *viz*., AB Bofors of Sweden, for finalising sale of its product, 155 mm calibre medium guns both towed and self-propelled, with the Ministry of Defence, Government of India.

The necessity of such provisions in our Code was felt, as it was alleged, that the amount of money paid by the Bofors was deposited in the accounts of the accused in the Banks at Switzerland. The two provisions are reciprocal in nature.

The letter authorised by these provisions are known as "Letter Rogatory". '"Letter Rogatory' is a formal communication in writing sent by a Court in which jurisdiction an

action is pending to a foreign Court or Judge requesting the testimony of a witness residing within the jurisdiction of that foreign Court may be formally taken thereon under its direction and transmitted to the issuing Court making such request for use in a pending legal contest or action. This request entirely depends upon the comity of Courts towards each other, that is to say, on the friendly recognition accorded by the Court of one nation to the laws and usages of the Court of another nation."[304.]

The Supreme Court has held that issuing of "Letter Rogatory" by the Delhi Judge for freezing of accounts in Swiss Banks was only to seek judicial assistance from judicial authorities in Switzerland for investigation and collection of evidence, and in such a case, accused has no right to have a say with regard to the manner and method of investigation and the rule of *audi alteram partem* simply does not apply here.[305.]

[s 166B.1] Investigation on request of foreign authority.—

The appellant was a suspect of murder in Canada. The Canadian authorities requested the Ministry of Home Affairs, Government of India, to interview the appellant and obtain, on voluntary basis, his statement and his blood for DNA analysis in a manner acceptable to the Canadian Court. The appellant was not willing to make his statement or give his blood sample. It was held that in such a case, the CBI could not take recourse to section 166B and compel the appellant to make the statement and give a blood sample.[306.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

303. Ins. by Act 10 of 1990, section 2 (w.r.e.f. 19-2-1990).

304. *UOI v WN Chadha*, AIR 1993 SC 1082 : 1993 Cr LJ 859 : (1993) 4 Supp SCC 260 .

305. *Ibid*

306. *Narinder Singh Dograh v State of Punjab*, AIR 2004 SC 1686 : (2004) 11 SCC 180 : 2004 Cr LJ 1446 .

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 167] Procedure when investigation cannot be completed in twenty-four hours.—

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in-charge of the police station or the police officer making the investigation, if he is not below the rank of Sub-Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

***Provided* that—**

[307.] **[(a) The Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, —**

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on

bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[308]**[(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]**

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[309] **[***Explanation I.*—**For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a) the accused shall be detained in custody so long as he does not furnish bail.]**

[310] **[*Explanation II.* —If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:]**

[311] **[*Provided further* that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognized social institution.]**

[312] **[(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):**

***Provided* that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.]**

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

[s 167.1] State Amendments

Andaman and Nicobar Islands and Lakshadweep Islands.— *The following amendments were made by Regulation 1 of 1974, section 5(b) (w.e.f. 30-3-1974).*

S 167.—In its application to the Union Territories of Andaman and Nicobar Islands and Lakshadweep Islands in section 167—

(i) in sub-section (1), after the words "nearest Judicial Magistrate," insert the words "or, if there is no Judicial Magistrate in an Island, to an Executive Magistrate functioning in that Island;"

(ii) after sub-section (1) insert the following—

(1-A) Where a copy of the entries in the diary is transmitted to an Executive Magistrate, references in section 167 to a Magistrate shall be construed as references to such Executive Magistrate".

(iii) to sub-section (3) add the following proviso—

"*Provided* that no Executive Magistrate, other than the District Magistrate or Sub-divisional Magistrate, shall, unless he is specially empowered in this behalf by the State Government, authorise detention in the custody of the police," and

(iv) to sub-section (4) add the following proviso—

"*Provided* that, where such order is made by an Executive Magistrate, the Magistrate making the order shall forward a copy of the order, with his reasons for making it, to the Executive Magistrate to whom he is immediately subordinate."

Andhra Pradesh.— *The following amendments were made by Andhra Pradesh Amendment Act, Act 31 of 2001, section 2 (w.e.f. 6-12-2000).*

In its application to the State of Andhra Pradesh, in section 167, sub-section (2),—

(i) in clause (b), add the following at the end, namely:—

"either in person or through the medium of electronic video linkage;"

(ii) in the *Explanation II* thereunder, for the words "an accused person was produced", substitute "an accused person was produced in person or as the case may be through the medium of electronic video linkage".

Union Territory of Chandigarh.—Amendment of Section 167 as under—

"Section 167 shall be so read as if the words "Executive Magistrate" were substituted for the words "Judicial Magistrate" or "Magistrate" and the words "District Magistrate" were substituted for the words "Chief Judicial Magistrate".

Chhattisgarh.— *The following amendments were made by Chhatisgarh Amendment Act 13 of 2006, section 3 (w.e.f. 13-3-2006).*

In its application to the State of Chhattisgarh, in section 167.—

(1) in sub-section (2), in the proviso, after clause (b), insert the following clause, namely:—

"(bb) No Magistrate shall authorise detention of the accused person other than in custody of the police under this section unless the accused is produced before him either in person or through the medium of electronic video linkage and represented by the pleader in the Court."

(2) in Explanation II, after the words "was produced", add the words "from police custody";

(3) after Explanation II, add the following Explanation, namely:—

"Explanation III.—If any question arises whether an accused person was produced from otherwise than in the custody of the police in person or (as the case may be) through medium of electronic video linkage before the Magistrate as required under paragraph (*bb*), the production of the accused person may be proved by his or his pleader's signature on the order authorising detention.".— Chhattisgarh Act 13 of 2006, section 3.

Delhi.— *The following amendments were made by the Code of Criminal Procedure (Delhi Amendment) Act, 2004 (Delhi Act 4 of 2004), section 2 (w.e.f. 16-8-2004).*

In its application to the State of Delhi, in section 167, in sub-section (2), in the proviso,—

(i) for clause (b), substitute the following clause, namely:—

"(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him either in person or through the medium of electronic video linkage:

Provided that if the accused is in police custody, no Magistrate shall authorise his detention in any custody unless the accused in produced before him in person";

(ii) for the Explanation II thereunder, substitute the following Explanation, namely:—

"Explanation II.—If any question arises whether an accused person was produced in person or, as the case may be, through the medium of electronic video linkage before the magistrate as required under paragraph (*b*), the production of the accused person may be proved by his signature on the order authorising his detention or by video recording of the proceedings, as the case may be.".

Gujarat.— *The following amendments were made by Gujarat Amendment Act, Act 21 of 1976, section 2 (w.e.f. 7-5-1976).*

S 167.—In its application to the State of Gujarat in section 167—

(i) in proviso to sub-section (2), substitute clause (a) as follows:—

(a) the Magistrate may authorise detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding—

(i) one hundred and twenty days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence; and, on the expiry of the said period of one hundred and twenty days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;"

(ii) in clause (b) for the words "no Magistrate shall" read "no Magistrate shall, except for reasons to be recorded in writing,"

(iii) the Explanation be numbered as Explanation II, and before so re-numbered Explanation insert as follows:—

"**Explanation I.—**For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused person shall be detained in custody so long as he does not furnish bail."

Amendment to apply to investigation.—The provisions of section 167 of the Code of Criminal Procedure, 1973, as amended by this Act, shall apply to every investigation pending immediately, before the commencement of this Act, if the period of detention of the accused person, had not, at such commencement, exceeded sixty days.

The following amendments were made by Code of Criminal Procedure (Gujarat Amendment) Act, 2003 (31 of 2003), section 2 (w.e.f. 16-8-2003).

(iv) in the proviso for clause (*b*), substitute the following clause, namely:—

"(*b*) no Magistrate shall authorise further detention in 'any custody under this section unless—

(i) where the accused is in the custody of police, he is produced in person before the Magistrate, and

(ii) where the accused is otherwise than in the custody of the police, he is produced before the Magistrate either in person or through the medium of electronic video linkage, in accordance with the direction of the Magistrate."

(v) in *Explanation II*, after the words "whether an accused person was produced before the Magistrate", insert "in person or, as the case may be, through the medium of electronic video linkage".

Haryana.—*The following amendments were made by Haryana Act 20 of 1981, section 2 (w.e.f. 22-12-1981).* After section 167 insert the following section 167A, namely:—

S 167A. Procedure on arrest by Magistrate.—For the avoidance of doubt, it is hereby declared that the provisions of section 167 shall, so far as may be, apply also in relation to any person arrested by, or under any order or direction of, a Magistrate whether executive or judicial.

Madhya Pradesh.— *The following amendments were made by M.P. Act 2 of 2008, section 3 (w.e.f. 14-2-2008).*

In section 167, in sub-section (2),—

(i) in the proviso, for clause (b), substitute the following clause, namely:—

"(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him in person, for the first time and subsequently every time till such time the accused remains in the custody of police, but the Magistrate may extend further detention in judicial custody on production of accused either in person or through the medium of electronic video linkage.";

(ii) for *Explanation II,* substitute the following *Explanation*, namely:—

"*Explanation II.*—If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be."

Maharashtra.— *The following amendments were made in its application to the State of Maharashtra by Maharashtra Act 8 of 2005 (w.e.f. 25-11-2004).*

S 167.—In sub-section (2) of section 167:

(a) in the proviso, for clause (*b*), in sub-section (2), the following paragraph shall be substituted:

"(*b*) no Magistrate shall authorise detention in any custody, of the accused person under this section unless, the accused person is produced before him in person, and for any extension of custody otherwise than the extension in the police custody, the accused person may be produced either in person or through the medium of electronic video linkage";

(b) in *Explanation II,* for the words "an accused person was produced" the words "an accused person was produced in person, or as the case may be, through the medium of electronic video linkage" shall be substituted (w.e.f. 25-11-2004).

Manipur.- *The following amendments were made by Manipur Act 3 of 1983, section 3.*

In its application to the State of Manipur, in sub-section (2) in the proviso, in clause (a),-

(i) for the words "ninety days" wherever they occur, substitute the words "one hundred and eighty days";

(ii) for the words "sixty days" wherever they occur, substitute the words "one hundred and twenty days".

Orissa.— *The following amendments were made by Orissa Act 11 of 1997, section 2 (w.e.f. 5-11-1997).*

In its application to the State of Orissa, in section 167, in clause (a) of the proviso to sub-section (2),—

(i) for the words "under this paragraph", substitute "under this section" and

(ii) for the words "ninety days" wherever they occur, substitute "one hundred and twenty days".

Punjab.— *The following amendments were made by Punjab Act 9 of 1986, section 2 (w.e.f. 8-4-1986).*

S 167(2).—In sub-section (2) of section 167, as amended in its application to the State of Punjab for the words "fifteen days", at both places where they occur, the words "thirty days" shall be substituted. **Rajasthan.–***The following amendments were made by Rajasthan Act 16 of 2005, section 2 (w.e.f. 16-7-2005)*

S 167.–In its application to the State of Rajasthan, in section 167, sub-section (2), in the proviso,–

(i) for the existing clause (b), substitute the following clause, namely:-

"(b) where the accused is in police custody, no Magistrate shall authorise detention in any custody under this section unless the

accused is produced before him in person;

(bb) where the accused is in judicial custody, no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him either in person or through the medium of electronic video linkage;"

(ii) for the existing *Explanation* II, substitute the following *Explanation*, namely:–

"Explanation II.–If any question arises whether an accused person was produced before the Magistrate as required under paragraphs (b) and (bb), the production of the accused person may be proved–

(i) by his signature on the other authorising detention, if he is produced in person; or

(ii) by a certificate to the effect that he was produced through the medium of electronic video linkage recorded by the Magistrate on the order authorising detention, if he is produced through the medium of electronic video linkage".

Tamil Nadu.— *The following amendments were made in its application to the State of Tamil Nadu by Tamil Nadu Act 29 of 2003 (w.e.f. 22-9-2003).*

S 167.—In section 167 of the Code of Criminal Procedure, 1973 (Central Act No. 2 of 1974):

(1) in the proviso to sub-section (2), for clause (*b*), the following clause shall be substituted namely:—

"(*b*) no Magistrate shall authorise the detention of an accused person under this section,—

(i) if the accused is in the custody of police, unless the accused is physically produced before him; and

(ii) if the accused is detained otherwise than in the custody of police, unless the accused is produced before him either in person or through the media or electronic video linkage".

(2) In the Explanation II under sub-section (2), after the expression "an accused person was produced" the expression "in person or, as the case may be, through the media of electronic video linkage" shall be inserted.

Tripura.— *The following amendments were made by Tripura Act 6 of 1992, section 2 (w.e.f. 29-7-1992).*

S. 167(2).—In section 167, in its application to the State of Tripura, in clause (a) of the proviso to sub-section (2),—

(a) for the words "ninety days" wherever they occur, the words "one hundred eighty days" shall be substituted;

(b) for the words "sixty days" wherever they occur, the words "one hundred twenty days" shall be substituted.

As amended by Tripura Amendment Act, 1997, the legislature never intended that if the notification issued under the proviso to sub-section (4)

of section 1 of the Amendment Act, is not laid before the Legislative Assembly of Tripura, the notification would become invalid or inoperative and the Amendment Act would cease to be operative.[313.]

Union Territory of Chandigarh.—Amendment of section 167 as under—

"S. 167 shall be so read as if the words "Executive Magistrate" were substituted for the words "Judicial Magistrate" or "Magistrate" and the words "District Magistrate" were substituted for the words "Chief Judicial Magistrate."

Uttar Pradesh.— *The following amendments were made by U.P. Act 18 of 1977, section 2 (w.e.f. 5-11-1977).*

S 167A.—In its application to the State of Uttar Pradesh after section 167 insert the following:—

"167A. Procedure on arrest by Magistrate.—For the avoidance of doubts, it is hereby declared that the provisions of section 167 shall, so far as may be, apply also in relation to any person arrested by, or under any order or direction of, a Magistrate, whether executive or judicial."

West Bengal.—*The following amendments were made by W.B. Act 24 of 1988*, section 4.

S 4.—(1) In section 167,-

(a) For sub-section (5), the following sub-section shall be substituted:—

"(5) If, in respect of—

(i) any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months, or

(ii) any case exclusively triable by Court of Session or a case under Chapter XVIII of the Indian Penal Codes (45 of 1860), the investigation is not concluded within period of three years, or

(iii) any case other than those mentioned in clauses (i) and (ii), the investigation is not concluded within a period of two years, from the date on which the accused was arrested or made his appearance, the Magistrate shall make an order stopping further investigation into the offence and shall discharge the accused unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the periods mentioned in this sub-section is necessary.";

(b) in sub-section (6) after the words "any order stopping further investigation into an offence has been made" the words "and the accused has been discharged" shall be inserted.

West Bengal.— *The following amendments was made by W.B. Act 20 of 2004, section 3,—*

S 167.—In its application to the state of West Bengal, in the proviso to sub-section (2) of section 167 of the principal Act, for clause (*b*) the following clause shall be substituted:—

"(*b*) no Magistrate shall authorise detention under this section—

(i) in the police custody, unless the accused is produced before him in person everytime till the accused is in police custody;

(ii) in the judicial custody, unless the accused is produced before him either in person or through the medium of electronic video linkage". [*Vide W.B. Act 20 of 2004*].

[s 167.2] CrPC (Amendment) Act, 2008 [*Clause (14)*].—

This clause amends section 167 relating to procedure when investigation cannot be completed in 24 hours. It amends proviso to sub-section (2) of section 167 in order to make provision for the Magistrate to extend further detention in judicial custody of the accused also through the medium of electronic video linkage except for the first time where the production of the accused in person is required. The clause also inserts a further proviso to the said sub-section (2) to provide that in the case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution (*Notes on Clauses*).

COMMENT

This section prescribes the procedure when investigation of an offence cannot be completed in 24 hours. Section 309, similarly, deals with the power to remand. This section provides for cases which are under investigation by the police. Section 309 provides for cases in which inquiry or trial before the Magistrate has commenced or is about to commence. The remand under section 309 is to jail and not to police custody. An accused cannot, during the pendency of the investigation which started before the coming into force of this Code, press into service proviso (a) to sub-section (2) of section 167 and claim, as a matter of right, to be released on bail. Saving clause (2)(a) of section 484 applies to such a case and the investigating officer can invoke section 344 of the old Code in such a case.[314.]

Where the person in detention was neither an alien enemy, nor his arrest was under preventive detention law, the omission on the part of the police officer to forward him to the nearest Judicial Magistrate within 24 hours of arrest, his further detention was held to be vitiated. The Court further said that it was not a valid excuse for not producing before the Magistrate that he was already in jail in some other State in connection with another case.[315.]

A special Judge under the Criminal Law (Amendment) Act, 1952, can exercise the power conferred on the Magistrate under section 167 thereof to authorise the detention of the accused who is in the custody of the police.[316.] Where a person was arrested by the Enforcement Directorate under Foreign Exchange Regulation Act, 1973, and produced before a Magistrate for judicial remand under section 167(2) CrPC, the Supreme Court overruling the decision of a five-Judge Bench of the Delhi High Court, held that sub-sections (1) and (2) of section 167 CrPC are squarely applicable with regard to production and detention of a person arrested under section 35 of FERA, 1973 and section 104 of the Customs Act, 1962 and the Magistrate has jurisdiction to authorise the detention of a person arrested under these Acts.[317.]

[s 167.3] Procedure where investigation cannot be completed within 24 hours [*Sub-section (1)*].—

When any investigation cannot be completed in 24 hours and the accusation is well founded, the police officer is required to send a copy of the entries in the diary relating to the case along with the accused to the nearest Magistrate. The object of requiring the accused to be produced before a Magistrate for purposes of remand is to enable the Magistrate to see that the remand is necessary.[318.] When a person is arrested and produced before a Magistrate, the Magistrate can remand him to police or judicial custody for 15 days at the first instance. Within this period of 15 days, there can be more than one order changing the nature of such custody either from police to judicial or *vice-versa*. After the expiry of the first period of 15 days, the further remand can only be in judicial custody. There cannot be any detention in police custody after the expiry of first 15 days even in a case where some more offences are found to have been committed in the same transaction at a later stage.

But he can be remanded to police custody from judicial custody if the same arrested person is involved in a different case arising out of a different transaction for first 15 days.

If the investigation is not completed within 90 or 60 days, then he has to be released on bail under the proviso to section 167(2).

The period of 90 or 60 days has to be computed from the date of detention as per orders of the Magistrate and not from the date of arrest by the police. Consequently, the first period of 15 days mentioned in section 167(2) has to be computed from the date of such detention, and after the expiry of the first 15 days, it should be only judicial custody.[319.] The Supreme Court had already said that an order of remand passed in the absence of prisoner in Court is highly unsatisfactory.[320.]

In Chaganti Satyanarayana v State of Andhra Pradesh,[321.] it has been held by the Supreme Court that period of 90 days under section 167(2) of the Code shall be computed from the date of remand of the accused and not from the date of his arrest under section 57 of the Code. In *State of MP v Rustam,*[322.] the Supreme Court held that while computing period of 90 days, the day on which the accused was remanded to the judicial custody should be excluded, and the day on which *challan* is filed in the Court, should be included.

Where under TADA [now repealed], prisoners did not press their bail applications before the filing of a charge-sheet against them, it was held that by not pressing their bail applications, they actually did not "offer" to be released on bail and the Court on its own could not release a person on bail even if the charge-sheet was not filed within the stipulated time.[323.] The Supreme Court has laid down the principle that for invoking section 167(1) CrPC, it is not necessary that the arrest should have been made only by a police officer and none else, and there need not necessarily be the records of entries in a case diary. The Magistrate may take into judicial custody a person who is produced before him if—

(i) the arresting officer is legally competent to make the arrest;

(ii) the particulars of the offence for which the person is arrested, or other grounds do exist and are well founded; and

(iii) the provisions of the Special Act in regard to the arrest of the persons and production of the arrestee serve the purpose of section 167(1) CrPC.

Thus, officers other than police officers who are authorised to arrest persons, such as officers of the Enforcement Directorate under FERA [now FEMA] or COFEPOSA or NDPS Act or Customs Act are competent persons to seek judicial remand of an arrested person.[324.]

In a case under NDPS Act, the Supreme Court held that if the accused failed to exercise his right to be released on bail for failure of the prosecution to file the charge-sheet within the time allowed by law, he could not contend that he had an indefeasible right to exercise it at any time even after filing of the charge-sheet. Had he exercised the right and got himself released before filing of the charge-sheet, he could not be rearrested after filing of the charge-sheet.[325.] The requirements of the section are applicable to cases under the NDPS Act, 1985, also.[326.]

[s 167.4] Authorising detention on remand [*Sub-section (2)*].—

The Magistrate to whom the accused is forwarded may authorise the detention of the accused for a term not exceeding 15 days. The benefit of section 167(2) of the new Code cannot be availed in a case registered prior to 1 April 1974 and to be investigated under the old Code. If the bail application is presented after the commencement of the new Code, it only implies that Chapter XXXIII relating to bail and bonds becomes applicable to the case, but merely because of that the beneficial provisions of section 167(2) will not automatically become applicable. It is apparent that section 167(2) does not fall at all within Chapter XXXIII. To bring in this section, it must be shown that the investigation of the case is also governed by the new Code and not by the old.[327.] The right accrued to the accused for being enlarged on bail under proviso (a) to section 167(2) of CrPC is not an absolute right. It gives only absolute right to be granted bail if the charge-sheet is not filed within the prescribed period, but the detention nonetheless continues to be authorised, therefore, the right accrued to the accused who is in custody, under the proviso to sub-section (2) of section 167 CrPC can be exercised by him only before the charge-sheet is filed.[328.]

The offence under section 304B IPC is covered by the provisions of section 167(2)(a)(ii).[329.] The offence under section 306 IPC is not covered by section 167(2)(a)(i).[330.]

An order of remand is a judicial order passed in exercise of judicial function. Such order is not to be passed mechanically.[331.] It has been clarified in *Suresh Kumar Bhikamchand Jain v State of Maharashtra,*[332.] that the revision of section 167(2)(a)(ii) enabling grant of default bail will be applicable irrespective of the fact of cognizance having been taken. In this case though the police report was submitted within the prescribed period, no cognizance was taken as there was no sanction to prosecute. The Magistrate went on granting remand till it was questioned by Special Leave Petitions after failing to get bail from the High Court under section 167(2). The Supreme Court clarified that once the police report is filed within the stipulated time, the question of grant of default bail does not arise. Whether cognizance is taken or not, is not material as far as section 167 is concerned.

An order for release on bail under section 167(2)(a) is not an order on merits but an order on default of the prosecuting agency. Such an order could be nullified for special reasons after the default has been cured. The accused cannot therefore claim any special right to remain on bail. If the investigation reveals that the accused had committed a serious offence and charge-sheet is filed, the bail granted under section 167(2)(a) could be cancelled on an application by the prosecuting agency.[333.]

[s 167.5] Extension of time.—

Remand order under section 167 is a judicial order. It has to be passed on application of mind to the contents of the remand report submitted by the investigating officer. The order should reflect application of mind and extension of remand in consequence thereof. The order should contain reasons for extending remand order.[334.]

In the absence of any request by the police or jail authorities or in absence of sufficient ground, remand should not be extended, and the Magistrate must inform the accused that they can be released provided they furnish bail.[335.]

In a case under Maharashtra Control of Organized Crime Act, 1999, where the appellant claimed bail on the ground of failure to file charge-sheet within the stipulated period, it was held by the Supreme Court that there was nothing in the language of the second proviso inserted in section 167 (2) of the Code by section 21 (2) of the Act of 1999 to indicate that the power of extension of time can be exercised only once. It was held that since the Special Court had granted extension of time, the prayer of the accused for bail on the ground of default in filing charge-sheet cannot be allowed.[336.] It was observed by the Supreme Court as follows:

> 16. In this context, we cannot lose sight of Section 167(2) of the Code. Section 167 of the Code and section 21 of MCOC Act deal with power of remand. The provisions of Section 21 of MCOC Act must be read in the light of Section 167 of Code. Section 167(2) of Code itself indicates that power of remand has to be exercised from time to time and this clearly dispels any doubt as regard the true effect of the second proviso added in Section 167(2) of Code by Section 21(2) of the MCOC Act, 1999. The only possible interpretation of the said proviso is that the special court can exercise power under the said proviso from time to time however, the total period of filing chargesheet/challan cannot exceed 180 days.[337.]

[s 167.6] "In such custody as such Magistrate thinks fit".—

The accused is detained in the custody of the police, or in such other custody as the Magistrate making the order thinks fit. Where army members come in aid of civil authorities for maintenance of law and order, they have absolutely no authority or power of investigation or interrogation. Remand of accused to the army custody on prayer of investigating officer is highly improper, illegal and *ultra vires* of the Constitution, the Court said.[338.] Ordinarily, no doubt, he will be in the custody of the police. Where the accused surrendered in the Court and the prosecution applied for police custody, but the prayer could not be granted till the expiry of first 15 days, it was held that the Magistrate rightly refused police custody.[339.] Such detention is altogether different from the custody in which an accused person is kept under remand given under section 309 of the Code, which is the custody provided by the Legislature for under-trial prisoners. However, the detention beyond period of 15 days cannot be in police custody. When an accused is produced before the Magistrate after arrest for detention in judicial custody, the Magistrate can after looking into the contents of the FIR, disagree with the opinion of the police about the penal provision which covers the case and can direct the police to detain the accused under such relevant section of the statute.[340.] Where an accused was remanded to police custody without production of up-to-date entries in the case-diary, it was held that if the material available to the Magistrate was such as would afford him an adequate information, on the basis of which he could decide as to whether an order of remand is necessary, the order of remand cannot be said to be without application of mind or illegal.[341.]

[s 167.7] Delay beyond period specified in sub-section (2)(a).—

The Supreme Court has explained the position as follows[342.]: Where a charge-sheet was not filed within the requisite period of 60 days, the accused became entitled to an indefeasible right to be released on bail. His application for bail was erroneously rejected by the Magistrate. He approached the higher authority. In the meantime, the charge-sheet was filed. It was held that the right to bail was not extinguished.

The right to statutory bail under section 167(2) [as amended by Unlawful Activities (Prevention) Act, 1967] gets extinguished on filing of charge-sheet. But the charge-sheet must be filed before application for statutory bail is made. A three-Judge Bench of the Supreme Court held that filing of charge-sheet during the pendency of the application for statutory bail does not affect the right of the accused to bail.[343.]

In a case, pursuant to FIR recorded by local police, the investigation was conducted, and charge-sheet was filed within the stipulated period. However, the investigation so conducted was not accepted by the Supreme Court and fresh investigation by CBI was ordered. The CBI recorded a fresh FIR. The petitioner claimed bail on the ground of default in submitting charge-sheet due to rejection of the first investigation. It was held by the Supreme Court that merely because further investigation has been ordered, it does not mean that the charge-sheet submitted earlier, gets abandoned.[344.]

[s 167.8] Detention in contravention of provisions, violation of right to life.—

The Supreme Court has observed[345.]: Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of section 167, any further detention beyond the period without filing of a *challan* by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21.

[s 167.9] Order of Magistrate necessary to give effect to mandate of proviso.—

The Supreme Court has held that an order is necessary to give effect to the mandate of the proviso and the bail is to be furnished in accordance with such order.[346.]

[s 167.10] Accused to be produced for detention [*Sub-section (2)(b)*].—

The CrPC (Amendment) Act, 2008, has substituted sub-section 2(b). The substituted sub-section 2(b) makes provision for the Magistrate to extend further detention in judicial custody of the accused also through the medium of electronic video linkage except for the first time where the production of the accused in person is required.

[s 167.11] "Fifteen days in the whole".—

The period for which a Magistrate can authorise the detention of the accused in police custody is 15 days in the whole, including one or more remands.[347.]

If there are adequate grounds, the Magistrate may extend the period—not exceeding 60 days—for detention of the accused person otherwise than in the police custody. On the expiry of that period, the person should be released on bail. It must be pointed out to the under-trial prisoner if he is entitled to be released on bail.[348.]

The Magistrate or the Sessions Judge before whom the accused appears is under an obligation to inform the accused that if he is unable to engage a lawyer on account of poverty, he is entitled to obtain free legal service at the cost of the State. The Supreme Court has given necessary directions to Magistrates, Sessions Judges and State Governments with guidelines to be followed in this regard.[349.]

Where an accused was detained for more than six years and his detention was granted mechanically, the Court ordered that he be released.[350.] Where the accused was not produced before the Magistrate and without seeing him, he remanded him to custody, the action was held illegal.[351.]

While computing the total period of 60 days referred to in sub-clause (ii) of proviso (a) to sub-section (2) of section 167, the period of detention under section 57 (which must not be more than 24 hours) has to be excluded.[352.] Once the accused is released on bail, the Magistrate ceases to have any jurisdiction to commit him to police custody. Only refusal of bail or cancellation of bail will enable him to commit him to custody.[353.] The purpose of section 167 is to protect the accused from unscrupulous police officers. The right of an accused to be released on bail after 90 days or 60 days as provided in cls. (a) and (b) of the proviso to sub-section (2) is absolute.[354.] Where the charge-sheet was filed within 90 days, but the Magistrate had not passed an order taking cognizance within the period, it was held that the accused was not entitled to seek bail under the proviso to section 167(2).[355.]

When the bail was granted on the ground that the charge-sheet was not filed within the prescribed period of 90 days and the charge-sheet had been filed on the 91st day, after the Court hours, it was held that the Court could not treat the charge-sheet as having been filed during the working hours and therefore could cancel the bail granted.[356.]

But where no prayer was made nor were any grounds made out cancellation of bail on a mere filing of a *challan* after the expiry of the statutory period was illegal.[357.]

The accused is entitled to be released on bail on account of default on the part of the prosecution to file a charge-sheet within the prescribed period. However, the accused cannot claim any special right to remain on bail. If the investigation reveals that (i) the accused has committed a serious offence; and (ii) a charge-sheet is filed, the bail granted under this proviso could be cancelled.[358.]

Once the accused is released on bail under section 167(2), he cannot be taken back in custody merely on filing of charge-sheet, which reveals the commission of a non-bailable crime. Unless there are strong grounds, bail cannot be cancelled on mere production of chargesheet.[359.]

Section 167 CrPC in its entirety applies squarely to offences under the Customs Act and as such an accused who was arrested under section 104 Customs Act, and the charge-sheet was not submitted within the prescribed period for investigation, the Calcutta High Court held him entitled to be released on bail.[360.]

Where the accused was remanded to custody and the 90th day of remand was a public holiday, section 10 of the General Clauses Act will not apply, while considering entitlement of accused to be released on bail, as there is no legislative command that

the charge-sheet should be filed within 90 days. The period of 90 days commences from the date on which the accused is remanded and not from the date of arrest.[361.]

If the investigation into the offence for which the accused was arrested initially reveals his involvement in some other offence associated therewith, any further investigation would continue to relate to the same initial arrest and as such the period envisaged in the proviso to section 167(2) would be unextendable.[362.]

[s 167.12] Further investigation.—

Where a person is arrested during further investigation, the Court can, even after taking cognizance of an offence, authorise detention in police custody. The words "the accused if in custody" in section 309(2) do not refer to a person who is arrested in the course of further investigation.[363.]

[s 167.13] On the expiry of 60 days.—

On the expiry of 60 days from the date of the arrest of the accused, his further detention does not *ipso facto* become illegal or void, but if the charge-sheet is not submitted within the period of 60 days then, notwithstanding anything to the contrary in section 347(1), the accused would be entitled to an order for being released on bail if he is prepared to and furnishes the bail.[364.]

[s 167.14] Release on bail after expiry of 90 days [*Sub-section (2) (proviso (a) (i)*].—

Where the accused was arrested for offences under the IPC and was remanded first to police custody and then to judicial custody but later approval was accorded under section 23 of Maharashtra Control of Organised Crime Act, 1999, for conducting investigation into offences under the Act, it was held that the period of 90 days contemplated under proviso (a)(i) to section 167(2) must be reckoned from the date of accused's remand at the first instance and not from the date of grant of approval for investigation under the Act. A new period of 90 days does not commence from the date of grant of approval for investigation under the Act. Second proviso to section 167(2) inserted by section 21(2)(b) of the Act which provides for extension of the period up to 180 days cannot apply where Public Prosecutor does not submit any report indicating specific reasons for detention beyond the period of 90 days. Where the charge-sheet could not be laid within 90 days from the date of remand to the custody at the first instance, accused would be entitled to bail. That the provision regarding bail under the Act is very stringent would be a relevant aspect for consideration only when any motion for bail would be made *dehors* section 167(2) CrPC Maharashtra Control of Organised Crime Act, 1999 (30 of 1999).[365.]

The provision for release is mandatory in the sense that the accused shall have to be released on bail, if he is prepared to and does furnish bail on expiry of the period of 90 or 60 days, as the case may be, if the charge-sheet is not filed within the said period.[366.]

The very fact that the applicant/accused made an application within the period prescribed seeking his release on bail would indicate that he was prepared to furnish bail. The Magistrate by postponing the passing of the order of bail cannot defeat the

right accrued to the applicant/accused of being released on bail which he had availed by making an application therefor.[367.]

The question was that of computation of the period of custody for entitlement to compulsory bail. The police custody contemplated by section 167(2) is custody in the particular case, but not judicial custody or detention in some other case. Notional surrender, while in custody for one case, is not to be taken as the starting point for computation of the period of 15, 90 or 60 days of detention in some other case.[368.]

However, in a decision in a case registered on the order of the High Court of Andhra Pradesh against YS Jaganmohan Reddy, Member of Parliament and 73 others under section 120B read with sections 420, 409 and 477A of the IPC and section 3(2) read with section 13(1) (c) and (d) of the Prevention of Corruption Act, 1988, where the petitioner, Jaganmohan Reddy, was in custody for more than a year and the investigation had not concluded, the Supreme Court refused the prayer of the accused petitioner for grant of bail under sub-section 2(a)(i) of section 167 of CrPC.[369.] P Sathasivam, J (as he then was), speaking for the Bench, observed as follows:

> 15. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deed rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.[370.]

In a case for grant of statutory bail, the initial period for filing charge-sheet is 90 days, but the prosecution neither filed charge-sheet prior to the expiry of 90 days nor filed any application for extension of time. It was held that asking the accused to file a rejoinder affidavit to the application for extension of time filed subsequently is improper. The application for grant of statutory bail has to be decided on the same date it is filed.[371.] Dipak Misra J (speaking for the Bench), observed as follows:

> When the charge-sheet is not filed and the right has ripened earning the status of indefeasibility, it cannot be frustrated by the prosecution on some pretext or the other. The accused can avoid his liberty only by filing application stating that the statutory period for filing of the chalan has expired. The same has not yet been filed and an indefeasible right has accrued in his favour and further he is prepared to furnish the bail bond.[372.]

In a case, where the police filed charge-sheet within 90 days and the Magistrate took cognizance of the offence and the same was not challenged, the plea of accused for grant of bail under the default clause on the ground that the police report was not in accordance with the requirements of section 173(2) and (5), is not tenable.[373.]

For release of accused on bail under the default clause, in computation of the period of 90 days, the date on which the accused was remanded to judicial custody is to be excluded. Thus, where charge-sheet was filed on the 90th day, it was held by the Supreme Court that there was no infringement of section 167(2) of the Code.[374.]

[s 167.15] Rejection of statutory bail application.—

An order extending time for completing investigation was already passed under section 49(2)(b) of POTA (now repealed), the Court became empowered to remand the accused to judicial or police custody during the extension period. The order rejecting the application for release on bail was held to be proper.[375.]

[s 167.16] Cancellation of bail.—

Where bail was granted to an accused at the initial stage by the trial Judge, which was confirmed by the High Court, but was cancelled by the Successor Judge where proper complaint was filed in the Court holding that bail granted was only provisional in nature, the Bombay High Court held that bail once granted cannot be cancelled *suo motu* subsequently unless a case is made out for cancellation after hearing both the parties on proper application for cancellation.[376.]

[s 167.17] Reason for authorising detention [*Sub-section (3)*].—

The Magistrate ordering the detention of the accused must record his reasons in writing,[377.] and copy of such an order shall be forwarded to the Chief Judicial Magistrate.

[s 167.18] Time-limit for completing investigation [*Sub-sections (5) and (6)*].—

Where the investigation took more than three years but the charge-sheet was filed subsequently and the Court took cognizance of the matter, the Supreme Court held that section 167(5) CrPC as amended by West Bengal (Amendment) Act 24 of 1988 would not apply. It was observed that the provision is intended to ensure speedy investigation within the time-frame otherwise face discharge of the accused, but where investigation is completed, a different situation not contemplated under section 167(5) CrPC emerges and unnecessary liberal construction of section 167(5) CrPC is not called for.[378.]

Where there is more than one accused and they are not arrested the same day, the computation of the stipulated time of investigation should be made from the date of arrest or surrender of the first accused. Charge-sheets filed after the expiry of the period of six months without any extension of time were quashed by the High Court.[379.]

This section is not attracted in case of surrender of an accused before a Magistrate.[380.]

About the provision for discharging the accused and stopping further investigation, it was held by the Supreme Court that they are not applicable to cases where the investigation had already been completed, though after two years, and charge-sheet filed. The investigation could not be completed for two years. The accused pleaded for discharge. The Supreme Court left the question undecided. The expression in sub-section (5) "made his appearances" was taken by the Supreme Court to mean physical appearance and not through counsel.[381.]

[s 167.19] Time-limit specified in sub-section (5) not mandatory.—

The Supreme Court has held that the time-limit specified in section 167(5) is not to be taken with rigidity. The discharge of the accused on the expiry of the period mentioned there is not mandatory.[382.]

[s 167.20] Legal advice.—

The police have no right to refuse to allow the legal adviser of an accused person, remanded to their custody, to interview him, or his relatives to supply him with food and clothing, as long as they satisfy themselves that no objectionable articles are supplied.[383.] The right of the accused to consult and to be defended by a lawyer of his choice is guaranteed under Article 22 of the Constitution of India.

The Supreme Court held that the period of 90 or 60 days prescribed in sub-clauses (i) and (ii) of, proviso (a) of section 167(2) should be computed from the date of remand of the accused and not from the date of his arrest under section 57.[384.]

Remand of accused/terrorist to army custody on prayer by investigation officer—order is illegal and *ultra vires* the Constitution—Armed forces have no powers of investigation interrogation while coming to the aid of civil authority.[385.]

[s 167.21] Remand application.—

Where several persons were arrested in connection with an offence and a remand application was filed, it was held that the material collected against any person not yet arrested need not be disclosed in the application.[386.]

[s 167.22] Transfer of under-trial prisoner.—

In the matter of transfer of an under-trial prisoner from one jail to another, it is only the Court passing the order of remand which is competent to direct transfer. The Court, while allowing/refusing transfer exercises judicial power.[387.]

[s 167.23] Stay of investigation—Effect.—

Where an order of remand is passed and subsequently investigation is stayed, the stay does not make the order of remand unsustainable and the detention pursuant thereto, illegal. Therefore, a writ of *habeas corpus* cannot be issued for the release of the person detained.[388.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

307. Subs. by Act 45 of 1978, section 13(a), for paragraph (a) (w.e.f. 18-12-1978).

308. Subs. by Act 5 of 2009, section 14(a)(i), for clause (b) (w.e.f. 31-12-2009). Clause (b), before substitution, stood as under:

"(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;".

309. Ins. by Act 45 of 1978, section 13(b) (w.e.f. 18-12-1978).

310. Subs. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 14(a)(ii), for *Explanation II* (w.e.f. 31-12-2009). Earlier *Explanation* was numbered as *Explanation II* by Act 45 of 1978, sec. 13(b) (w.e.f. 18-12-1978). *Explanation II*, before substitution by Act 5 of 2009, stood as under:

"Explanation II.—If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.".

311. Ins. by Act 5 of 2009, section 14(b) (w.e.f. 31-12-2009).

312. Ins. by Act 45 of 1978, section 13(c) (w.e.f. 18-12-1978).

313. *NK Sinha v State of Tripura*, 2002 Cr LJ 404 (Gau).

314. *Natabar Parida v The State of Orissa*, AIR 1975 SC 1465 : (1975) 2 SCC 220 : 1975 Cr LJ 1212 .

315. *Manoj v State of MP*, AIR 1999 SC 1403 : 1999 Cr LJ 2095 : (1999) 3 SCC 715 .

316. *State of TN v Krishnaswami*, AIR 1979 SC 1255 : 1979 Cr LJ 1069 .

317. *Directorate of Enforcement v Deepak Mahajan*, AIR 1994 SC 1775 : 1994 Cr LJ 2269 : (1994) 3 SCC 440 , the decision **overruled** is reported in 1991 Cr LJ 1124 .

318. *Bal Krishna*, (1930) 12 Lah 435.

319. *CBI Delhi v Anupam J Kulkarni*, AIR 1992 SC 1768 : 1992 Cr LJ 2768 : (1992) 3 SCC 141 .

320. *SK Dey v The Officer-in-charge, Sakchi PS., Jamshedpur*, AIR 1974 SC 871 : 1974 Cr LJ 740 : (1974) 4 SCC 273 .

321. *Chaganti Satyanarayana v State of Andhra Pradesh*, (1986) 3 SCC 141 ; 1986 SCC Cri 321 .

322. *State of MP v Rustam*, (1995) Supp 3 SCC 221 : 1995 SCC (Cri) 830 .

323. *Hitendra Vishnu Thakur v State of Maharashtra*, AIR 1994 SC 2623 : 1995 Cr LJ 517 : (1994) 4 SCC 602 .

324. *Directorate of Enforcement v Deepak Mahajan*, AIR 1994 SC 1775 : 1994 Cr LJ 2269 : (1994) 3 SCC 440 .

325. *Bipin Shanti Lal Panchal (Dr) v State of Gujarat*, AIR 1996 SC 2897 : 1996 Cr LJ 1652 : (1996) 1 SCC 718 .

326. *Manoj v State of MP*, AIR 1999 SC 1403 : 1999 Cr LJ 2095 : (1999) 3 SCC 715 .

327. *Baldev Singh v State of Punjab*, (1975) 77 Punj LR 534 (FB); *Kapoor Singh and Nidhan Singh v The State of Haryana*, (1975) 77 Punj LR 253 : 1975 Cr LJ 1007 .

328. *Abdul Wahid v State of Maharashtra*, 1992 Cr LJ 1900 (Bom).

329. *Sunil Kumar v State of Jharkhand*, 2002 Cr LJ 2507 (Jhar).

330. *Pralhad Vithal Giri v State of Maharashtra*, 2002 Cr LJ 3162 (Bom).

331. *Manubhai Ratilal Patel v State of Gujarat*, AIR 2013 SC 313 : 2013 Cr LJ 160 : (2013) 1 SCC 314 .

332. *Suresh Kumar Bhikamchand Jain v State of Maharashtra*, (2013) 3 SCC 77 : 2013 Cr LJ 1625 : JT 2013(8) SC 70 : 2013 (2) Scale 425 .

333. *Abdul Basit @Raju v Mohd. Abdul Khader*, (2014) 10 SCC 754 : 2014 (11) Scale 96 .

334. *T Jagadeeswar v State of AP*, 2003 Cr LJ 701 (AP).

335. *G Shravan Kumar v State of AP*, 2002 Cr LJ 2997 (AP).

336. *Mustaq Ahmad Mohammed Isak v State of Maharashtra*, AIR 2009 SC 2772 : (2009) 7 SCC 480 : (2009) 3 SCC (Cri) 449 .

337. *Ibid.* para 16 at p 2780 (of AIR).

338. *Shri Joyant Borbora v State of Assam*, 1992 Cr LJ 2147 (Gau).

339. *Bhajan Lal v State of UP*, 1996 Cr LJ 460 (All).

340. *Harihar Chaitanya v State of UP*, 1990 Cr LJ 2082 (All).

341. *Sudha Shivarame Gowda v State of Karnataka*, 1993 Cr LJ 1533 (Kant).

342. *Uday Mohan Lal Acharya v State of Maharashtra*, AIR 2001 SC 1910 : 2001 Cr LJ 1832 : (1994) Supp 2 SCC 9. The Court overruled the decision in *State of MP v Rustam*, 1995 Supp. 3 SCC 221 : 1995 SCC Cri 830 .

343. *Syed Mohd Ahmad Kazmi v State*, *GNCTD*, AIR 2013 SC 152 : (2012) 1 SCC 1 .

344. *Vipul shital Prasad Agarwal v State of Gujarat*, AIR 2013 SC 73 : (2013) 1 SCC 197 . (Three-Judge Bench).

345. *Uday Mohan Lal Acharya v State of Maharashtra*, AIR 2001 SC 1910 , at p 1918 : 2001 Cr LJ 1832 : (2001) 5 SCC 453 . *Rajeev Chaudhary v State (NCT) of Delhi*, (2001) Cr LJ 2941 : AIR 2001 SC 2369 : (2001) 5 SCC 34 , the expression "imprisonment for a term of not less than ten years" as used in section 167(2) proviso (*a*)(i) covers offences punishable with imprisonment for a clear period of 10 years or more.

346. *Uday Mohanlal Acharya v State of Maharashtra*, AIR 2001 SC 1910 : 2001 Cr LJ 1832 : (2001) 5 SCC 453 .

347. *Krishnaji P Joglekar*, (1897) 23 Bom 32; *Queen-Empress v Engadu*, (1887) ILR 11 Mad 98; *GK Moopanar*, *MLA v State of TN*, 1990 Cr LJ 2685 (Mad). *Budh Singh v State of Punjab*, (2000) 9 SCC 266 : 2001 Cr LJ 2942 , after the expiry of 15 days of police remand, an order for police remand for a further period of 7 days was held to be violative of section 167. *Public Prosecutor High Court*, *AP v Tatikayale Veerana*, 2003 Cr LJ NOC 165 : (2003) 1 Andh. LT (Cri) 337 (AP), police custody after the expiry of 15 days with no further extension becomes illegal and not permissible.

348. *Hussainara Khatoon v Home Secretary*, *State of Bihar*, AIR 1979 SC 1377 : 1979 Cr LJ 1052 : (1980) 1 SCC 108 .

349. *Khatri v State of Bihar*, 1981 Cr LJ 470 : AIR 1981 SC 928 : (1981) 1 SCC 635 .

350. *Mantoo Mazumdar v State of Bihar*, 1980 Cr LJ 546 : AIR 1980 SC 847 : (1980) 2 SCC 406 .

351. *Khatri v State of Bihar*, 1981 Cr LJ 470 : AIR 1981 SC 928 : (1981) 1 SCC 635 .

352. *LR Chawla v Murari*, 1976 Cr LJ 212 (Del); *Jai Singh v State of Haryana*, 1980 Cr LJ 1229 (P&H); *Arjun Singh v State of Rajasthan*, 1987 Cr LJ 1236 (Raj); *State of J&K v Abdul Rashid*, 1988 Cr LJ 834 (J&K).

353. *Chadayam Makki Nandanan v State of Kerala*, 1980 Cr LJ 1195 (Ker).

354. *Babubhai Parshottamdas Patel v Gujarat*, 1982 Cr LJ 284 (Guj) (FB).

355. *Dorai v State of Karnataka*, 1994 Cr LJ 2987 (Knt).

356. *Madaba Ramaiah v State of AP*, 1992 Cr LJ 676 (AP); *Sairabibi v State of Gujarat*, 1987 Cr LJ 1732 (Guj); *Reaz Ahmed v State of J&K*, 1990 Cr LJ 536 (J&K).

357. *Jagdish v State of MP*, 1989 Cr LJ 531 (MP).

358. *Sardulbhai v State of Gujarat*, 1990 Cr LJ 1275 (Guj); *Rajnikant v Intelligence Officer*, *Narcotic Control Bureau*, 1990 Cr LJ 62 (SC) : AIR 1990 SC 71 : JT 1989 (3) SC 67 : 1989 (1) Scale 1586 : (1989) 3 SCC 532 ; *Sankar v State of TN*, 1991 Cr LJ 1745 (Mad); *Santan Sahu v State of Orissa*, 1992 Cr LJ 352 (Ori); *Hari Om v State of UP*, 1992 Cr LJ 182 (All).

359. *Aslam Baba Lal Desai v State of Maharashtra*, AIR 1993 SC 1 : 1992 Cr LJ 3712 : (1992) 4 SCC 272 .

360. *Re Md Rashidur Rahman*, 1995 Cr LJ 1170 (Cal).

361. *Shivanna v State by Arasikera Rural Police*, 1992 Cr LJ 2287 (Karn).

362. *State of Maharashtra v Bharati Chandmal Varma*, 2002 Cr LJ 575 (SC) : (2002) 2 SCC 121 .

363. *State v Dawood Ibrahim Kaskar*, (2000) 10 SCC 438 : AIR 1997 SC 2494 .

364. *State of UP v Laxmi Brahmananda*, AIR 1983 SC 439 : 1983 Cr LJ 839 : (1983) 2 SCC 372 . *Bhupinder Singh v Jarnail Singh*, AIR 2006 SC 2622 : (2006) 6 SCC 277 : 2006 Cr LJ 3621 , the period for filing of *challan* for the offence under section 304B IPC is 90 days.

365. *State of Maharashtra v Bharati Chandmal Varma*, (2002) 2 SCC 121 : AIR 2002 SC 285 : 2002 Cr LJ 575 : (2002) 1 CHN (Supp.) 95. The Court relied upon *Uday Mohanlal Acharya v State of Maharashtra*, (2001) 5 SCC 453 : AIR 2001 SC 1910 : 2001 Cr LJ 1832 ; *Sukhjinder Singh v State (NCT of Delhi)*, (2001) 8 SCC 630 : 2002 SCC (Cri) 11 , offence at Delhi, arrest at Karnal, 90 days expired since the day of arrest, handed over to Delhi Police, bail petition was rejected. After the filing of the charge-sheet by the Delhi Police, the Supreme Court held that the accused could apply for regular bail. *Maulavi Hussein Haji Abraham Umarji v State of Gujarat*, AIR 2004 SC 3946 : (2004) 6 SCC 672 : 2004 Cr LJ 3860 , the effect of section 167(2)(b) and proviso considered by the Supreme Court.

366. *Rehemankha Kalukha v State of Maharashtra*, 2002 Cr LJ 24 (Bom—FB), the right is not extinguished by a subsequent charge-sheet filed before the Magistrate's order on bail application.

367. *Rehemankha Kalukha v State of Maharashtra*, 2002 Cr LJ 24 (Bom—FB).

368. *State of WB v Dinesh Dalmia*, AIR 2007 SC 1801 : (2007) 5 SCC 773 .

369. *YS Jaganmohan Reddy v CBI*, 2013 (7) Scale 7 : (2013) 7 SCC 439 .

370. *Ibid*, para 15 at p 14.

371. *UOI through CBI v Nirala Yadav*, AIR 2014 SC 3036 : (2014) 9 SCC 457 : 2014 Cr LJ 3952 (SC).

372. *Ibid*, para 23 at p 3047 (of AIR).

373. *Narendra Kumar Amin v CBI*, AIR 2015 SC 1002 : 2015 (1) Scale 427 : (2015) 3 SCC 417 . *CBI v RS Rai*, AIR 2002 SC 1644 : (2002) 5 SCC 82 ; *Narayan Rao v State of AP*, AIR 1957 SC 737 : 1958 SCR 283 : 1957 Cr LJ 1320 .

374. *Ravi Prakash Singh v State of Bihar*, AIR 2015 SC 1294 : 2015 (2) Scale 596 .

375. *Ateef Nasir Mulla v State of Maharashtra*, AIR 2005 SC 3293 : (2005) 7 SCC 29 : 2005 Cr LJ 3748 .

376. *RJ Sharma v RP Patankar*, 1993 Cr LJ 1550 (Bom).

377. *Bal Krishna*, (1930) 12 Lah 435; *Krishnaji P Joglekar*, (1897) 23 Bom 32; *Daulat Ram*, (1933) 8 Luck 518 .

378. *Durgesh Chandra Saha v Bimal Chandra Saha*, AIR 1996 SC 740 : 1996 Cr LJ 1137 : (1996) 1 SCC 341 .

379. *Subratapatra v Director of Panchayat*, 1995 Cr LJ 115 (Cal).

380. *Sushil Kumar v State of West Bengal*, 1987 Cr LJ 1571 (Cal).

381. *State of WB v Pranab Ranjan Roy*, AIR 1998 SC 1887 : 1998 Cr LJ 2527 : (1998) 3 SCC 209 .

382. *Nirmal Kanti Roy v State of WB*, AIR 1998 SC 2322 : 1998 Cr LJ 3282 : (1998) 4 SCC 590 . *Dukhishyam Benupani v Arun Kumar Bajoria*, AIR 1998 SC 696 : (1998) 91 Comp Cases 413 : 1998 Cr LJ 841, the Court should not monitor the process of investigation unless there is transgression of any provision of law.

383. *Llewelyn Evans*, (1926) 28 Bom LR 1043 : 50 Bom 741.

384. *Chaganti Satyanarayana v State of AP*, (1986) 2 SCC 141 : AIR 1986 SC 2130 .

385. *Joyanta Borbora v State of Assam*, 1992 Cr LJ 2147 (Gau).

386. *State of Maharashtra v Ramesh Taurani*, AIR 1998 SC 586 : 1998 Cr LJ 855 : (1998) 1 SCC 41 .

387. *State of Maharashtra v Saeed Sohail Sheikh*, AIR 2013 SC 168 : (2012) 13 SCC 192 .

388. *Manubhai Ratilal Patel v State of Gujarat*, AIR 2013 SC 313 : 2013 Cr LJ 160 : (2013) 1 SCC 314 .

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The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 168] Report of investigation by subordinate police officer.—

When any subordinate police officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in-charge of the police station.

Reports made by a police officer in compliance with this section are not public documents within the meaning of section 74 of the Indian Evidence Act, and consequently, an accused person is not entitled, before trial, to have copies of such reports.[389.]

1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

389. *Queen-Empress v Arumygam*, (1897) ILR 20 Mad 189 (FB).

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[s 169] Release of accused when evidence deficient.—

If, upon an investigation under this Chapter, it appears to the officer in-charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is, in custody, release him on his executing a bond with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.

This section enables the officer-in-charge of a police station to release the accused, when there is no sufficient evidence, on his executing a bond to appear when required before a Magistrate.

The High Court cannot direct the investigating officer to take the opinion of the public prosecutor as to whether a charge-sheet is to be filed or not. The Court said: "A Public Prosecutor is appointed, as indicated in section 24 CrPC, for conducting any prosecution, appeal or other proceedings in the court. He has also the power to withdraw any case from the prosecution with the consent of the court. He is the officer of the court. Thus the Public Prosecutor is to deal with a different field in the administration of justice and he is not involved in investigation. It is not in the scheme of the Code for supporting or sponsoring any combined operation between the investigating officer and the Public Prosecutor for filing the report in the court."[390.] The Magistrate, however, can direct the police to make further investigation.

The Magistrate has no jurisdiction to pass an order of release or discharge before the police final report.[391.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .

2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

390. *R Sarala v TS Velu*, (2000) 4 SCC 459 : AIR 2000 SC 1731 : 2000 Cr LJ 2453 .

391. *Heera Lal Pandit v State of Bihar*, 2003 Cr LJ 2976 (Pat).

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 170] Cases to be sent to Magistrate when evidence is sufficient.—

(1) If, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in-charge of a police station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any), and so many of the persons who appear to such officer to be acquainted with the facts and circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the Chief Judicial Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference to given to such complainant or persons.

(4) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

This section is the counterpart of section 169. It requires the officer-incharge of a police station to send a case to a Magistrate when evidence is sufficient. This is the only section under which a police officer can take re-cognizances from the accused for his appearance before a Magistrate.

An illegally exported consignment of NDPS which was exported from India was seized abroad. A piece of information was received from the police of the foreign countries concerned that there was no material in their hands up to the time of the information to connect the appellant with the contraband consignment. It was held that such information could not bar the investigating agency in India from arriving at a different conclusion or the police force of those countries taking a different view subsequently.[392.]

[s 170.1] "Sufficient evidence".—

A mere admission of guilt or confession during the investigation of an offence does not necessarily amount to sufficient evidence.[393.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

392. *Umar Abdul Sakoor Sorathia v Intelligence Officer, Narcotic Control Bureau*, AIR 1999 SC 2562 : 1999 Cr LJ 3972 : (2000) 1 SCC 138 .

393. *Lakshmipat Choraria v State*, (1965) 67 Bom LR 618 .

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In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 171] Complainant and witnesses not to be required to accompany police officer and not to be subjected to restraint.—

No complainant or witness on his way to any Court shall be required to accompany a police officer, or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond:

***Provided* that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer-in-charge of the police station may forward him in custody to the Magistrate, who may detain him in custody until he executes** Si **such** 12 **bond, or until the hearing of the case is completed.**

1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

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[s 172] Diary of proceedings in investigation.—

(1) **Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.**

394. **[(1A) The statements of witnesses recorded during the course of investigation under Section 161 shall be inserted in the case diary.**

395. **(1B) The diary referred to in sub-section (1) shall be a volume and duly paginated.]**

(2) **Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.**

(3) **Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.**

[s 172.1] CrPC (Amendment) Act, 2008 [*Clause (15)*].—

This clause amends section 172, relating to diary of proceedings in investigation. Two new sub-sections (1A) and (1B) are inserted so as to provide that the statements of witnesses recorded during the course of investigation under section 161 shall be recorded in the case diary and that such diary shall be a volume and duly paginated (*Notes on Clauses*).

COMMENT

This section shows what a "special" diary of a police officer making an investigation should contain. Every police officer making an investigation shall enter his proceedings

in a diary which may be used at the trial or inquiry, not as evidence in the case but to aid the Court in such inquiry or trial.[396.] The provisions of this section do not apply to an inquiry or an investigation started under section 174 of the Code.[397.]

The object of recording "case diaries" under this section is to enable Courts to check the method of investigation by the police.[398.] The entries in a police diary should be made with promptness in sufficient details mentioning all significant facts on careful chronological order and with complete objectivity. The haphazard maintenance of a police case diary not only does no credit to those responsible for maintaining it but defeats the very purpose for which it is required to be maintained.[399.]

[s 172.2] Scope.—

The Supreme Court has held that the police diaries of a case under inquiry or trial can be made use of by a criminal court only for aiding it, in such inquiry or trial. The Court would be acting improperly if it uses them in its judgment or seeks confirmation of its opinion on the question of appreciation of evidence from statements contained in such diaries.[400.]

Entries in police diaries cannot be used as evidence against the accused. They cannot, therefore, be used to explain any contradiction in the evidence of a prosecution witness which the defence has brought forth for using any portion of his statement under section 161.[401.] Where the prosecution case was supported by two independent witnesses who were naturally there at the place of occurrence and their version was also corroborated by medical evidence, the Supreme Court said that the Trial Court was not obliged to scrutinize the case diary closely just only because it might have some tell-tale points in favour of the defence.[402.]

[s 172.3] Special diary [*Sub-section (1)*].—

The diary referred to in this section is the "special diary" known as the "station-house report." All police-officers-in-charge of a police station are required to keep a diary, and the Magistrate of the district is authorised to call for and inspect the same. The entire diary maintained by the police was made available to the accused by the Trial Court. The investigating officer was extensively cross-examined on many facts which were not very much relevant for purposes of the case. The Court deprecated the procedure adopted by the Trial Court.[403.]

[s 172.4] Production in Court.—

The production in Court of the daily diary of a police station cannot be ordered as a matter of course in every case.[404.]

[s 172.5] Site plan.—

A site plan is not necessary when the place of offence is clearly specified. In this case, the accused was found to be in possession of opium while he was sitting on a bench

by the side of a public road. The preparation of the site plan was not considered necessary.[405.]

[s 172.6] Slip attached to injury report.—

A slip was attached to injury report which formed part of the case diary. The Court relied on the note made in the slip without proof of such document and without drawing the attention of the investigating officer towards it. This was held to be improper.[406.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

394. Ins. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 15 (w.e.f. 31-12-2009).

395. Ins. by Act 5 of 2009, section 15 (w.e.f. 31-12-2009).

396. *Dal Singh v Emperor*, (1917) 19 Bom LR 510 : 44 Cal 876 : 44 IRA 137.

397. *Palaniswamy Vaiyapuri v State*, (1966) 68 Bom LR 941 : AIR 1968 Bom 127 : 1968 Cr LJ 453 .

398. *Peary Mohan Das v D Weston*, (1911) 16 Cal WN 145.

399. *Bhagwant Singh v Commissioner of Police*, AIR 1983 SC 826 : 1983 Cr LJ 1081 : (1983) 3 SCC 344 .

400. *Habeeb Mohammad v The State of Hyderabad*, (1954) SCR 475 : AIR 1954 SC 51 : 1954 Cr LJ 338 ; *State of Kerala v Ammini*, 1988 Cr LJ 107 (Ker) : AIR 1988 Ker 1 ; *Bahadur Singh v State of MP*, (2002) 1 SCC 606 : AIR 2002 SC 289 : (2002) ELT 281 : 2002 Cr LJ 579 : (2002) 1 CHN (Supp) 34, late entries were made by police officer in their registers/records by interpolation, the Court said that such entries were not permissible. An entry should be made at its appropriate place and under the correct date on which it was actually made and any delay in making the same should be explainable. *Md. Ankoos v Public Prosecution, High Court of AP*, AIR 2010 SC 566 : (2010) 1 SCC 94 : 2010 Cr LJ 861 , impermissible to use case diary to overcome contradictions pointed out by the defence. Acceptance of evidence of prosecution witnesses by the High Court by verifying their statements recorded under section 161(3) from case diary also regarded as illegal.

401. *Mahabir Singh v State of Haryana*, AIR 2001 SC 2503 : (2001) 7 SCC 148 .

402. *Bhai Lal v State of UP*, (1998) 9 SCC 66 : (1998) 7 JT 284 .

403. *Sidharth v State of Bihar*, AIR 2005 SC 4352 : (2005) 12 SCC 545 : 2005 Cr LJ 4499 .

404. *Kalpnath Rai v State*, AIR 1998 SC 201 , 217 : (1997) 8 SCC 733 .

405. *Sayar Puri v State of Rajasthan*, (1998) 7 SCC 441 : AIR 1998 SC 3224 : 1998 Cr LJ 4589 .

406. *Hari Yadav v State of Bihar*, AIR 2008 SC 867 : (2007) 15 SCC 266 : 2008 Cr LJ 821 .

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[s 173] Report of police officer on completion of investigation.—

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

[407.] **[(1A) The investigation in relation to [408.][an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code shall be completed within two months] from the date on which the information was recorded by the officer in charge of the police station.]**

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

- **(a) the names of the parties;**
- **(b) the nature of the information;**
- **(c) the names of the persons who appear to be acquainted with the circumstances of case;**
- **(d) whether any offence appears to have been committed and, if so, by whom;**
- **(e) whether the accused has been arrested;**
- **(f) whether he has been released on his bond and, if so, whether with or without sureties;**
- **(g) whether he has been forwarded in custody under Section 170.**
- [409.]**[(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376B, 376C, [410.][376D or section 376E of the Indian Penal Code (45 of 1860)].]**

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

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

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

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

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

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

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

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in subsection (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

[s 173.1] Criminal Law (Amendment) Act, 2013.—

This is a consequential change brought about by the present amendment which seeks to enlarge the scope of the sexual acts enumerated in sub-clause (h) of clause (i) of sub-section 2 of section 173.

[s 173.2] Criminal Law (Amendment) Act, 2018.—

Section 173 CrPC as amended *vide* the Criminal Law (Amendment) Act, 2018 provides that the investigation in relation to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code shall be completed within

two months from the date on which the information was recorded by the officer in charge of the police station.

COMMENT

There are three different kinds of reports to be made by police officers at three different stages of investigation. (1) Section 157 requires a preliminary report from the officer-in-charge of a police station to the Magistrate. (2) Section 168 requires reports from a subordinate police officer to the officer-in-charge of the station. (3) Section 173 requires a final report of the police officer as soon as investigation is completed to the Magistrate.

[s 173.3] Officer-in-charge.—

In the absence of the officer-in-charge of the police station from the station house at the time of sending the final report, the officer next in the rank to him, (in this case Addl SI), becomes the officer-in-charge and in that capacity can file a final report to Court.[411.]

[s 173.4] Rape of a child [*Sub-section (1A)*].—

New sub-section (1A) was added with a view to provide that the investigation of the offence of rape of a child shall be completed within three months from the date on which the information was recorded by the officer-in-charge of the police station. The 2018 amendment Act has further reduced this period to two months. Now the amended sub-section (IA) provides that the investigation in relation to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.

[s 173.5] Police report [*Sub-section (2)*].—

The report under this section is called "Completion Report." It is also known as "charge-sheet." Such a report is absolutely necessary.[412.] The report should contain the particulars referred to in sub-clauses (a) to (h) of clause (i). A Magistrate who has disposed of a police report is competent to revise his order and call for a "charge-sheet."[413.]

The police "charge-sheet" corresponds to the complaint of a private individual on which criminal proceedings are initiated. When the charge-sheet is sent, the preliminary stage of investigation and preparation is over. Upon its receipt, the Magistrate can take cognizance of the offence. When the Sub-Inspector of police after making an investigation and examining as many as 10 witnesses, referred the case as "mistake of fact" and the Magistrate, accepting the report, ordered recording it as such, it was held that it was a judicial order and that the case could not have been re-opened by a Police Inspector by filing a charge-sheet after re-investigation.[414.]

Even after the filing of the charge-sheet under this section, there can be further investigation into the case by the police and if there is further investigation into the case the provisions of sub-sections (2) to (6) will apply to the further evidence, as far as possible. Where the investigating agency (CBI) could not collect sufficient evidence

to establish criminal conspiracy and abuse of official position by the accused, no sanction of the department concerned under Prevention of Corruption Act, 1988, is required for closure of the case.[415.]

The provisions of chapter XII of the Code apply to investigations conducted by the CBI. The word "police" referred to in the chapter for the purposes of investigation, would apply to an officer of the Delhi special Police Establishment Act, 1946. Therefore, on completion of the investigation, the report has to be filed by CBI in the manner provided in section 173(2) of the Code.[416.]

The Supreme Court had held, in a case under the old Code, that where the report made by a police officer to the Magistrate complies with the requirements of this section, the Magistrate can take cognizance of the case under section 190(1)(b) of the Code. The fact that a second *challan* was put in later would not necessarily vitiate the first and invalidate the proceedings taken before the second *challan* was submitted.[417.] There is no compulsion on the investigating officer to supply the *challan* papers.[418.] Even if a *challan* is submitted without the report of the Central Forensic Science Laboratory, it is a complete *challan* in terms of sub-section (2).[419.] The submission of a report under sub-section (2) of section 173 does not preclude further investigation in a crime by the investigating agency, supplementary reports can be submitted by the investigating agency to the Magistrate notwithstanding that the Magistrate has taken cognizance of the offence upon a police report submitted under sub-section (2) of section 173.[420.] The superior officer of police also may, under section (3), direct further investigation pending orders of the Magistrate. Notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under section 173, the right of the police to investigate further is not exhausted.[421.]

Appointment of a Special Officer with a direction to inquire into the commission of an offence can only be on the basis that there has not been a proper investigation and no other basis.[422.] The power of senior police officers to act as a police officer in charge of the police station under section 173(2) came to be adverted to in *State of Bihar v Lalu Singh*.[423.] In this case, the case first handled by the SHO was ordered to be transferred to CID before he could submit his report under section 173(2). This was held right by the Supreme Court since in view of section 36 of the Code, police officers, superior in rank to an officer in charge of the police station, throughout the local area have been conferred with the authority to exercise the same power as that of officer in charge of police station.

The practice of not accepting the charge-sheet either on the ground that the same was not submitted on the stipulated days as fixed for particular police station or it was not accompanied by FSL Report or *muddamal* is patently illegal.[424.]

The original photographs relied upon were filed alongwith the report under section 173(2). They could be taken back with the permission of the Court to be produced as and when required. Alternatively, xerox copies could be filed alongwith the certificate that they could be compared with the originals as and when so directed by the Court.[425.]

In a case relating to the incident at *Godhra*, the investigation was monitored by the Court. The Special Investigation Team (SIT) appointed by the Court completed investigation in terms of the order passed by the Court. It was held that the SIT should forward the final report under section 173(2) to the Court empowered to take cognizance of the alleged offence. The Court should not continue to monitor the case any further.[426.]

[s 173.6] Police report, deemed complaint.—

The scheme of the Code on the subject which is reflected by section 2(d) defining "complaint" encompasses a police report also as a "deemed complaint" if the matter has been investigated by a police officer regarding a case involving commission of a non-cognizable offence. It obviously means that the proceedings before the Magistrate could not be viewed as without jurisdiction merely because proceedings were instituted by the police officer after investigation when he had no power to investigate. The police officer here was cognizant of his limitation and had, according to the appellant State, undertaken an inquiry and not an investigation and had submitted before the Court not a police report, but a complaint. In either view of the matter, the interference of the High Court was not called for. Proceedings had to be allowed to be continued as if they were instituted on a complaint.[427.]

A police officer filing a charge-sheet does not make any statement on oath nor is he bound by any express provision of law to state the truth though being a public servant he is obliged to act in good faith. Whether the statement made by the police in a charge-sheet amounts to a declaration upon any subject within the meaning of the clause "*being bound by law to make a declaration upon any subject*" occurring under section 191 of the IPC is a question which requires further examination.[428.]

[s 173.7] Final report of absconding accused.—

Final report by police against absconding accused can be filed if the investigating officer finds sufficient evidence against the accused. He needs not to wait till his arrest.[429.]

[s 173.8] Information to the informer [*Sub-section (2)(ii)*].—

Where the Magistrate accepted the final report submitted by the investigating agency under this section and passed an order dropping the proceedings without issuing any notice to the informant, it was held by the Supreme Court that the order was illegal.[430.]

[s 173.9] Two information reports in one case.—

The FIRs arose out of the same incident. The same investigation agency (CBI) was carrying out investigation under both FIRs. That was held to be valid. The investigating agency was not precluded from further investigation inspite of forwarding reports under section 173(2) on a previous occasion also.[431.]

[s 173.10] Documents and statements to be forwarded with report [*Sub-section (5)*].—

The police officer should, when the report is in respect of a case under section 170, forward to the Magistrate all documents or other relevant extracts and also the statements recorded under section 161 of persons on whom the prosecution rely. Where a police report submitted under section 173(2) CrPC was not accompanied by the necessary documents as required under section 173(5) CrPC, it was held that the Magistrate was not justified in taking cognizance on the basis of such incomplete

report and the order of cognizance was quashed.[432.] The word "shall" as used in sub-section (5) should be interpreted as directory and not mandatory.[433.] Where all the necessary documents were not filed with the final report and the plea of prejudice was not raised by the accused, it was held that the final report was not vitiated.[434.]

Documents submitted in the Court along with the report under section 173, though unexhibited or unmarked, ought to be disclosed to the accused if demanded. The doctrine of free and fair trial so demands.[435.]

In *Narendra Kumar Amin v CBI,*[436.] it was held that it is incorrect to hold that the report shall be deemed to be complete if it is accompanied by all documents and statements of witnesses as required under section 173(5). The word "shall" used in section 173(5) is directory in nature and cannot be interpreted as mandatory. A default bail therefore cannot be granted on the contention that the police report filed is not as per legal requirement under sections 173(2) and (5).

[s 173.11] Copies of documents to accused [*Sub-section (7)*].—

The police officer may, if he finds it convenient, himself furnish to the accused copies of all or any of such documents. The police officer has power to indicate to the Magistrate parts of statement which should be omitted from copies to be granted to the accused on grounds of irrelevancy, public interest or not being essential in the interests of justice.

[s 173.12] Interpolation in report.—

Where the Court found that an interpolation was made in the report by the investigating officer which seemed to have been made to cover up omissions, the Supreme Court was of the view that the benefit of doubt had to be given to the accused.[437.]

[s 173.13] Documents to be given to sanctioning authority.—

Investigating agency (in this case CBI) is not obliged to place before the sanctioning authority for the formation of its opinion the material collected during investigating where no *prima facie* was made out against the accused.[438.]

[s 173.14] Further investigation [*Sub-section (8)*].—

The law does not mandate taking of prior permission for further investigation or carrying out further investigation even after filing of charge-sheet, it being a statutory right of the police.[439.] Further investigation is permissible even after filing of the final report. Further investigation can be taken up even after cognizance.[440.]

After submission of police report under sub-section (2) on completion of investigation, the police can only conduct investigation under sub-section (8) but it cannot undertake fresh investigation or re-investigation.[441.]

The investigating agency or the Court subordinate to the High Court have to exercise powers within the four corners of CrPC. Thus, investigating agency may undertake further investigation and the Court may direct further investigation where charge-sheet has been filed. But such further investigation will not mean fresh investigation or reinvestigation. These limitations under section 173(8) do not apply to High Court under section 482 of CrPC for securing the ends of justice. Thus, where senior functionaries of the state police and political leaders were involved, it was held by the Supreme Court that the High Court was justified in directing investigation by CBI.[442.]

The Supreme Court has held that a further investigation by the police after a report under section 173(2) has been forwarded to the Magistrate is permissible.[443.] It has been further held that additional evidence gathered during investigation can be produced by the police officer even after submission of the charge-sheet. The word "shall" used in sub-section (5) for requiring a police officer to forward to the Magistrate "all documents" is directory and not mandatory.[444.]

When a report is filed under sub-section (2) of section 173, the Magistrate (in this case, it was the Special Judge) has to deal it by bestowing upon it judicial consideration. If the report shows that the allegations in the original complaint were found true in investigation, or that some other accused and/or some other offences were also detected, the Court has to decide whether cognizance of the offences should be taken or not on the strength of that report. But when the report was against the allegations in the complaint and showed that no offence has been committed by any person, it was open to the Court to accept the report after hearing the complainant at whose behest the investigation had been commenced. Where the report verifies the allegations, it is open to the Court to independently apply its mind to the facts emerging therefrom and it can even take cognizance of the offences which appear to it to have been committed, in exercise of its power under section 190(1)(b) of the Code. The third option is the one adumbrated in section 173(8) of the Code.[445.]

It is not within the province of the Magistrate while exercising the power under section 173(8) to specify any particular officer to conduct such investigation, not even to suggest the rank of the officer who should conduct such investigation. Therefore, the direction made by the Special Judge that further investigation be conducted by an officer of DIG rank of CBI was deleted.[446.]

In a case investigated by the CBI, where the CBI submits report to the Court, it is the Court in which charge-sheet is filed which is to deal with all matters relating to the trial of accused including matters falling within the scope of section 173(8) of the Code.[447.]

The power to direct further investigation is exercisable even after filing of chargesheet.[448.]

The power to direct further investigation is not inhibited by the requirement to hear the accused before making such direction.[449.]

[s 173.15] Addition of Sections of the Penal Code in the charge-sheet.—

In a case based on the FIR lodged before police where charge-sheet was submitted, the Magistrate, on the plea of prosecution/informant, cannot add or subtract sections at the time of taking cognizance. The correct stage for addition or subtraction of sections of IPC in charge-sheet is at the time of framing of charge.[450.]

[s 173.16] Motive behind re-investigation.—

From the mere fact that in the application, for permission to reinvestigate, it was not stated that the previous investigation was not honest, an inference of oblique motive could not be drawn. Without further investigation, no charge of dishonesty could have been levelled against the police officers associated with the earlier investigation at that stage. The Court observed that the subsequent investigation did not seem to have been done with any oblique motive.[451.]

[s 173.17] Order of further investigation.—

In *Dharam Pal v State of Haryana,*[452.] it was held that the power of police officer under section 173(8) is unrestricted and that although the Magistrate has no power to interfere, it would be appropriate on part of Investigating Officer to inform Court.

Some of the witnesses were summoned and examined in the course of further investigation. The order of the Magistrate summoning witnesses was based on supplementary charge-sheet. That was held to be not illegal.[453.]

Further investigation in a case cannot be ordered once cognizance of the offence has been taken by the Court.[454.]

As regards the power to order investigation beyond the first investigation, the Supreme Court has ruled that where the Magistrate can only direct "further investigation", the higher Courts can direct further investigation, re-investigation or even investigation *denovo* depending on the facts of the case. In *Vinay Tyagi v Irshad Ali,*[455.] it was held that—

> 40. Having analysed the provisions of the Code and the various judgments as aforeindicated, we would state the following conclusions in regard to the powers of a Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code:
>
> 40.1. The Magistrate has no power to direct "reinvestigation" or "fresh investigation" (de novo) in the case initiated on the basis of a police report.
>
> 40.2. A Magistrate has the power to direct "further investigation" after filing of a police report in terms of Section 173(6) of the Code.
>
> 40.3. The view expressed in Sub-para 40.2 above is in conformity with the principle of law stated in Bhagwant Singh case by a three-Judge Bench and thus in conformity with the doctrine of precedent.
>
> 40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).
>
> 40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the court to the extent that even where the facts of the case and the ends of justice demand, the court can still not direct the investigating agency to conduct further investigation which it could do on its own.

It has been held by the Supreme Court in *Chandra Babu v State*[456.] that the learned Chief Judicial Magistrate has correctly directed for further investigation but he could not have directed another investigating agency to investigate as that would not be within the sphere of further investigation and, in any case, he does not have the jurisdiction to direct re-investigation by another agency.

[s 173.18] Interference in order of further investigation.—

The Supreme Court has held that it would not be proper for the High Court to interfere in the exercise of its revisional jurisdiction in the Magistrate's order of further investigation.[457.] The cognizance of an offence was taken by the Magistrate on the basis of police report. The accused appeared in the pursuance of the process issued against him. It was held that the Magistrate could not in such circumstances order further investigation of his own.[458.]

An order for further investigation was passed without indicating in what respect the investigation had not been carried out. What were hidden truths, which were required to be unearthed, was not indicated. The fact that the investigation had been carried by two different agencies and responsible police officers was not considered. There was no evidence to show that the investigating officer was in any way biased against the complainant. The order of further investigation was set aside.[459.]

[s 173.19] Hearing accused not necessary for making order of further investigation.—

The power of the Court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in section 173(8) to suggest that the Court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As the law does not require it, the Magistrate cannot be burdened with such obligation.[460.]

[s 173.20] Right to statutory bail.—

The right to be released on bail is available only till investigation remains pending. The right is lost once the charge-sheet is filed. It does not get revised only because further investigation is pending.[461.]

[s 173.21] Proclaimed offenders.—

The investigating officer cannot acquit an absconding accused on the ground that the investigation has been kept pending.[462.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

407. Ins. by the CrPC (Amendment) Act, 2008 (5 of 2009), sec. 16(a) (w.e.f. 31-12-2009)..

408. Subs. by Act 22 of 2018, section 14(i), for "rape of a child may be completed within three months" (w.r.e.f. 21-4-2018).

409. Ins. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 16(b) (w.e.f. 31-12-2009)..

410. Subs. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 17 for the words "or 376D of the Indian Penal Code" (w.e.f. 3-2-2013).

411. *Surjith v State of Kerala*, 2003 Cr LJ 983 (Ker).

412. *Emperor v Appa Ragho*, (1914) 17 Bom LR 69 .

413. *Uma Singh v Emperor*, (1932) 12 Pat 234 : AIR 1933 Pat 242 .

414. *K Ramasubbu v State of TN*, 1988 Cr LJ 214 (Mad).

415. *State (CBI) v Lachhman Das Gupta*, 1992 Cr LJ 3555 (Del).

416. *Ashok Kumar Todi v Kishwar Jahan*, AIR 2011 SC 1254 : (2011) 3 SCC 758 .

417. *Tara Singh v The State*, (1951) 2 SCR 729 : AIR 1951 SC 441 : 1952 Cr LJ 1491 .

418. *Vardaram v State of Rajasthan*, 1989 Cr LJ 724 (Raj).

419. *Taj Singh v State (Delhi Admn.)*, 1988 Cr LJ 1634 .

420. *Zulfiqar Beg alias Baby v State of UP*, 1992 Cr LJ 2067 (All); *Hassan Khan v State of Rajasthan*, 1996 Cr LJ 4303 (Raj), final report, Magistrate neither accepting nor rejecting, returning documents to investigating officer on his request for further investigation, not an abuse of process.

421. *Ram Lal Narang v State (Delhi Admn)*, AIR 1979 SC 1791 : 1979 Cr LJ 1346 : (1979) 2 SCC 322 .

422. *State of WB v Sampat Lal*, AIR 1985 SC 195 : (1985) 2 SCR 256 : 1985 Cr LJ 516 .

423. *State of Bihar v Lalu Singh*, (2014) 1 SCC 663 : JT 2013 (15) SC 180 : 2013 (13) Scale 336 .

424. *Sardar Singh Nag Singh Rajput v State of Gujarat*, 1993 Cr LJ 3473 (Guj).

425. *Bhupinder Singh v Jarnail Singh*, AIR 2006 SC 2622 : (2006) 6 SCC 277 : 2006 Cr LJ 3621 .

426. *Jakia Nasim Ansari v State of Gujarat*, AIR 2012 SC 243 : (2012) 1 SCC (Cri) 559 .

427. *State of Bihar v Ganesh Choudhary*, (2001) 2 SCC 245 ; *State of Bihar v Chandra Bhushan Singh*, AIR 2001 SC 429 : 2001 Cr LJ 702 : (2001) 2 SCC 241 , inquiry report submitted by railway about unlawful possession of railway property was held to be a mere complaint and not a charge-sheet.

428. *Perumal v Janaki*, 2014 Cr LJ 1454 (SC) (2014) 5 SCC 377 .

429. *Dinesh Dalmia v CBI*, AIR 2008 SC 78 : (2007) 8 SCC 770 : 2008 Cr LJ 337 .

430. *Union Public Service Commission v S Papaiah*, AIR 1997 SC 3876 : (1997) 7 SCC 614 : 1997 Cr LJ 4636 , notice given by the investigating agency is not a substitute for the notice required to be given by the Magistrate, remitted to Magistrate for disposal according to law.

431. *Bank of Rajasthan v Keshav Bangur*, AIR 2008 SC 202 : (2007) 13 SCC 145 : 2008 Cr LJ 397 .

432. *Raghubirsaran Jain v State of West Bengal*, 1995 Cr LJ 4117 (Cal); the Court **relied on** *Satya Narain Musadi*, AIR 1980 SC 506 : 1980 Cr LJ 227 : (1980) 3 SCC 152 .

433. *CBI v RS Pal*, 2002 Cr LJ 2029 (SC) : AIR 2002 SC 1644 : (2002) 5 SCC 82 .

434. *Dinesh Dalmia v CBI*, AIR 2008 SC 78 : (2007) 8 SCC 770 : 2008 Cr LJ 337 .

435. *VK Sasikala v State*, AIR 2013 SC 613 : (2012) 9 SCC 771 .

436. *Narendra Kumar Amin v CBI*, (2015) 3 SCC 417 : AIR 2015 SC 1002 : 2015 Cr LJ 1334 : 2015 (1) Scale 427 .

437. *K Ashokan v State of Kerala*, (1998) 3 SCC 570 : AIR 1998 SC 1974 : 1998 Cr LJ 2834 .

438. *George v State of Kerala*, AIR 1998 SC 1376 : (1998) 4 SCC 605 : 1998 Cr LJ 2034 , the Court may direct further investigation, if necessary.

439. *State of AP v AS Peter*, AIR 2008 SC 1052 : (2008) 2 SCC 383 .

440. *Dinesh Dapnia v CBI*, AIR 2008 SC 78 : (2007) 8 SCC 770 : 2008 Cr LJ 337 .

441. *KM Natarajan v Sasidharan*, 2002 Cr LJ 1672 (Ker); *Arun Kumar v State of MP*, 1999 Cr LJ 717 (SC) : (2013) 14 SCC 127 , the Trial Court directed to order prosecution to file the alleged dying declaration.

442. *State of Punjab v CBI*, AIR 2011 SC 2962 : (2011) 9 SCC 182 : (2011) 3 SCC (Cri) 666 .

443. *Kari Choudhary v Sita Devi*, (2002) 1 SCC 714 : AIR 2002 SC 441 : 2002 Cr LJ 923 : (2002) 1 CHN (Supp) 108.

444. *CBI v RS Pai*, AIR 2002 SC 1044 : 2002 Cr LJ 2029 : (2002) 2 Ker LT 149 ; *Hasanbhai Valibhai Quareshi v State of Gujarat*, AIR 2004 SC 2078 : (2004) 5 SCC 347 , further investigation not ruled out merely on the ground that it might delay trial, even after taking cognizance, fresh facts may come to light, police can seek permission.

445. *Hemant Dhasmana v CBI*, (2001) 7 SCC 536 : 2001 SCC (Cri) 1280 : AIR 2001 SC 2721 ; *CBI v Rajesh Gandhi*, AIR 1997 SC 93 : (1996) 11 SCC 253 : 1997 Cr LJ 63 , order for further investigation by CBI.

446. *Hemant Dhasmana v CBI*, AIR 2001 SC 2721 : (2001) 7 SCC 536 .

447. *Narmada Bai v State of Gujarat*, AIR 2011 SC 1804 : (2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526 .

448. *Shantibhai J Vaghela v State of Gujarat*, AIR 2013 SC 571 : (2012) 13 SCC 231 .

449. *Samaj Parivartan Samudaya v State of Karnataka*, AIR 2012 SC 2326 : (2012) 7 SCC 407 ; relied on *Shri Bhagwan SSVVV Maharaj v State of Andhra Pradesh,* AIR 1999 SC 2332 : JT 1999 (4) SC 537 .

450. *State of Gujarat v Girish Radhakrishnan Varde*, AIR 2014 SC 620 : (2014) 3 SCC 659 .

451. *SN Dube v NB Bhoir*, (2000) 2 SCC 254 : AIR 2000 SC 776 : 2000 Cr LJ 830 .

452. *Dharam Pal v State of Haryana*, (2016) 4 SCC 160 : AIR 2016 SC 618 : 2016 (1) Scale 635 .

453. *Rama Chaudhary v State of Bihar*, AIR 2009 SC 2308 : (2009) 6 SCC 346 .

454. *Nupur Talwar v CBI*, AIR 2012 SC 1921 : (2012) 11 SCC 465 .

455. *Vinay Tyagi v Irshad Ali*, (2013) 5 SCC 762 : 2013 Cr LJ 754 : JT 2013 (1) SC 97 : 2012 (12) Scale 343 .

456. *Chandra Babu v State*, (2015) 8 SCC 774 : AIR 2015 SC 3566 : 2015 Cr LJ 4538 : 2015 (7) Scale 529 .

457. *Hemant Dhasmania v CBI*, (2001) 7 SCC 536 : AIR 2001 SC 2721 ; *K Chandrasekhar v State of Kerala*, 1998 Cr LJ 2897 : AIR 1998 SC 2001 : (1998) 5 SCC 223 , entrusted to CBI with the consent of the State Government concerned, CBI conducted investigation and submitted its report, subsequent withdrawal by the State Government of the permission of investigation for further investigation was held to be not permissible.

458. *Randhir Singh Rana v State (Delhi Admn.)*, AIR 1977 SC 639 : 1997 Cr LJ 779 : (1977) 1 SCC 741 .

459. *Kishan Lal v Dharmendra Bafna*, AIR 2009 SC 2932 : (2009) 7 SCC 685 : 2009 Cr LJ 3721 .

460. *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v State of AP*, AIR 1999 SC 2332 , at p 2334 : 1999 Cr LJ 3661 : (1999) 5 SCC 740 ; *Ranjeet Singh v State of UP*, 2000 Cr LJ 2738 : 2000 (2) Andh LD Cri 291, also to the same effect.

461. *Dinesh Dalmia v CBI*, AIR 2008 SC 78 : (2007) 8 SCC 770 : 2008 Cr LJ 337 .

462. *Mahesh v State of Rajasthan*, 1999 Cr LJ 4625 (Raj).

The Code of Criminal Procedure, 1973

CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 174] Police to enquire and report on suicide, *etc*.—

(1) When the officer -in-charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more, respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) [463.] **[When—**

(i) the case involves suicide by a woman within seven years of her marriage; or

(ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or

(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or

(iv) there is any doubt regarding the cause of death; or

(v) the police officer for any other reason considers it expedient so to do,

he shall,] subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil

Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate.

[s 174.1] Inquest and report on suicide, *etc*.—

The provisions of this section and section 175 afford a complete and autonomous Code in itself for the purposes of inquiries in cases of accidental or suspicious deaths under this section. Sections 174, 175 and 176 deal with inquiries into suicide or inquiries into sudden, violent or unnatural deaths. Section 174 provides for such inquiries by the police: section 176, by Magistrates. The police officer making an inquiry under this section cannot order the exhumation of a human body but a Magistrate can do so under section 176.

The proceedings under section 174 relating to inquest report have a very limited scope. The object of the proceedings is to ascertain whether a person had died under the circumstances which were doubtful or unnatural and if so, what is the cause of death. The questions regarding details such as how the deceased was assaulted or who assaulted him, *etc*., are beyond the scope of the proceedings under this section.[464.]

Sub-section (3) of section 174 was added by the Criminal Law (Second Amendment) Act, 1983. This amendment was enacted to deal with the increasing incidents of dowry deaths or cases of cruelty to married women by their in-laws. Provision was made for inquest by Executive Magistrates for post-mortem in all cases where a woman has, within seven years of her marriage committed suicide or died in circumstances raising a reasonable suspicion that some other person has committed an offence under section 498A of the IPC (of Cruelty by husband or relatives of husband). Post-mortem is also provided for in all cases where a married woman has died within seven years of her marriage and a relative of such women has made a request in this behalf.

In *Manoj Kumar Sharma v State,*[465.] the Supreme Court has held that investigation on an inquiry under section 174 is entirely distinct from as under section 154 of the Code. Sections 174 and 175 afford a complete code in itself for the purposes of inquiries in cases of accidental or suspicious deaths and are entirely different distinct from investigation under section 157.

In *George v State of Kerala*[466.], it has been held that the investigating officer is not obliged to investigate, at the stage of inquest, or to ascertain as to who were the assailants. A similar view has been taken in *Suresh Rai v State of Bihar.*[467.]

[s 174.2] Inquest report or post mortem report not substantive evidence.—

The statement under section 174 cannot be used as a substantive piece of evidence as such a statement would be within the inhibition of section 162 which provides *inter alia* that no statement of any person, if recorded, by a police officer in the course of investigation shall be signed by the person making it. Behind this provision is a

wholesome rule of public policy that witnesses at the trial should be free to tell the truth unhampered by anything they might have been made to say to the police. Therefore, the statements under section 174 can at the most be used only as a previous statement to corroborate and contradict the person making it at the trial.[468.] There is the following further ruling of the Supreme Court on this point:

> The post-mortem report is a document which by itself is not a substantive evidence. It is the doctor's statement in the court, which has the credibility of a substantive evidence and not the report, which in normal circumstances ought to be used only for refreshing the memory of the doctor witness or to contradict whatever he might say in the witness box. In a similar vein, the inquest report also cannot be termed to be a basic or substantive evidence being prepared by the police personnel who is a non-medical man and at the earliest stage of the proceeding. A mere omission of a particular injury or indication in the report of an additional inquiry cannot, invalidate the prosecution case. Discrepancy occurring between the inquest report and the post-mortem report can neither be termed to be fatal nor even a suspicious circumstance, which would warrant a benefit to the accused and the resultant dismissal of the prosecution case.[469.]

[s 174.3] Inquest in presidency-towns.—

In the presidency-towns of Bombay and Calcutta, the Coroner holds inquests, and not the police, under the Coroner's Act (IV of 1871). In Madras, the office of Coroner has been abolished by Act V of 1889.

[s 174.4] Metropolitan Magistrate can hold inquiry after Coroner's inquest.—

A Metropolitan Magistrate is not ousted of his jurisdiction because the Coroner has held an inquiry into the cause of death of a person and drawn up an inquisition. He is competent to hold a preliminary inquiry even though the accused has been committed to the High Court by the Coroner.[470.] No analogy exists between a Coroner's inquest and an inquiry into the cause of death under the Criminal Procedure Code.[471.]

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

463. Subs. by Act 46 of 1983, section 3, for certain words (w.e.f. 25-12-1983).

464. *Basit Ali v MP*, 1976 Cr LJ 776 (MP); *Yogendra Singh v State of Rajasthan*, 1980 Cr LJ NOC 113 (Raj); *Podda Narayana v State of Andhra Pradesh*, AIR 1975 SC 1252 : 1975 Cr LJ 1062 : (1975) 4 SCC 153 ; *Shukla Khader v Nausher Gama*, AIR 1975 SC 1324 : (1975) 4 SCC 122 ; *Siddalingappa v State of Karnataka*, 1993 Cr LJ 397 (Kant). *Radha Mohan Singh v State of UP*, AIR 2006 SC 951 : (2006) 2 SCC 450 : 2006 Cr LJ 1121 . Limited purpose of ascertaining the cause of death, mention of names of accused, eye-witnesses or weapons, carried in the inquest report was not necessary. See also *Rupinder Singh Sandhu v State of Punjab*, AIR 2018 SC 2395 : [2018] 3 MLJ (Crl) 727 : LNIND 2018 SC 276 .

465. *Manoj Kumar Sharma v State*, (2016) 9 SCC 1 : AIR 2016 SC 3930 : 2017 Cr LJ 418 : 2016 (8) Scale 149 .

466. *George v State of Kerala,* (1998) 4 SCC 605 .

467. *Suresh Rai v State of Bihar,* (2000) 4 SCC 84 .

468. *Ch Razik Ram v Ch JS Chauhan*, AIR 1975 SC 667 : (1975) 4 SCC 769 ; *State of UP v Shobhanath*, AIR 2009 SC 2395 : (2009) 6 SCC 600 : (2009) 3 Crimes 208 , the inquest report is prepared by police who are not experts like doctors, not a piece of admissible evidence.

469. *Munshi Prasad v State of Bihar*, AIR 2001 SC 3031 , at p 3034 : (2002) 1 SCC 351 . The Court approved the decision in *Re Ramaswami*, AIR 1938 Mad 336 : 1938 Mad WN 36.

470. *Queen-Empress v Mahomed Rajudin*, ILR (1890) 16 Bom 159 .

471. *Re Troylokhanath Biswas*, (1878) ILR 3 Cal 742.

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CHAPTER XII INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

The statutory right of the police to carry on investigation under this Chapter before a prosecution is launched, cannot be interfered with by the Courts either under section 401 or under section 482 of the Code.[1.]

In *King-Emperor v Nazir Ahmad*,[2.] it was held by the Privy Council that the functions of the Judiciary and of the police are complementary, not overlapping; the Court's function begins when a charge is preferred before it, and not until then.

[s 175] Power to summon persons.—

(1) A police officer proceeding under section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case and every person so summoned shall be bound to attend and to answer truly all questions other than questions the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the police officer to attend a Magistrate's Court.

[s 175.1] "Person...acquainted with the facts of the case".—

It is neither necessary that all eye-witnesses should be examined at an inquest nor it is incumbent on the police officer to record verbatim and separate statements of the persons examined by him under this section.[472.]

[s 175.2] "Bound...to answer truly all questions."—

The witnesses must answer all questions. Refusal to answer questions is punishable under section 179 of the Penal Code. Again, the person examined at an inquest is bound to answer truly all questions other than questions the answers to which would be incriminating. Section 161 also imposes such an obligation to speak the truth. A witness speaking falsely under this section commits the offence of intentionally giving false evidence punishable under section 193 of the IPC.

1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

472. *Re Pentayya*, AIR 1960 AP 545 : 1960 Cr LJ 1402 .

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[s 176] Inquiry by Magistrate into cause of death.—

[473.][(1)] [474.] **[***] when the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174] the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in subsection (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.**

[475.] **[** ***(1A) Where,—***

(a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman,

while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed.]

(2) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.

(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

[476.][(5)] **The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case**

may be, under sub-section (1A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical man appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing.]

Explanation. **—In this section, the expression "relative" means parents, children, brothers, sisters and spouse.**

[s 176.1] CrPC (Amendment) Act, 2005 [*Clause (18)*].—

Section 176 is being amended to provide that in the case of death or disappearance of a person, or rape of a woman while in the custody of the police, there shall be a mandatory judicial inquiry and in case of death, examination of the dead body shall be conducted within twenty-four hours of death (*Notes on Clauses*).

COMMENT

Under this section when any person dies while in the custody of the police, it is obligatory on the nearest Magistrate to hold an inquest. In any other case mentioned in section 174 sub-section (1), the Magistrate may hold an inquest either instead of, or in addition to, the investigation held by the police officer. The relatives of the dead person should, whenever possible, be notified and allowed to be present in the inquiry. In a case, the accused confessed before the Police Sub-Inspector to have killed his wife on the basis of which the FIR was drawn. He is also said to have confessed before the Executive Magistrate at the time of holding inquest, but the confession was neither tendered in evidence nor proved, nor any other witness was present at that time, it was held that there was no material to convict the accused.[477.]

Proceedings under this section are judicial proceedings and the High Court exercises its jurisdiction over such proceedings under sections 397 and 401 or under section 482 of the Code.

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1. *State of West Bengal v SN Basak*, AIR 1963 SC 447 : 1963 SCR (2) 52 .
2. *King-Emperor v Nazir Ahmad*, (1945) 71 IA 203 : AIR 1945 PC 18 ; *Jehan Singh v Delhi Administration*, AIR 1974 SC 1146 : 1974 Cr LJ 802 : (1974) 4 SCC 522 .

473. Subs. by Act 46 of 1983, sec. 4, for "When any person dies while in the custody of the police" (w.e.f. 25-12-1983).

474. The words "When any person dies while in the custody of the police or" omitted by the CrPC (Amendment) Act, 2005 (25 of 2005), section 18 (w.e.f. 23-6-2006 *vide* Notfn. No. SO 923(E), dated 21-6-2006).

475. Ins. by the CrPC (Amendment) Act, 2005 (Act 25 of 2005), section 18(ii) (w.e.f. 23-6-2006).

476. Ins. by the CrPC (Amendment) Act, 2005 (25 of 2005), section 18(iii) (w.e.f. 23-6-2006).

477. *M Yellappa v State of Karnataka*, 1993 Cr LJ 388 (Knt).

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CHAPTER XIII JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

The Common law principle of England, that all crimes are local and justiciable by local Courts only within whose jurisdiction they are committed, finds place in section 177. But the scheme of the Chapter seems to be intended to enlarge as much as possible the ambit of the situs in which the trial may be held to minimise as much as possible the inconvenience caused by the success of a technical plea that the offence was not committed within the local limits. The ordinary rule founded in section 177 is gradually extended in the following sections.

[s 177] Ordinary place of inquiry and trial.—

Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

The competency of a forum to take cognizance of an inquiry into, and trial of, an offence, as defined by section 2 of the Code, is determined by the place in which the offence may have been committed.[1.] Crimes are in their nature local; and the jurisdiction of Criminal Courts is local.[2.] A Magistrate, within whose local jurisdiction the offence is committed, is authorised to take cognizance and to try the case or to commit it to the Court of Session. The subsequent transfer of the locality to another district does not oust the jurisdiction of the Magistrate.[3.] Save in exceptional cases, a Magistrate has no power to try an accused for an offence committed wholly outside the limits of his jurisdiction.[4.] Where the offence consists of several acts done in different areas, it may be enquired into or tried by a Court having jurisdiction over any of such local areas.[5.] The section leaves the place of trial open. The Court having jurisdiction to try the offences committed in pursuance of the conspiracy, can try the offence of conspiracy even if it was committed outside its jurisdiction, as the provisions of section 223 are not controlled by the provisions of this section which do not create an absolute prohibition against the trial of offences by a Court other than the one within whose jurisdiction the offence is committed.[6.]

Where a newspaper containing a defamatory article is printed and published at one place and is circulated at other places, then there would be publication of the defamatory article in all such other places, and the jurisdictional Magistrates can entertain the complaint for defamation.[7.]

Under section 6 of the Dowry Prohibition Act, 1961, it is obligatory on the part of the person who has received dowry to transfer it to the woman. He should transfer it at the place where the woman is residing. If he fails, the woman gets cause of action for filing a complaint at the place where it should have been transferred to her.[8.] The offence under clause (7) of the Iron and Steel Control Order, 1956, is an act of omission. Hence, the Court within whose jurisdiction the omission took place has jurisdiction to entertain the case.[9.] Where the question of jurisdiction is raised, it must be decided before the trial can be commenced.[10.]

[s 177.1] "Ordinarily".—

This word means "except in the cases provided hereinafter to the contrary."[11.] For example, see section 181, where the accused *may be found*; section 182(2) "the offender *last resided* with his or her spouse...", *etc*. "The use of the word "ordinarily" indicates that the provision is a general one and must be read subject to the special provisions contained in the Code. That apart, the exceptions implied by the word "ordinarily" need not be limited to those specially provided for by the law and exceptions may be provided by law on considerations of convenience or may be implied from other provisions of law permitting joint trial of offences by the same court".[12.]

[s 177.2] Power of High Court to change jurisdiction.—

Under section 407, the High Court may order that any offence be inquired into or tried by any Court not empowered under sections 177 to 185, but in other respects competent to inquire into or try such offence.[13.]

[s 177.3] Lack of territorial jurisdiction.—

The quashing of the FIR on the ground of lack of territorial jurisdiction to investigate the offence has been held to be improper. The police officers are competent to investigate any cognizable offence. The investigation officer can, if he feels that the offence falls outside his jurisdiction, forward the case to the proper police station. But there should be no refusal to register the FIR and conduct investigation.[14.] The Court further said that where it is uncertain as to which of the local areas the offence in question was committed and where the different acts which constitute the offence occurred in different local areas, such offence can be enquired into or tried by a Court having jurisdiction over any of the local areas.[15.]

The principle that the debtor must seek the creditor cannot be applied to criminal cases. The jurisdiction of Courts to try criminal cases is governed by the provisions of the Criminal Procedure Code and not by the common law principles.[16.]

All the alleged facts as per the complaint were related to the offence under section 498A of the IPC and they took place in the state of Punjab. The complaint was filed in a Court in the State of Rajasthan where the complainant resided with her maternal relations. The Court said that no cause of action arose in Rajasthan. The Magistrate at that place had no jurisdiction to deal with the matter.[17.]

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1. *Shaik Fakrudin*, ILR (1885) 9 Bom 40 ; *MN Adhikari v Food Inspector*, AIR 1965 Ker 295 : 1965 Cr LJ 775 .
2. *Rafael v Verelst*, (1776) 2 Wm Bl 1055; *MN Adhikari v Food Inspector, supra*.
3. *Sayer Uddin Pramanik*, (1938) 2 Cal 357 .

4. *Emperor v Goverdhan Ridkaran*, (1928) 30 Bom LR 387 : AIR 1928 Bom 140 a; *Emperor v Mohanlal Aditram*, (1928) 30 Bom LR 1253 : AIR 1928 Bom 475 a; *Mussammat Bhagwatia v King Emperor*, (1924) 3 Pat 417; *State v Dhulaji Bavaji*, AIR 1963 Guj 234 : 1963 Cr LJ 273 .
5. *ESI Corp v Md Ismail Saheb*, AIR 1960 Mad 64 FB : 1960 Cr LJ 242 .
6. *Purshottamdas Dalmia v The State of West Bengal*, AIR 1961 SC 1589 : 1961 Cr LJ 728 ; *LN Mukherjee v State of Madras*, AIR 1961 SC 1601 .
7. *P Lankesh v H Shivappa*, 1994 Cr LJ 3510 (Kant) : 1994 Cr LJ 3510 .
8. *PTS Saibaba v Mangatyaru*, 1978 Cr LJ 1362 (AP); *Radha Krishan v Ellamua Reddy*, 1984 Cr LJ 573 .
9. *DC Bhowmic v State*, 1978 Cr LJ 637 .
10. *Abhay Lalan v Yogendra Madhavlal*, 1981 Cr LJ 1667 .
11. *Emperor v Goverdhan Ridkaran*, (1928) 30 Bom LR 387 : AIR 1928 Bom 140 a; *Emperor v Ramnarayan Kapur*, (1936) 39 Bom LR 61 : (1937) Bom 244 : AIR 1937 Bom 186 ; *Narumal v State of Bombay*, AIR 1960 SC 1329 : 1960 Cr LJ 1674 .
12. *Mohan Baitha v State of Bihar,* AIR 2001 SC 1490 : (2001) 4 SCC 350 .
13. *Radhesh Chandra v State of Rajasthan*, 1995 Cr LJ 3394 (Raj).
14. *Satvinder Kaur v State, (Govt of NCT) of Delhi,* AIR 1999 SC 3596 : (1999) 8 SCC 728 ; *Rajendra Ramachandra Kawalekar v State of Maharashtra*, AIR 2009 SC 1792 : (2009) 11 SCC 286 : 2009 Cr LJ 1592 , the fact that FIR was registered in a particular state, was held to be not the sole criterion to decide that no cause of action had arisen even partly within territorial limits of jurisdiction of another state.
15. *Ibid*.
16. *Harman Electronics Pvt Ltd v National Panasonic India Ltd*, AIR 2009 SC 1168 : (2009) 1 SCC 720 : 2009 Cr LJ 1109 , the case had arisen out of the dishonour of a cheque.
17. *Bhura Ram v State of Rajasthan*, AIR 2008 SC 2666 : (2008) 11 SCC 103 .

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CHAPTER XIII JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

The Common law principle of England, that all crimes are local and justiciable by local Courts only within whose jurisdiction they are committed, finds place in section 177. But the scheme of the Chapter seems to be intended to enlarge as much as possible the ambit of the situs in which the trial may be held to minimise as much as possible the inconvenience caused by the success of a technical plea that the offence was not committed within the local limits. The ordinary rule founded in section 177 is gradually extended in the following sections.

[s 178] Place of inquiry or trial.—

(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

This section provides for the difficulty which may arise where there is a conflict between different areas, and there may be some doubt as to which particular Magistrate has jurisdiction to try the case. Each portion of the section refers to this conflict.[18.] The section provides for four contingencies—

(1) when it is uncertain in which of several local areas an offence is committed;

(2) where an offence is committed partly in one local area and partly in another;

(3) where an offence is a continuing one, and continues to be committed in more local areas than one; and

(4) where an offence consists of several acts done in different local areas.

This section lays down that in any of the above four cases the offence may be inquired into or tried by a Court having jurisdiction over any of such local areas.

[s 178.1] "Uncertain in which of several local areas an offence was committed". —

The words "local area" only apply to a local area to which the Criminal Procedure Code applies, and not to a local area in a foreign country or in other portions of the British

Empire to which the Code has no application.[19.]

When there is an uncertainty as to whether a particular spot, where an offence has been committed, is situated within one district or another, the case is governed by this section, and the offence is triable in the Court of either district. It was uncertain whether the offence of embezzlement was committed at Bombay or Nagpur. It was held by the Supreme Court that the Court sitting at Nagpur had therefore, jurisdiction to inquire into the offence. This was a specific provision and not a general principle of law.[20.] The expression "local area" includes, and was intended to include, a "district".[21.] Section 462 clearly shows that a sessions division, district, or sub-division is, within the meaning of the Act, intended to be included in the term "local area".[22.]

[s 178.2] Places through which smuggled goods carried.—

The Courts of all the places through which smuggled goods have been carried have been held by the Supreme Court to have jurisdiction to try the offence. The accused can file an application for transfer of his case if he is likely to be prejudiced by the proceedings at the place where they have been instituted. His application would have to be decided on its own merits.[23.]

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18. *Bichitranund Dass v Bhugbut Perai*, (1889) 16 Cal 667 , 676; *Debendra Nath Das v Registrar of Joint Stock Cos*, (1917) 45 Cal 490 .
19. *Bichitranund Dass v Bhugbut Perai*, (1889) 16 Cal 667 .
20. *State of MP v KP Ghiara*, AIR 1957 SC 196 : 1957 Cr LJ 322 .
21. *Punardeo Narain Singh v Ram Sarup Roy*, (1898) ILR 25 Cal 858.
22. *Ibid*.
23. *Harbans Lal v State of Haryana,* (1998) 8 SCC 319 : AIR 1999 SC 326 : 1999 Cr LJ 455 .

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[s 179] Offence triable where act is done or consequence ensues.—

When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

Under this section, a person accused of the commission of an offence is triable by a Court within the local limits of whose jurisdiction the act amounting to the offence has been done or the consequence of that act has ensued. This section applies to those offences which by their very definition consist of an act and its consequences, for example, culpable homicide.[24.]

[s 179.1] "Anything which has been done".—

This phrase means some act constituting the offence or any part of it.

[s 179.2] "A consequence which has ensued".—

The "consequence" must form part of the offence charged.[25.] The section contemplates cases where the act done, and the consequence ensuing therefrom, together constitutes the offence. The "consequence" contemplated must be a necessary ingredient of the offence. If the offence is complete in itself by reason of the act having been done, and the consequence is a mere result of it which was not essential for the completion of the offence, then this section would not be applicable. Where deception is practised by means of letters or telecommunication messages, the Courts from whose jurisdiction the same were sent out or received will possess jurisdiction. Similarly, in cases of dishonestly inducing delivery of property, the Court under whose jurisdiction the property was delivered or received will have jurisdiction (see section 182).

The cases of criminal breach of trust and criminal misappropriation of property often raised the vexed question of jurisdiction under the old Code. This has now been set right by sub-section (4) of section 181 by enlarging the jurisdiction.

[s 179.3] "By a Court within whose local jurisdiction such thing has been done or such consequence has ensued".—

If a foreign subject, resident in a foreign territory, instigates the commission of an offence which, in consequence, is committed in Indian Territory, he is not amenable to the jurisdiction of an Indian Court because the instigation has taken place outside India.[26.]

[s 179.4] CASES

[s 179.4.1] Instigation by letter.—

Where one person instigates another to the commission of an offence by means of a letter sent through the post, the offence of abetment by instigation is completed as soon as the contents of such letter become known to the addressee, and such offence is triable at the place where such letter is received.[27.]

Where in a case, misrepresentation was done by A at place X and property was delivered at Y, it was held by the Supreme Court that A could be tried for the offence of cheating either at X or at Y. B being an abettor, could also be tried either at X or Y.[28.]

[s 179.4.2] Delivery of share certificates.—

An offence under section 113 of the Companies Act, 1956, is committed where the company fails to deliver share certificates as required by the Act. The Supreme Court held that since the mode of delivery allowed by the Act is by post, the cause of action arises at the place where the registered office of the company is situated and not where the purchaser resides. A complaint can be filed only at the place of the company's registered office.[29.]

[s 179.4.3] Conspiracy.—

A Court trying an accused for an offence of conspiracy is competent to try him for all offences committed in pursuance of that conspiracy irrespective of the fact that any or all the other offences were not committed within its territorial jurisdiction.[30.] Where a conspiracy to cheat a Bank was hatched in Chandigarh in confabulation with an NRI at Dubai, where forgery and payment were made in pursuance of the conspiracy, the consequence of which took place in India, RM SAHAI J opined that the case fell under section 179 of CrPC and the Chandigarh Court had jurisdiction to take cognizance of offence even against the NRI without any sanction of the Government as section 188 of CrPC was not attracted.[31.]

Offences under sections 471 and 474 of the IPC were committed. The accused was possessing and using a forged motor transport permit knowing it to be forged. It was held by the Supreme Court that the owner was liable where the forged permit was seized from the driver. He was guilty from the moment the forged permit had been in his possession. The offence under section 471 was the desired consequence and could also be tried at the same place.[32.]

Where an offence under the Essential Commodities Act, 1955, was committed, and manufacture of the sub-standard fertiliser took place at one place and its sale at another, the manufacturer could be tried at the place of sale.[33.]

Where an alleged defamatory statement was made by the accused in a Press Conference at Chandigarh, and that statement was published in a newspaper published and circulated in Bombay, it was held that the consequence was completed at Bombay and therefore both the Courts, at Bombay as well as Chandigarh would, have jurisdiction to entertain the complaint.[34.]

[s 179.4.4] Defamation.—

It was held that place of trial could be where the letter was written and posted, or where the letter was received and read.[35.]

The court would have territorial jurisdiction to try the case where the offending publication causing defamation was delivered and was read by the complainant.[36.]

[s 179.4.5] Carriage of smuggled gold.—

In the process of the carriage of smuggled gold, the material passed through three places and reached its destination at the fourth place. It was held that the Courts through whose territorial area the contraband passed had jurisdiction to try the offence. The prosecution was launched at the 3rd place from where the goods passed to the 4th place.[37.]

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24. *Laxman v Dayabhai*, (1947) Nag 378; *MN Bhatia*, 1968 Cr LJ 555 .
25. *Jivandas Savchand*, ILR (1930) 55 Bom 59 : 32 Bom LR 1195 : AIR 1930 Bom 490 , **overruling** *Emperor v Ramratan Chunilal*, (1921) 24 Bom LR 46 : 46 Bom 641 : AIR 1922 Bom 39 ; *Rambilas*, (1915) ILR 38 Mad 639 : AIR 1915 Mad 600 ; *Krishnamachari v Shaw Wallace & Co*, (1915) 39 Mad 576; *Simhachalam v Emperor*, (1917) ILR 44 Cal 912; *Ganga Prasad v Chhotelal Jain*, AIR 1963 MP 128 : 1963 Cr LJ 445 ; *State v Dhulaji*, AIR 1963 Guj 234 : 1963 Cr LJ 273 .
26. *Pirlai*, (1873) 10 BHCR 356.
27. *Queen Empress v Sheo Dial Mal*, (1894) 16 All 389 .
28. *K Satwant Singh v State of Punjab*, AIR 1960 SC 266 : 1960 Cr LJ 410 .
29. *HV Jayaram v ICICI,* AIR 2000 SC 579 : 2000 Cr LJ 736 : (2002) 2 SCC 202 .
30. *Banwarilal v UOI*, AIR 1963 SC 1620 : (1963) 2 Cr LJ 529 .
31. *Ajay Agarwal v UOI*, AIR 1993 SC 1637 : 1993 Cr LJ 2516 : (1993) 3 SCC 609 .
32. *Gajjan Singh v State of MP*, AIR 1965 SC 1921 : (1965) 2 Cr LJ 822 .
33. *HS Co-op S & M Federation Ltd v State of Punjab*, 1983 Cr LJ 1595 ; *State of Punjab v Nohar Chand*, 1984 Cr LJ 1153 : AIR 1984 SC 1492 : 1984 (1) Scale 869 : (1984) 3 SCC 512 .

34. *Subramaniam Swamy v PS Pai*, 1984 Cr LJ 1329 ; *See also S Bangarappa v Ganesh Narayan*, 1984 Cr LJ 1618 .
35. *Rekhabai v Dattatraya,* 1986 Cr LJ 1797 (Bom).
36. *Dilip Kumar Hazarika v Nalin Ch Buragohain*, 2002 Cr LJ 1608 .
37. *Harbans Lal v State of Haryana,* AIR 1999 SC 326 : 1999 Cr LJ 455 : (1999) 8 SCC 319 .

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The Common law principle of England, that all crimes are local and justiciable by local Courts only within whose jurisdiction they are committed, finds place in section 177. But the scheme of the Chapter seems to be intended to enlarge as much as possible the ambit of the situs in which the trial may be held to minimise as much as possible the inconvenience caused by the success of a technical plea that the offence was not committed within the local limits. The ordinary rule founded in section 177 is gradually extended in the following sections.

[s 180] Place of trial where act is an offence by reason of relation to other offence.—

When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence the first mentioned offence may be inquired into or tried by a Court within whose local jurisdiction either act was done.

This section provides for a place of trial where the act committed is an offence by reason of its relation to any other act which is also an offence.

[s 180.1] "When an act is an offence by reason of its relation to any other act which is also an offence".—

A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed or by the Court within whose local limits the offence abetted was committed. The other act must be one committed in Indian Territory.

Courts in India have no jurisdiction to try a non-Indian citizen for the abetment of an offence committed in India in pursuance of the abetment done by his acts outside India.[38.]

When sub-standard fertiliser was manufactured, it was held that the place of the trial was the place of marketing.[39.]

[s 180.2] "Which would be an offence if the doer were capable of committing an offence".—

See sections 76–106 of the IPC.

38. *Hiralal*, (1945) Nag 130.
39. *State of Punjab v Noharchand*, AIR 1984 SC 1492 : 1984 Cr LJ 1153 : (1984) 3 SCC 512 .

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[s 181] Place of trial in case of certain offences.—

(1) Any offence of being a thug, or murder committed by a thug, of dacoity, of dacoity with murder, of belonging to a gang of dacoits, or of escaping from custody, may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the accused person is found.

(2) Any offence of kidnapping or abduction of a person may be inquired into or tried by a Court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained.

(3) Any offence of theft, extortion or robbery may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property which is the subject of the offence was possessed by any person committing it or by any person who received or retained such property knowing or having reason to believe it to be stolen property.

(4) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

(5) Any offence which includes the possession of stolen property may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property was possessed by any person who received or retained it knowing or having reason to believe it to be stolen property.

This section determines the place of trial where the offences committed are (1) being a thug or murder committed by a thug; (2) dacoity, belonging to a gang of dacoits, or dacoity with murder; (3) escape from custody; (4) kidnapping; (5) abduction; (6) theft; (7) extortion; (8) robbery; (9) criminal misappropriation; (10) criminal breach of trust; and (11) possession of stolen property.

[s 181.1] Sub-section (1).—

As to the offence of being a thug, see section 311 of the IPC; as to dacoity, section 395; as to escape from custody, section 224.

[s 181.2] Sub-section (2).—

As to kidnapping, see sections 359, 360 and 361 of the IPC; as to abduction, see section 362.

[s 181.3] CASE.—

A married young woman, who was discarded by her husband, lived with her father and brother in Madras. She became intimate with the accused who was her next-door neighbour. The two ran away from Madras in a motorcar, flew to Bangalore in an aeroplane, and eventually settled in Bombay. The accused was convicted of kidnapping by a Presidency Magistrate, Bombay. It was held that the alleged taking and the enticing of the woman, if there was any, having taken place in Madras, the Magistrate in Bombay had no jurisdiction to try the offence.[40.]

[s 181.4] Place of trial for theft, extortion, robbery, *etc*. [*Sub-section (3)*].—

As to stealing, see sections 378, 410 and 411; extortion, see sections 383, 388–390; and robbery, sections 390 and 392 of the IPC. The offence of theft, extortion or robbery, or the possession of stolen property which was the object of the offence can be tried by a Magistrate within whose jurisdiction either of the two offences is committed. This sub-section gives jurisdiction to Indian Courts to inquire into an offence of theft committed outside India, provided the stolen property was possessed in India either by the thief or by any person who received or retained the same knowing it to be stolen.

[s 181.5] Place for trial for stolen property.—

Under section 410 of the IPC, "stolen property" has received a very wide meaning. It is immaterial whether the act by which the property becomes stolen property is committed within or outside India. But to give an Indian Court jurisdiction to inquire into the offence of dishonestly receiving or retaining stolen property, the receiving or retaining or the offence by which the owner was deprived of it must have been committed within its jurisdiction.

[s 181.6] Place of trial for criminal misappropriation or breach of trust [*Sub-section (4)*].—

As to criminal misappropriation, see section 403 of IPC; as to criminal breach of trust, see section 406. It is not essential that at the time the property is said to have been received or retained by the accused person he must have a dishonest intention to misappropriate it or to commit criminal breach of trust with reference to it. It is enough if the property which is the subject of the offence was received or retained by the accused at a particular place to give jurisdiction to the Magistrate of that place to try the case.[41.] Even the Magistrate having jurisdiction over the place where the property

was to be returned or accounted for can try the offence. Therefore, even supposing falsification of account has taken place outside jurisdiction, but if the accountability is within jurisdiction, the Court can try the case.

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40. *Emperor v Ramnarayan Kapur*, (1936) 39 Bom LR 61 : (1937) Bom 244 : AIR 1937 Bom 186 .
41. *Emperor v Laxman*, (1926) 51 Bom 101 : 28 Bom LR 1292.

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[s 182] Offences committed by letters, *etc*.—

(1) Any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

(2) Any offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage, [42.][, or the wife by the first marriage has taken up permanent residence after the commission of the offence.]

Sub-section (1) which sets at rest the previous state of law stipulates that (a) when an offence which includes cheating is practised by means of letters or telecommunication messages, the case can be inquired into and tried by the Magistrate from whose jurisdiction such letter or message originated or the Magistrate in whose jurisdiction they were received; and (b) in cases of cheating and dishonestly inducing delivery of property, the Court in whose jurisdiction the property was delivered by the deceived person as well as the Court in whose jurisdiction such property was received by the accused can try the same.

Where deception is practised and inducement is made to a person so as to cause cheating, the Court of the place where it is done will have jurisdiction in addition to those Courts which have it under section 182.[43.] In cases of cheating generally by letters or telecommunication messages, the earlier part of section 182 leaves option with the complainant to choose his forum out of any of the two places. But where deception is practised in person by the accused and not by letters, section 182 would not apply.[44.]

In cases of bigamy, the Magistrate having jurisdiction over the place where the offence is committed and also the Magistrate having jurisdiction over the place where the offender last lived with his or her first spouse will have jurisdiction. In case of an offence of bigamy, where the first wife was residing at a particular place before the

commission of the offence and continued to live there, she must be deemed to have taken permanent residence at that place. It was held that the complaint could be entertained by the Court having territorial jurisdiction over that place.[45.] In a case for bigamy, the complainant gave address of her father as her own, it was held that she should be deemed to be permanently residing at her father's place and the Magistrate having territorial jurisdiction at that place would be competent to take cognizance of the offence.[46.]

Even though a provision in the constitution of a society registered under the Societies Registration Act, 1860 enjoins that all claims or actions by or against the society shall be instituted at and adjudicated by the Court in Lucknow, a complaint lodged against the society before Chief Judicial Magistrate (CJM), Kurukshetra alleging commission of offences at that place under sections 420, 465, 467, 468, 471, 109, 120B and 34 of "IPC" was maintainable. A provision contained in the constitution of the society could not have the effect of negating section 182(1).[47.]

It has already been pointed out that the scheme of the Chapter seems to be to gradually extend the forum in different situations, so that prosecution does not fail merely on the technical ground of jurisdiction.

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42. Ins. by Act 45 of 1978, section 15 (w.e.f. 18-12-1978).
43. *Bhola Nath v State*, 1982 Cr LJ 1482 .
44. *Krishna Narain v Mahabir Agencies Satti Bazar*, 1984 Cr LJ 1682 .
45. *Tekumalla Muneiah v CB Ammanamma*, 1991 Cr LJ 548 (AP); *Amrit Kaur v Indrajit Kaur*, 1991 Cr LJ 789 (Pat).
46. *Suresh v State of Maharashtra*, 1996 Cr LJ 1782 (Bom).
47. *Jimmy R Jagtiani v State of Haryana*, 2002 Cr LJ 2397 (P&H).

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[s 183] Offence committed on journey or voyage.—

When an offence is committed whilst the person by or against whom, or the thing in respect of which, the offence is committed is in the course of performing a journey or voyage, the offence may be inquired into or tried by a Court through or into whose local jurisdiction that person or thing passed in the course of that journey or voyage.

This is also a case of extended jurisdiction. It confers power, in cases where the offence is committed by a person on journey or voyage, or against a person or in respect of a thing on voyage or journey, on the Court through or into whose jurisdiction the person or the thing passed.

The words "journey or voyage" do not include a voyage on the high seas or in a foreign territory but are confined in their meaning to a journey or voyage within the territory of India, as down the Ganges or the Buckingham Canal.[48.]

Where the accused pushed the complainant down the running train within jurisdiction of the Eluru Governmental Railway Police Station in Vijayawada district, but he was arrested within jurisdiction of Cuttack GRPS, it was held that since the occurrence took place in between Eluru and Chabrol railway stations, which comes within jurisdiction of Vijayawada Magistracy, the Magistrate at Vijayawada had jurisdiction to try the case. It was observed that in section 183 of CrPC, "may" indicates that it is not mandatory that the accused be tried where he ends his journey.[49.]

Where a quarrel took place on a running train between Shahjahanpur and Moradabad, and the accused got down at Moradabad, but the complainant terminated his journey at Jalandhar, where he filed the complaint against the accused, it was held that Jalandhar Court had jurisdiction to try the case.[50.]

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48. *Bapu Daldi v The Queen*, (1882) ILR 5 Mad 23.
49. *Ganpat Nath Jogi v State of Orissa*, 1995 Cr LJ 3680 (Ori).
50. *Harish Tewari v Vimal Kumar Singh*, 1995 Cr LJ 3859 (P&H).

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[s 184] Place of trial for offences triable together.—

Where—

(a) the offences committed by any person are such that he may be charged with, and tried at one trial for, each such offence by virtue of the provisions of section 219, section 220 or section 221, or

(b) the offence or offences committed by several persons are such that they may be charged with and tried together by virtue of the provisions of section 223,

the offences may be inquired into or tried by any Court competent to inquire into or try any of the offences.

The section provides that:—

(a) where a person commits several offences for which he may be charged with and tried at one trial (see sections 219–221, *infra*); or

(b) where several persons commit offence or offences for which they may be charged with and tried together at one trial (see section 223, *infra*), then the Court which is competent to inquire into or try any of the offences can have jurisdiction. When series of acts giving rise to more than one offence were so connected as to form part of the same transaction, it was held that any Court competent to try any one of the offences could try all the offences at one trial.[51.]

[s 184.1] Conspiracy.—

The Supreme Court has laid down that a Court trying an accused for an offence of conspiracy is competent to try him for all offences committed in pursuance of that conspiracy, irrespective of the fact that any or all other offences were not committed with its local jurisdiction.[52.] Similarly, the Court having jurisdiction to try the offences committed in pursuance of the conspiracy, can try the offence of conspiracy even if it was committed outside its jurisdiction.[53.] The section makes the law clear.

51. *Taiyab Shaikh v State*, 1988 Cr LJ NOC 1 (Cal).
52. *Banwarilal v UOI*, AIR 1963 SC 1620 : (1963) 2 Cr LJ 529 ; *Purushottamdas v State of WB*, AIR 1961 SC 1589 : (1961) 2 Cr LJ 728 .
53. *LN Mukherjee v The State of Madras*, AIR 1961 SC 1601 : (1961) 2 Cr LJ 736 .

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[s 185] Power to order cases to be tried in different sessions divisions.—

Notwithstanding anything contained in the preceding provisions of this Chapter, the State Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division:

***Provided* that such direction is not repugnant to any direction previously issued by the High Court or the Supreme Court under the Constitution, or under this Code or any other law for the time being in force.**

This section gives power to the State Government to order cases to be tried in different sessions divisions provided that such order does not suffer from vice of repugnancy in respect of order passed by the High Court or the Supreme Court. For the power of the Supreme Court to transfer cases and appeals from one High Court to another, see section 406; for the power of the High Court, see section 407; and for the power of Sessions Judge, see section 408 of the Code.

Where special Sessions Courts have been established by the State for trial of a particular case or class of cases (such as, cases investigated by Central Bureau of Investigation), all such cases can only be tried by those Courts.[54.]

54. *Superintendent of Police v Firozuddin Bashiruddin*, 1993 Cr LJ 2775 (Ker).

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[s 186] High Court to decide, in case of doubt, district where inquiry or trial shall take place.—

Where two or more Courts have taken cognizance of the same offence and a question arises as to which of them ought to inquire into or try that offence, the question shall be decided—

(a) if the Courts are subordinate to the same High Court, by that High Court;

(b) if the Courts are not subordinate to the same High Court, by the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced,

and thereupon all other proceedings in respect of that offence shall be discontinued.

Clause (a) is not restricted to cases to which there is a doubt as to whether one Court or another has jurisdiction, but is applicable to a case in which the doubt is on the point whether the choice between two Courts both of which have jurisdiction, should be decided on the ground of "convenience" and "expediency".[55.]

Clause (b) provides for cases where cognizance has been taken by two Courts not subordinate to the same High Court. The provision seems to be mandatory; otherwise if the High Court, in whose appellate criminal jurisdiction the proceedings are first commenced, does not pass any order, the proceedings in both the Courts will come to a standstill.

The Supreme Court has held that the main object and intention of the Legislature in enacting the provision is to prevent the accused persons from being unnecessarily harassed for the same offences alleged to have been committed with the territorial jurisdiction of more than one Courts. In order to avoid unnecessary harassment of the accused to appear and face trial in more than one Courts, necessary direction is to be issued to discontinue the subsequent proceedings in other Courts. The provision is based on the principle of convenience and expediency. However, the *sine qua non* for the application of this provision is that the cases instituted in different Courts are in respect of the same offence arising out of the same occurrence and that the same transaction and that the parties are the same. In other words, the persons implicated as an accused in different cases must be the same. If these conditions are satisfied, then subsequent proceeding has to be discontinued.[56.]

55. *Charu Chandra v Emperor*, (1916) ILR 44 Cal 595 (FB).
56. *State of Rajasthan v Bhagwan Das Agrawal*, (2013) 16 SCC 574 .

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[s 187] Power to issue summons or warrant for offence committed beyond local jurisdiction.—

(1) **When a Magistrate of the first class sees reason to believe that any person within his local jurisdiction has committed outside such jurisdiction (whether within or outside India) an offence which cannot, under the provisions of sections 177 to 185 (both inclusive), or any other law for the time being in force, be inquired into or tried within such jurisdiction but is under some law for the time being in force triable in India, such Magistrate may inquire into the offence as if it had been committed within such local jurisdiction and compel such person in the manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is not punishable with death or imprisonment for life and such person is ready and willing to give bail to the satisfaction of the Magistrate acting under this section, take a bond with or without sureties for his appearance before the Magistrate having such jurisdiction.**

(2) **When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.**

This section empowers the Magistrate mentioned therein to inquire into an offence committed outside the local limits of his jurisdiction (which may also be outside India) by a person found within his jurisdiction and to send such person to the Magistrate having jurisdiction to inquire into or try such offence.

[s 187.1] Magistrate can issue process while outside his jurisdiction.—

It is not essential to the validity of a warrant issued that the Magistrate issuing it, should be at the time he issues it, within the local limits of his jurisdiction.

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[s 188] Offence committed outside India.—

When an offence is committed outside India—

(a) by a citizen of India, whether on the high seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

***Provided* that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.**

This section provides for extra-territorial jurisdiction over Indian citizens and also over non-citizens. Compare section 4 of the IPC, which gives extra-territorial jurisdiction in respect of acts committed outside India by Indian citizens.

The section specifies two cases in which a person is triable for offences committed out of India, namely,—

(1) when an Indian citizen commits an offence in any place either on the high seas or elsewhere; and

(2) when any person, not being such citizen, commits an offence on any ship or aircraft registered in India.

[s 188.1] Offence committed outside India [*Clause (a)*].—

This clause provides that an Indian citizen who commits an offence at any place outside India or on the high seas may be dealt with, in respect of such offence as if it had been committed in India. It has been held that even if offence is committed by a citizen of India outside the country, the same is subject to jurisdiction of Courts of India.[57.]

[s 188.2] "Offence".—

The word "offence" means an act or omission made punishable by any law for the time being in force [section 2(n)]. To attract the section, it must be shown that an accused has been guilty of an act or omission made punishable by some law (that is, law applicable to India) for the time being in force.[58.]

[s 188.3] "Citizen of India".—

The expression citizen of India under Article 5 of the Constitution of India means every person who had his domicile in the territory of India at the commencement of the Constitution and, (a) who was born in the territory of India, or (b) either of whose parents was born in India, or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution. Persons who have migrated to India from Pakistan are also citizens of India provided they satisfy the requirements of Article 6 of the Constitution.

An order was passed for taking cognizance of an offence. The accused was not a citizen of India. The offence was committed outside India (Kuwait). The order was held to be illegal in view of section 4 of the IPC and section 188 of CrPC.

[s 188.4] "May be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found".—

The word "found" must be taken to mean not where a person is discovered, but where he is actually present.[59.] Where a man is in the country and is charged before a Magistrate with an offence under the Indian Penal Code, it will not avail him to say that he was brought there illegally from a foreign country. The principle upon which English cases are based also underlies this section.[60.]

The accused were charged under section 407 of the IPC with committing criminal breach of trust in respect of certain property entrusted to them as carriers. They were all citizens of India (as understood in the present Constitution). The offence was alleged to have been committed in Portuguese Territory, and they were found in a place in India. It was held that the accused could be tried in the place where they were found.[61.] A citizen of India, who was a soldier in the Indian Army, committed a murder in Cyprus while on service in such army. He was accused of such offence at Agra. It was held that the Criminal Court at Agra had jurisdiction to try him.[62.] The expression "at which he may be found" in section 188 has the effect that the victim who suffered at the hands of the accused on a foreign land can complain about the offence to a competent Court which he may find convenient.[63.]

[s 188.5] Offence on ship or aircraft [*Clause (b)*].—

If an offence, meaning thereby, an offence defined in section 2(n) of the Code, is committed by a person who is not a citizen of India, but on board a ship or on an aircraft which ship or aircraft is registered in India, then he may be dealt with in respect of that offence as if the offence had been committed in India at any place in which he is found.

[s 188.6] Sanction of Central Government [*Proviso*].—

Where the offence is committed outside and beyond India, then previous sanction of the Central Government becomes necessary for inquiry or trial of such offence. Offence of conspiracy to do illegal acts was committed during a meeting at Bombay and not at Singapore.

It was held that for the investigation, trial *etc* of the offence, sanction of the Central Government under section 188 was not necessary.[64.]

Where the police at Kerala refused to entertain a complaint that one Suleman was murdered at Sharjah in United Arab Emirates, by Ali, as the offence was committed outside India, the Kerala High Court directed the police to register the First Information Report (FIR) on the basis of the complaint and take steps for extradition of the accused, who was an Indian citizen. It was further held that sanction of the Government of India was not required at the investigation stage.[65.]

Where the conspiracy for cheating a Bank was hatched in Chandigarh in confabulation with a non-resident Indian at Dubai, and during the continuing course of the transaction certain documents were forged and payment was obtained at Dubai, which finally culminated in cheating the Bank in India, *K. Ramaswamy J* of the Supreme Court opined that the need to obtain sanction for various offences under section 188 of CrPC was obviated.

RM Sahai J opined that forgery and payment at Dubai were only a part of the chain of activities in pursuance of the conspiracy, the consequence of which took place in India, so the offence was not committed outside India, hence section 188 of CrPC was not attracted and the case fell under section 179 of CrPC. It was held that the Chandigarh Court would have jurisdiction to take cognizance of the offences without sanction of the Government of India.[66.]

Where a resident of Kerala had committed embezzlement in United Arab Emirates, it was held that the proviso to section 188 of CrPC requiring prior sanction of the Government of India is mandatory but applies only to enquiries and trials and does not apply to a pre-enquiry stage, such as taking cognizance of an offence, issuing warrant *etc*.[67.]

On the scheme of section 188 under the Indian jurisprudence, SB Sinha J (Speaking for the Supreme Court Bench), observed as follows:

> In our constitutional scheme, all laws made by Parliament primarily are applicable only within the country. Ordinarily, therefore, all persons who commit a crime in India can be tried in any place where the offence is committed. Section 41 of the Indian Penal Code, however, extends the scope of applicability of the territorial jurisdiction of the court of India to try a case, the cause of action of which took place outside the geographical limits. Parliament indisputably may enact a legislation having extra territorial application but the same must be applied subject to the fulfilment of the requirements contained therein.[68.]

Thus, in the above case, where the accused was not a citizen of India and the offence committed outside India (Kuwait), it was held by the Supreme Court that the order taking cognizance was illegal in view of section 4 of the IPC and section 188 of the CrPC.[69.]

In the same case, the accused filed as application that the complaint petition filed without obtaining the requisite sanction under section 188 of CrPC was bad in law. Where the said application was dismissed, the accused filed a fresh petition raising the same contention. It was held by the Supreme Court that the petition cannot be dismissed on the ground of *res judicata* as principles analogous to *res judicata* have no application with regards to criminal cases. It was observed that where jurisdictional

issue is raised, save and except for certain categories of cases, the same may be permitted to be raised at any stage of the proceedings.[70.]

57. *AV Mohan Rao v M Kishan Rao,* (2002) 6 SCC 174 : AIR 2002 SC 2653 : JT 2002 (5) SC 180 : 2002 (5) Scale 218 : (2002) 6 SCC 174 .
58. *Emperor v Narayan Mahale*, (1935) 37 Bom LR 885 : 59 Bom 745 : AIR 1935 Bom 437 .
59. *Empress v Maganlal*, (1882) 6 Bom 622.
60. *Emperor v Vinayak Damodar Savarkar*, (1910) 35 Bom 225 : 13 Bom LR 296; *Sahebrao v Suryabhan*, (1948) Nag 334.
61. *Queen-Empress v Daya Bhima*, ILR (1888) 13 Bom 147 .
62. *Empress of India v Sarmukh Singh*, (1879) ILR 2 All 218 FB.
63. *Om Hemrajani v State of UP*, AIR 2005 SC 392 : (2005) 1 SCC 617 : 2005 Cr LJ 665 .
64. *Vinod Kumar Jain v State through C.BI*, 1991 Cr LJ 669 (Del).
65. *Remia v Sub-Inspector of Police, Tanur*, 1993 Cr LJ 1098 (Ker).
66. *Ajay Agarwal v UOI*, AIR 1993 SC 1637 : 1993 Cr LJ 2516 : (1993) 3 SCC 609 .
67. *Mohd Sajeed K v State of Kerala*, 1995 Cr LJ 3313 (Ker).
68. *Fatima Bibi Ahmed Patel v State of Gujarat*, AIR 2008 SC 2392 : (2008) 6 SCC 789 : (2008) 3 SCC (Cri) 151 , para 5 at p 2394 (of AIR).
69. *Ibid,* para 5 at p 2394 (of AIR).
70. *Ibid*, para 5 at p 2396 (of AIR).

The Code of Criminal Procedure, 1973

CHAPTER XIII JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

The Common law principle of England, that all crimes are local and justiciable by local Courts only within whose jurisdiction they are committed, finds place in section 177. But the scheme of the Chapter seems to be intended to enlarge as much as possible the ambit of the situs in which the trial may be held to minimise as much as possible the inconvenience caused by the success of a technical plea that the offence was not committed within the local limits. The ordinary rule founded in section 177 is gradually extended in the following sections.

[s 189] Receipt of evidence relating to offences committed outside India.—

When any offence alleged to have been committed in a territory outside India is being inquired into or tried under the provisions of section 188, the Central Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before a judicial officer in or for that territory or before a diplomatic or consular representative of India in or for that territory shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

The Code of Criminal Procedure, 1973

CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 190] Cognizance of offences by Magistrates.—

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence.—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(b) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

[s 190.1] State Amendments

Punjab.— *The following amendments were made by Punjab Act No. 22 of 1983 (w.e.f. 27-6-1983).*

S 190A.—After section 190, section 190A inserted—

"190A. Cognizance of offences by Executive Magistrates.—Subject to the provisions of this Chapter any Executive Magistrate may take cognizance of any specified offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

Union Territory of Chandigarh.— *The following amendments were made by (Punjab Amendment) Act, 1983 (Act 22 of 1983).—*

S 190A.—After section 190, insert as under—

"190A.Cognizance of offences by Executive Magistrates.—Subject to the provisions of this Chapter any Executive Magistrate may take cognizance of any specified offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

This section describes the conditions requisite for the initiation of proceedings.

Under clause (b), a Magistrate is empowered to take cognizance of non-cognizable offences upon a report in writing made by a police officer.[2.]

[s 190.2] "Subject to the provisions of this Chapter" [*Sub-section (1)*].—

That is to say, if contrary intention does not appear in other provisions made in this Chapter.

[s 190.3] "Specially empowered".—

If a Magistrate not empowered by law takes cognizance of an offence under sub-section (1), clause (a) or (b), erroneously but in good faith, his proceedings shall not be set aside merely on the ground of him not being so empowered.[3.] But if he takes cognizance of an offence under clause (c) without a complaint or police report, his proceedings shall be void.[4.]

[s 190.4] "May take cognizance of any offence".—

The word "may take cognizance" in the context means "must take cognizance". The Magistrate has no discretion in the matter; otherwise, the section will be violative of Article 14 of the Constitution.[5.]The term "taking cognizance" means any judicial action permitted by the Code taken with a view to initiate prosecution preliminary to the commencement of the inquiry or trial. It does not involve any formal action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence.[6.]

"Cognizance" means taking notice of the matter judicially. Taking of cognizance is *sine qua non* for trial. It cannot be equated with issuance of process. The complaint for offences in this case was under the Foreign Exchange Management Act, 1999 (FEMA). It was held on the facts that cognizance was taken before the period of limitation stipulated by section 49(3) of the FEMA.[7.]

Cognizance can be said to have been taken when the Magistrate applies his mind for proceeding under section 200.[8.] Whether cognizance has been taken by the Magistrate or not is a question of fact to be determined in each case.[9.] Before taking cognizance of an offence, the Magistrate has to see that the complaint constitutes an offence. He has to apply his mind whether there is sufficient cause or ground to take cognizance of the offence.[10.]

In taking cognizance, the Magistrate exercises a judicial function. Magistrate can refuse to take cognizance if he is satisfied that the complaint, case diary and

statements of witnesses recorded under sections 161 and 164 do not make out any offence. However, he cannot appreciate and weigh the evidence and the balance of probability in order to reach a conclusion as to which evidence is acceptable.[11.]

Where the Magistrate takes cognizance by rejecting the report of the investigating agency and the order is well-reasoned and shows due application of mind, superior court would refuse to interfere. Order taking cognizance can be interfered with only if it is perverse or based on no material, but while considering an order taking cognizance, superior courts are to exercise restraint.[12.]

Under section 190, it is the application of judicial mind to the averments in the complaint that constitute cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. The fact whether the evidence is adequate for supporting conviction can be determined only at the trial.[13.]

The jurisdiction of the Magistrate in the matter of issuance of process or taking of cognizance depends upon the existence of condition precedent therefor. The Magistrate has jurisdiction in the event a final form is filed (i) to accept the final form; (ii) in the event a protest petition is filed to treat the same as complaint petition and if a *prima facie* case is made out to issue processes; (iii) to take cognizance of the offences against a person, although a final form has been filed by the police, in the event he comes to the opinion that sufficient materials exist in the case diary itself therefor; and (iv) to direct reinvestigation into the matter.[14.]

Once cognizance has been taken by the Magistrate, he "takes cognizance" of an offence and not of the offenders. Once he takes such cognizance, it becomes his duty to find out who the offenders really are. If he comes to the conclusion that apart from the persons sent up by the police some other persons are also involved, it is his duty to proceed against those persons. Therefore, when a Magistrate takes cognizance under clause (b) of sub-section (1) upon a report made by a police officer, he is not restricted to issue process only to the persons challaned by the police.[15.] If, ultimately, the Magistrate forms the opinion that the facts set out in the final report constitute an offence, then he can take cognizance of the offence under clause (c), notwithstanding the contrary opinion of the police expressed in the final report.[16.]

The Supreme Court has held that before it can be said that a Magistrate has taken cognizance of an offence under clause (1)(a) of section 190 of the Code, he must not only have applied his mind to the contents of the petition but have done so for the purpose of proceeding under section 200 and the subsequent provisions of the Code. Where he applied his mind only for ordering investigation or issuing a warrant for purpose of investigation, he cannot be said to have taken cognizance of the offence.[17.] Where a complaint under section 406 Indian Penal Code (IPC) was filed in the Court of the Chief Judicial Magistrate, who transferred it to another Judicial Magistrate for disposal without taking cognizance, and the transferee Judicial Magistrate proceeded with the case, the Supreme Court held that a transferee Magistrate would not become incompetent to take cognizance in such a case, merely because the transfer of the case on his file was not in accordance with law.[18.]

The Supreme Court has held that the Magistrate can, before taking cognizance under this section, ask for investigation under section 156(3). He can also issue warrant for production before taking cognizance. But, if after cognizance has been taken, the Magistrate wants any investigation, then he should proceed under section 202 of the Code.[19.] The Magistrate should, before taking cognizance, determine whether his power is barred under any other provision, eg, section 195(1) of the Code.[20.]

A Magistrate, who on receipt of a complaint orders an investigation under section 156(3) and receives a police report under section 173(1), may, thereafter, do one of the three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under section 190(1)(b) on the basis of the police report and issue process; thus, he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under section 190(1)(a) on the basis of the original complaint and proceed to examine the complainant and his witnesses under section 200.[21.]

For taking cognizance of offence, it is not open to the court to analyse the evidence produced at that stage. The court has to consider averments made in the complaint or the charge-sheet.[22.]

Cognizance is taken by the Court of the offence which has been committed and not of the offenders who might have committed it. Persons who are not joined in the charge-sheet as accused can be summoned at the stage of taking cognizance of an offence. The Magistrate can ascertain from statement of witnesses examined by the investigating officer as to who the offenders were. There was no question of applicability of section 319 at that stage.[23.]

[s 190.5] Material relevant for taking cognizance.—

In the words of the Supreme Court[24.]:

> Where the statement made in the complaint and statements made u/s. 202 taken on face value made out the offence, taking of cognizance, would be justified. At this stage, other material could not be considered by the High Court to quash the cognizance. But at the stage of framing of charge, the accused could argue as to whether the materials on record were sufficient for framing of the charge.

[s 190.6] Maintainability of civil proceedings.—

Even in respect of commercial or money transactions, the element of cheating would not allude the criminal prosecution, which cannot be thwarted merely because civil proceedings are also maintainable. Therefore, cognizance of the offence under sections 420, 417, 467 and 471 IPC was rightly taken by the trial Court.[25.]

[s 190.7] An order of discharge is not a bar to fresh proceedings.—

An order of discharge does not operate as a bar to fresh proceedings being taken before a competent Magistrate upon a complaint or upon a police report, or under clause (c) of this section.[26.]

[s 190.8] "Upon receiving a complaint of facts which constitute such offence" [*Sub-section(1)(a)*].—

As to the definition of "complaint", see section 2(d), *supra*. The "complaint" may be by word of mouth or in writing; no prescribed form of words is necessary; all that is required is that facts, which *prima facie* constitute an offence, should be brought to the

notice of the Magistrate by the complainant.[27.] It may be made even by post.[28.] The term "complaint" will include allegations against unknown persons.[29.] As a general rule, any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence. The exceptions to this rule of which sections 195 and 198 are examples and exceptions created by statute.[30.]

In *Sarah Mathew v Institute of Cardio Vascular Diseases,* A Magistrate takes cognizance when he applies his mind or takes judicial notice of an offence with a view to initiating proceedings in respect of offence which is said to have been committed. This is the special connotation acquired by the term "*cognizance*", and it has to be given the same meaning wherever it appears in Chapter XXXVI of the Code. Cognizance is entirely an act of the Magistrate.[31.]

[s 190.9] Upon police report [*Sub-section (1)(b)*].—

This clause applies to any police report whether of a cognizable or non-cognizable offence.[32.] "Police report" means a report within the meaning of section 170. The police report must state facts which constitute the offence. This is a requisite of fundamental importance.[33.] Magistrate is not bound to accept the opinion of the police.[34.]

It has been held by a five-Judge Constitution Bench that where Magistrate disagrees with the police report, but he is convinced that case has been made out for trial against persons placed in column 2 of the report, he has jurisdiction to issue summons against them to include their names along with the main accused to stand trial. The Supreme Court repelled the interpretation advanced before it that the Magistrate cannot proceed against persons named in column 2 of the police report and would have to wait till the stage of section 319 was reached in the trial. It was held that this interpretation would not only lead to duplication of the trial as the trial may have to be commenced *de novo*, but the trial would also get prolonged.[35.]

In *Balveer Singh v State of Rajasthan,*[36.] the Supreme Court was seized of a question that whether the Court of Sessions was empowered to take cognizance of offence under sections 304B and 498A IPC, when similar application to this effect was rejected by the Judicial Magistrate, First Class (JMFC) while committing the case to Sessions Court, taking cognizance of offence only under section 306 IPC and specifically refusing to take cognizance of offence under sections 304B and 498A IPC. It was held that in the Police report which was submitted to the Magistrate, the IO (Investigating Officer) had not included the appellants as accused persons. The complainant had filed application before the learned Magistrate with prayer to take cognizance against the appellants as well. This application was duly considered and rejected by the learned Magistrate. The situation in this case is, thus, not where the investigation report/charge-sheet filed under section 173(8) of the Code implicated the appellants, and appellants contended that they are wrongly implicated. On the contrary, the police itself had mentioned in its final report that case against the appellants had not been made out. This was objected to by the complainant who wanted the Magistrate to summon these appellants as well, and for this purpose, the application was filed by the complainant under section 190 of the Code. The appellants had replied to the said application, and after hearing the arguments, the application was rejected by the Magistrate. This shows that order of the Magistrate was passed with due application of mind whereby he refused to take cognizance of the alleged offence against the appellants and confined it only to the son of the appellants. This order was not challenged. Normally, in such a case, it cannot be said that the Magistrate had played

"passive role" while committing the case to the Court of Sessions. He had, thus, taken cognizance after due application of mind and playing an "active role" in the process. The position would have been different if the Magistrate had simply forwarded the application of the complainant to the Court of Sessions while committing the case. In this scenario, the Court opined that it would be a case where Magistrate had taken the cognizance of the offence. Notwithstanding the same, the Sessions Court on the similar application made by the complainant before it took cognizance thereupon. Normally, such a course of action would not be permissible.

[s 190.10] Final report by Police.—

The police did not in a case take any action on the report of the complainant. The complainant filed a private complaint, and the Magistrate directed investigation by the police. The police submitted a final report, and thereupon the Magistrate issued a notice to the informant, who lodged a protest petition against the final report. On the prayer of the informant, the Magistrate got recorded evidence of a few witnesses under section 164 CrPC. Then the Magistrate perused the FIR, case diary, statement of witnesses recorded under section 164 CrPC and protest petition and concluded that strong *prima facie* case was made out against the accused. It was held that this had the effect of the Magistrate taking cognizance of the offence upon police report as provided under section 190(1)(b).[37.]

Even after acceptance by the Court of the final report submitted by the police, there is no bar for filing fresh complaint on the same facts, and the Magistrate can take cognizance of the offence on such complaint.[38.]

The police filed a final report to the effect that no offence as alleged in the FIR was made out. The Magistrate passed an order accepting the final report by observing that despite service of notice, the aggrieved person had failed to appear to oppose the final report, but a protest complaint was passed thereafter on the same allegations. The question was whether the Magistrate could take cognizance of the case and initiate proceedings on the protest complaint. The Supreme Court referred to a larger Bench for deciding the legal position involved in the case.[39.]

[s 190.11] Change of forum of trial by amendment of law.—

Where through Madhya Pradesh Amendment Act, 2007, Schedule I of the CrPC was amended changing forum of trial of certain offences, it was held that the amended law would govern cases that had been instituted but pending as on the date of the amendment. It was further held that if in a case involving offences covered by the state amendment, no charge-sheet has been filed till the date of amendment, it cannot be said to be pending as on the date of amendment and as such would be triable by the amended law.[40.] TS Thakur J (speaking for the Bench), explained the proposition as follows:

> 8. Applying the test judicially recognized in the above pronouncements to the case at hand, we have no hesitation in holding that no case was pending before the Magistrate against the appellant as on the date the Amendment Act came into force. That being so, the Magistrate on receipt of a charge sheet which was tantamount to institution of a case against the appellant was duty bound to commit the case to the Sessions as three of the offences with which he was charged were triable only by the Court of Sessions. The case having been instituted after the Amendment Act had taken effect, there was no need to look for any provision in the Amendment Act for determining whether the amendment was applicable even to pending matters as on the date of the amendment no case had been instituted against the appellant nor was it pending before any court to necessitate a search for any such provision in the Amendment Act. The Sessions Judge as also the High Court

were, in that view, perfectly justified in holding that the order of committal passed by the Magistrate was a legally valid order and the appellant could be tried only by the Court of Sessions to which the case stood committed.[41.]

[s 190.12] "Upon information received from any person other than a police officer" [*Sub-section 1(c)*].—

The expression "information received from any person other than a police officer" clearly means only such information as does not constitute a complaint or a police report.

This clause applies only to cases where the private individual who is injured or aggrieved or someone on his part does not come forward to make a formal complaint. It is a provision of law for enabling a public official to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute.[42.]

While acting under section 190(1)(b), the Magistrate cannot make use of any material or evidence other than the investigation records. If he chooses to make use of any other material, he will have to follow the procedure laid down in relation to complaint cases, on the basis of the original complaint or application moved under section 156(3) which otherwise tantamounts to complaint or protest petition filed against acceptance of final report treating the same as complaint.[43.]

Information under this clause is distinct from a complaint under clause (a). The essential difference between a complaint and information is that a Magistrate acts on a complaint because the complainant has asked him to act, but in the case of information, a Magistrate acts of his own accord and initiative. It is for this reason that in the latter case, section 191 requires that he must inform the accused that the accused may be tried by another Court.[44.]

Where a complaint was filed in respect of a case which the police had also taken up and, therefore, there was continuation of the police investigation, it was held that the Magistrate ought not to have issued the process against the accused without waiting for the report of the investigation. The process against the accused was stayed and direction was issued for completing investigation and clubbing the two cases.[45.]

[s 190.13] "Upon his own knowledge" [*Sub-section (1)(c)*].—

A Magistrate can take cognizance of an offence, without any complaint, only when it has come to his knowledge that such offence has been committed.[46.] Mere suspicion is not enough.[47.] A gratuitous suspicion or a belief founded on private information contained in an anonymous petition is not knowledge.[48.]

[s 190.13.1] *Locus standi.*—

Prosecuting offenders is a social need. Therefore, the concept of *locus standi* is foreign to criminal jurisprudence.[49.]

[s 190.13.2] On charge-sheet submitted by CBI.—

In one of the off-shoots of the Bofors case, the CBI submitted a charge-sheet without approval of the Central Vigilance Commission (CVC). The Supreme Court held that cognizance taken on such a charge-sheet could not be set aside, nor further proceedings were to be stopped.[50.] Directions given by the Supreme Court in *Vineet Narain v UOI*[51.] did not require the CBI to take the concurrence of CVC before filing a charge-sheet. They did not confer any right on the accused to approach CVC for restraining CBI.

[s 190.13.3] Dismissal of complaint.—

If a complaint is dismissed, fresh proceedings may be initiated upon a fresh complaint. A complaint may also be revived by a Magistrate on his own initiative or under orders of the Appellate or Revisional Court.[52.]

Where the Magistrate did not take cognizance because no *prima facie* case was made out, the Supreme Court held that the High Court could not reverse that order and ask the Magistrate to take cognizance without giving any notice to the accused. The matter was remitted to the High Court for giving opportunity of hearing to the accused.[53.]

Where a certain person was not included in the charge-sheet and the question was whether he could also be summoned after the cognizance of the offence was taken, it was held that he could be summoned by the Magistrate if some material was found against him having regard to the FIR, his statement recorded by the police and other documents. Section 319 does not operate in such a situation.[54.] Cognizance can be taken by a Magistrate of an offence (in this case, offence under section 395 IPC), though not included in the charge-sheet submitted by the police. The Magistrate became satisfied on the basis of the evidence collected by the police about the commission of that offence also by some persons other than those arrested by the police. The Supreme Court said that it was the duty of the Magistrate to proceed against such persons also.[55.]

The complaint was against alleged execution of forged will filed under sections 420, 462, 467, 468 and 471 IPC. It was rejected by the Magistrate. A subsequent application was made under section 156(3) of CrPC making similar allegations. This second complaint also disclosed no exceptional case. No fresh fact was brought to the notice of the Court. The Supreme Court said that no cognizance of the offence could have been taken or any summons could have been issued in such a case.[56.]

[s 190.13.4] Offence outside Magistrate's jurisdiction.—

A Magistrate can take cognizance of an offence, though it is beyond his territorial jurisdiction. A first-class judicial Magistrate can take cognizance of an offence whether committed within or outside his jurisdiction.[57.]

[s 190.13.5] Special Court.—

The offences under the SC & ST (Prevention of Atrocities) Act, 1989, are exclusively triable by the Special Court under section 14 of the Act. But because both the special Court and Magistrate's Court are empowered under section 190 of CrPC, they can deal with such cases at the pre-trial stage.[58.]

[s 190.13.6] Where offence becomes aggravated.—

Where initially cognizance was taken for the offence of causing grievous injuries but later on the victim died and a supplementary charge-sheet was submitted under section 302 of IPC, the supplementary charge-sheet was deemed to have been merged with the case, the cognizance of which was already taken; therefore, the Court had jurisdiction to take cognizance on the subsequent charge-sheet.[59.]

[s 190.13.7] Complaint for dishonour of cheque by power of attorney holder-Validity of cognizance.—

In a case of dishonour of cheque, where the complaint under section 138 of Negotiable Instruments Act, 1881, had been filed by a holder of power of attorney of the payee, a question was raised whether the power of attorney holder can sign and file the complaint on behalf of complainant. In view of the conflict of opinion among various High Courts and also decisions of the Supreme Court in *MMTC v Medchl Chemicals and Pharma Pvt Ltd* [60.] and *Janki Bhojwani v IndusInd Bank Ltd,*[61.] the matter was referred to a larger Bench. The larger Bench held that filing of complaint petition under section 138 of the Negotiable Instruments Act through power of attorney is perfectly legal and competent. It was further held by the larger Bench that where the power of attorney holder possessed due knowledge of the transaction, he can depose and verify the complaint in order to prove its contents. But the complaint is required to make specific assertion as to the knowledge of power of attorney holder in the impugned transaction.[62.]

[s 190.13.8] Prosecution of Army Officer.—

Under the provisions CrPC and the Prevention of Corruption Act, 1988, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Armed Forces (Jammu and Kashmir Special Powers) Act, 1990, and the Armed Forces (Special Powers) Act, 1958, the investigating agency/complainant/person aggrieved is restrained to institute criminal proceedings, suits or other legal proceedings. Thus, there is a marked distinction in the mandatory provisions of the Acts of 1990 and 1958 which are of much wider magnitude and are required to be enforced strictly.

Thus, in a case of killing of 36 Sikhs by terrorists in Jammu and Kashmir, 5 persons purported to be terrorists were killed in an encounter. The Supreme Court held that the Competent Army Authority has to exercise its discretion to opt as to whether the trial of the army officers would be by a court martial or a criminal court after filing of chargesheet.[63.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .
2. *Sival Ram*, (1956) Hyd 616; *Biroo v State*, AIR 1960 All 509 : 1960 Cr LJ 1059 .

3. **See** section 460(e), *infra*. *Chautmal v State of Rajasthan*, 1982 Cr LJ 1403 (Raj).
4. Section 461(k), *infra*.
5. *Aggarwal v Ram Kali*, AIR 1968 SC 1 : 1968 Cr LJ 82 ; *Jagarlmaudi Surya Prasad v State of AP*, 1992 Cr LJ 597 (AP).
6. *Emperor v Sourindra Mohan Chuckerbutty*, (1910) ILR 37 Cal 412; *The State v Pukhia*, AIR 1963 Raj 48 : 1963 Cr LJ 318 ; *Re Raju Thevan*, AIR 1966 Mad 349 : 1966 Cr LJ 1141 ; *State of Bihar v Sakaldip Singh*, AIR 1966 Pat 473 : 1967 Cr LJ 111 ; *RR Chari v State of UP*, AIR 1951 SC 207 : 52 Cr LJ 775.
7. *SK Sinha v Videocon International Ltd*, AIR 2008 SC 1213 : (2008) 2 SCC 492 : 2008 Cr LJ 1636 .
8. *D Lakshminarayana v Narayana*, 1976 Cr LJ 1361 : AIR 1976 SC 1672 : (1976) 3 SCC 252 ; *KG Sharma v Pratap Autowheels,* 2002 Cr LJ 3711 (Raj), when the Magistrate applies his mind for registering a case and further orders that statements of the complainant and its witnesses be recorded under sections 200 and 202, he takes cognizance.
9. *Sarup Ram v State of Haryana*, 1977 Cr LJ 1420 (P&H).
10. *State of HP v Naval Thakur*, 1991 Cr LJ 1377 (HP); *Stephen v Chandra Mohan*, 1988 Cr LJ 308 (Ker).
11. *Ajay Kumar Parmar v State of Rajasthan,* AIR 2013 SC 633 : (2012) 12 SCC 406 .
12. *Dr Mrs Nupur Talwar v CBI, Delhi*, AIR 2012 SC 847 : (2012) 2 SCC 188 : (2012) 1 SCC (Cri) 711 .
13. *Bhushan Kumar v State (NCT of Delhi*), AIR 2012 SC 1747 : (2012) 5 SCC 424 : (2012) 2 SCC (Cri) 872 .
14. *Popular Muthiah v State*, (2006) 7 SCC 296 : (2006) 3 SCC (Cri) 245 .
15. *Raghubans Dubey v State of Bihar*, AIR 1967 SC 1167 : 1967 SCR (2) 423 ; *Trinimong Sangtam v State of Nagaland*, 1978 Cr LJ NOC 174 (Gau); *Hareram v Tikaram*, 1978 Cr LJ 1687 : AIR 1978 SC 1568 : (1978) 4 SCC 58 .
16. *Abhinandan Jha v Dinesh Mishra*, (1967) 3 SCR 668 : AIR 1968 SC 117 : 1968 Cr LJ 97 .
17. *RR Chari v The State of Uttar Pradesh*, (1951) SCR 312 : AIR 1951 SC 207 : 1951 Cr LJ 775 ; *Gopal Das Sindhi v State of Assam*, AIR 1961 SC 986 : (1961) 2 Cr LJ 39 ; *Pakhand v State of UP,* 2002 Cr LJ 1210 (All).
18. *Anil Saran v State of Bihar*, AIR 1996 SC 204 : 1996 Cr LJ 408 : (1995) 6 SCC 142 .
19. *State of Assam v Abdul Noor*, AIR 1970 SC 1365 : (1970) 3 SCC 10 .
20. *Govind Mehta v State of Bihar*, AIR 1971 SC 1708 : 1971 Cr LJ 1266 : (1971) 3 SCC 329 .
21. *HS Bains v State of Union Territory of Chandigarh*, AIR 1980 SC 1883 : 1980 Cr LJ 1308 : (1980) 4 SCC 631 .
22. *Dr Subramanian Swami v Dr Manmohan Singh,* AIR 2012 SC 1185 : (2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 .
23. *SWIL Ltd v State of Delhi,* AIR 2001 SC 2747 : (2001) 6 SCC 670 ; *Manjabhai Bhagwandas Shah v State of Gujarat,* 2002 Cr LJ 2134 (Guj).
24. *Ajay Mehra v Durgesh Babu,* (2002) 9 SCC 709 ; *Rashmi Kumar v Mahesh Kumar Bhada,* (1997) 2 SCC 397 : (1999) 2 Recent Cr 43. The Court should go by the averments in the complaint and is not required to sift or appreciate evidence.
25. *Sanghhi Brothers (Indore) Ltd v Gurudev Singh Gyani & Sons*, 2003 Cr LJ 931 (MP).
26. *Emperor v Sheikh Idoo*, (1913) ILR 40 Cal 71 : (1912) 40 Cal 71 ; *Mir Ahwad Hossein v Mahomed Askair*, (1902) 29 Cal 726 (FB); *Harjinder Kaur v State of Jharkhand,* (2001) 8 SCC 394 : 2002 SCC (Cri) 88 , the Magistrate dropped one of the charges in a woman's complaint against her in-laws. He was directed to take witness statements on that charge also and then decide

about the next step. *Ashok Chaturvedi v Shitul H Chanehani,* AIR 1998 SC 2796 : (1998) 7 SCC 698 : 1998 Cr LJ 4091 , a complaint as to forgery, filing the claim as to forgery before a consumer forum, the Supreme Court said it did not have the effect of making it only a civil dispute.

27. *Queen Empress v Sham Lall*, (1887) ILR 14 Cal 707 (FB).

28. *State v SD Gupta*, 1973 Cr LJ 999 .

29. *Pravin Chandra Mody v State of Andhra Pradesh*, (1965) 1 SCR 269 : AIR 1965 SC 1185 : (1965) 2 Cr LJ 250 .

30. *Ganesh Narayan Sathe v Unknown*, (1889) 13 Bom 600; *Imperatrix v Keshavlal Jekrishna*, (1896) 21 Bom 536; *Vishwa Mitter v OP Poddar*, 1984 Cr LJ 1 : AIR 1984 SC 5 .

31. *Sarah Mathew v Institute of Cardio Vascular Diseases,* AIR 2014 SC 448 : (2014) 2 SCC 62 : 2014 Cr LJ 586 [Five Judge Bench]; *Jamuna Singh v Bhadai Shah,* AIR 1964 SC 1541 : 1964 (2) Cr LJ 468 ; *RR Chari v State of Uttar Pradesh*, 1951 SC 207 : 1951 SCR 312 : 1951 Cr LJ 775 ; *SK Saiha, Chief Enforcement Officer v Videocon International Ltd*, AIR 2008 SC 213 : 2008 Cr LJ 1636 (SC) : (2008) 2 SCC 492 —Ref.

32. *Emperor v Shivaswami*, (1927) 29 Bom LR 742 : 51 Bom 498.

33. *Nagendra Nath Chakravarti v Unknown*, (1923) 51 Cal 402 ; *Rama Sharma v Pinki Sharma*, 1989 Cr LJ 2153 (Pat).

34. *Satyapal v State of UP*, 1988 Cr LJ NOC 17 (All); See also, *Param Hansh Singh v State of UP*, 1988 Cr LJ NOC 16 (All).

35. *Dharam Pal v State of Haryana,* AIR 2013 SC 3018 : (2013) Cr LJ 3900 (SC) (Five-Judge Constitution Bench) : (2014) 3 SCC 306 .

36. *Balveer Singh v State of Rajasthan,* (2016) 6 SCC 680 : AIR 2016 SC 2266 : 2016 (5) Scale 59 .

37. *Mohd Jakaullah v Noor Mohd Khan*, 1992 Cr LJ 4022 (Ori); *Pooran Singh v State of UP,* 2003 Cr LJ 2275 (All), cognizance even after submission of police report. He is not obliged to adopt the procedure of a complaint; *Mahendra Pal Sharma v State of UP,* 2003 Cr LJ 698 (All), need not adopt the procedure of a complaint case; *Harkesh v State of UP,* 2002 Cr LJ 283 (All), the Magistrate can also take into account statements of witnesses to police made during investigation; *Harkesh v State of Uttar Pradesh*, 2002 Cr LJ 285 (All), police report under section 173(2), the Magistrate is entitled to take cognizance of an offence even if the police report is to the effect that no case is made out against the accused.

38. *Jamuna Shah v Bhuben Chandra Kalita*, 2002 Cr LJ 451 (Gau).

39. *Kishore Kumar Gyanchandani v GD Mehrotra,* (2001) 10 SCC 59 .

40. *Ramesh Kumar Soni v State of Madhya Pradesh,* AIR 2013 SC 1896 : (2013) 14 SCC 696 : 2013 Cr LJ 1738 (SC); *Jamuna Singh v Bahdai Shah,* AIR 1964 SC 1541 : 1964 Cr LJ 468 ; *Devrapally Lakshminarayana Reddy v Narayana Reddy,* AIR 1976 SC 1672 : (1976) 3 SCC : 1976 Cr LJ 1361 (SC); *Kamlapati Trivedi v State of West Bengal,* AIR 1979 SC 777 : (1980) 2 SCC 91 —Rel. on.

41. *Ramesh Kumar Soni v State of Madhya Pradesh,* AIR 2013 SC 1896 : (2013) 14 SCC 696 : 2013 Cr LJ 1738 (SC) (para 8).

42. *Surrendro Nath Roy*, (1870) 13 WR (Cr) 27.

43. *Harkesh v State of Uttar Pradesh*, 2002 Cr LJ 285 (All).

44. *Sheo Pratap Singh v Emperor*, (1930) 53 All 208 .

45. *Rabi Nath v Baula Devi,* 2003 Cr LJ NOC 155 (Ori) : (2003) 1 Ori LR 334 .

46. *Venkata Ramaniar*, (1938) Mad 814.

47. *Hiro Sah v State of Bihar*, 1980 Cr LJ 55 (Pat).

48. *Mohesh Chunder Banerjee v Ram Pursono Chowdry*, (1870) 13 WR (Cr) 1.
49. *Manohar Lal v Vinesh Anand,* AIR 2001 SC 1820 : 2001 Cr LJ 2044 : (2001) 5 SCC 407 .
50. *UOI v Prakash B Hinduja,* AIR 2003 SC 2612 : 1998 AIR SCW 645 : 1998 Cr LJ 1208 : (2003) 6 SCC 195 .
51. *Vineet Narain v UOI,* AIR 1998 SC 889 : 1998 AIR SCW 645 : 1998 Cr LJ 1208 : 1998 (1) SCC 226 .
52. *Aditya Das*, (1948) 1 Cal 407 .
53. *Bhagirath v Kana Ram,* 2001 Cr LJ 122 (SC).
54. *SWIL Ltd v State of Delhi,* (2001) 6 SCC 670 : AIR 2001 SC 2747 : 2001 Cr LJ 4173 : 2001 (5) Scale 224 .
55. *Rajinder Prasad v Bashir,* (2001) 8 SCC 522 : AIR 2001 SC 3524 : 2002 Cr LJ 90 : JT 2001 (7) SC 652 : 2001 (6) Scale 414 .
56. *Hiralal v State of UP*, AIR 2009 SC 2380 : (2009) 11 SCC 89 : 2009 Cr LJ 2849 ; *Nijay Shekhar v UOI*, AIR 2004 SC 3976 : (2004) 4 SCC 666 : 2004 Cr LJ 3857 , complaint found to be not genuine and a product of fraud, all actions taken on its basis void *ab initio*, hence quashed.
57. *Trisuns Chemical Industry v Rajesh Agarwal,* 1999 Cr LJ 4325 : AIR 1999 SC 3499 : (1999) 8 SCC 686 .
58. *Bhura Lal v State,* 1999 Cr LJ 3552 (Raj—FB).
59. *Satish Rai v State of UP*, 2003 Cr LJ 180 (All).
60. *MMTC v Medchl Chemicals and Pharma Pvt Ltd,* AIR 2002 SC 182 : 2002 Cr LJ 266 : (2002) 1 SCC 234 .
61. *Janki Vashdeo Bhojwani v IndusInd Bank Ltd,* AIR 2005 SC 439 : (2005) 2 SCC 217 .
62. *AC Narayanan v State of Maharashtra,* AIR 2014 SC 630 : 2014 Cr LJ 576 (Three-Judge Bench).
63. *General Officer Commanding v CBI,* AIR 2012 SC 1890 : (2012) 6 SCC 228 : (2012) 3 SCC (Cri) 88 .

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CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 191] Transfer on application of the accused.—

When a Magistrate takes cognizance of an offence under clause (c) of sub-section (1) of section 190, the accused shall, before any evidence is taken, be informed that he is entitled to have the case inquired into or tried by another Magistrate, and if the accused or any of the accused, if there be more than one, objects to further proceedings before the Magistrate taking cognizance, the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf.

[s 191.1] State Amendments

Punjab.— *The following amendments were made by Punjab Act No. 22 of 1983, section 7, (w.e.f. 27- 6-1983).*

S 191.—In section 191, for the words, brackets and figures "clause (c) of sub-section (1) of section 190", substitute the word, figures and letter "section 190A," and for the word "Magistrate" wherever occurring, and the words "Chief Judicial Magistrate" substitute the words "Executive Magistrate" and "District Magistrate".

Union Territory of Chandigarh.—*The following amendments were made by (Punjab Amendment) Act, 1983 (Act 22 of 1983),section 7, (w.e.f. 27-6-1983)*.

S 191.—Amendment of section 191 as under—

Section 191 shall be so read as if for the words, brackets and figures "clause (c) of sub-section (1) of section 190", the word, figures and letter "section 190A" were substituted and for the word "Magistrate" wherever occurring, and the words "Chief Judicial Magistrate" the words "Executive Magistrate" and "District Magistrate", respectively, were substituted.

This section provides that if a Magistrate takes cognizance of an offence under sub-section (1), clause (c) of section 190, and if, before any evidence is taken, the accused objects to further proceeding before such Magistrate, the case shall be transferred to another Magistrate as directed by the Chief Judicial Magistrate. A Magistrate taking cognizance of an offence under that clause is not competent to try the case unless and until he has informed the accused, before taking any evidence, that he is entitled to have his case tried by another Court.[64.]

[s 191.2] "If the accused...objects to further proceedings before the Magistrate,...the case shall be transferred."—

If the accused applies for a transfer, the Magistrate must transfer the case.[65] All that the accused is entitled to is to have the case tried by another Court. The section gives the accused no right to select or determine for himself by what other Court the case is to be tried.[66]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .
64. *Emperor v Chedi*, (1905) 28 All 212 ; *Baldeo Prasad*, (1933) 12 Pat 758.
65. *Queen-Empress v Howthorne*, (1891) ILR 13 All 345; *Chedi, ibid*.
66. *Shriniwas*, (1905) 7 Bom LR 637 .

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A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 192] Making over of cases to Magistrates.—

(1) Any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him.

(2) Any Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify, and thereupon such Magistrate may hold the inquiry or trial.

[s 192.1] State Amendments

Punjab.— *The following amendments were made by Punjab Act No. 22 of 1983, section 8 (w.e.f. 27-6-1983).*

S 192.—In section 192, for the words "Chief Judicial Magistrate", and the words "Magistrate of the First Class" or "Magistrate" wherever occurring, substitute the words "District Magistrate" and "Executive Magistrate" respectively.

Union Territory of Chandigarh.— *The following amendments were made by (Punjab Amendment) Act, 1983 (Act 22 of 1983), section 8, (w.e.f. 27-6-1983).*

S. 192.—Amendment of section 192 as under—

Section 192 shall be so read as if for the words "Chief Judicial Magistrate", and the words "Magistrate of the first class", or "Magistrate" wherever occurring, the words "District Magistrate" and "Executive Magistrate", respectively, were substituted.

The provisions of this section are intended for distribution of work where there are more Magistrates than one at a place.

This section provides for transfer of cases to a subordinate Magistrate who is competent to proceed with the inquiry or trial. Section 410 enables a superior Magistrate to withdraw any case from or recall any case which he has transferred to any subordinate Magistrate. Under this section, no notice to the accused is necessary. But under section 410, the Magistrate should record his reasons.

Transfer of proceedings after the party, against whom a conditional order was made under section 133 has shown cause, is not invalid.[67.]

[s 192.2] Power of Chief Judicial Magistrate [*Sub-section (1)*].—

Under this sub-section, the Chief Judicial Magistrate is empowered to transfer a case to subordinate Magistrates. Under sub-section (2), any first-class Magistrate may transfer a case to any other competent Magistrate in his district who is competent to try the accused or commit him for trial.

[s 192.3] "After taking cognizance of an offence".—

Cognizance is not confined to offences only. Cognizable may be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Code, for example, cases under sections 107, 110 and 145.[68.] A Magistrate can transfer only those cases of which he has taken cognizance under section 190.[69.] A Magistrate cannot transfer a case which has been transferred to his Court.[70.]

The Supreme Court has held that section 192(1) CrPC has conferred a special power on the Chief Judicial Magistrate, as normally, a Magistrate taking cognizance of an offence has himself to proceed, but an exception has been made in the case of the Chief Judicial Magistrate, may be because he has some administrative functions to perform.[71.]

[s 192.4] "Make over the case".—

There is a class of cases which a Magistrate must transfer to another Magistrate, see section 352, *infra*.

This section provides for making over of the whole case and not a particular portion of it, and the Magistrate to whom the case is transferred is to decide the entire case and to dispose of it finally.[72.]

The transfer is not limited to a "criminal case" only. The phrases "case" and "criminal case" are not co-extensive and are not used indiscriminately or interchangeably. The phrase "criminal case" is intended to be used in a limited sense and not to apply to every case cognizable by the criminal Court.[73.] The class is not restricted to criminal cases only but is wide enough to include any case triable by any criminal Court.[74.]

[s 192.5] "For inquiry or trial".—

"Inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court [see section 2(*g*) *supra*].

[s 192.6] "To any competent Magistrate subordinate to him".—

The transfer of a case under this section must be from any one of the Magistrates mentioned in sub-sections (1) and (2) to a subordinate Magistrate.

For subordination of Magistrates, see Chapter II.

[s 192.6.1] Effect of transfer.—

Where a case has once been made over by a Chief Judicial Magistrate or a Magistrate of the first class duly empowered to another Magistrate for trial, the former has no jurisdiction to do anything more in the matter so long as the transfer to the Magistrate is in existence.[75.] Where a case is made over to a subordinate Magistrate, no other Magistrate is competent to deal with it, and applications for warrants against other persons concerned in that offence should be made to the Magistrate before whom the case is, and to no other Magistrate.[76.]

[s 192.6.2] Notice of transfer.—

Notice of transfer should be served upon the parties so as to enable any or either of the parties to come forward and show cause why such transfer should not be made.[77.]

[s 192.7] Transfer to competent Magistrate [*Sub-section (2)*].—

Under this sub-section, a Magistrate of the first class, duly empowered to transfer cases, can transfer a case for an inquiry or trial to a competent Magistrate.

This sub-section does not authorise transfer for trial to a subordinate Magistrate of cases which are not within the powers of that Magistrate to try.[78.] If the Magistrate to whom a case is transferred lacks jurisdiction to try the case, the order of transfer is bad in law.[79.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

67. *Mahadeb v Adhir Kumar*, 1970 Cr LJ 573 : AIR 1970 Cal 169 ; **see** contra *Suresh Chandra v Puttu Lal*, 1972 Cr LJ 1336 .

68. *Hafizar Rahman v Aminal Haque*, (1941) 1 Cal 67 .

69. *Gopaldas v State of Assam*, AIR 1961 SC 986 : (1961) 2 Cr LJ 39 ; *Md Abdullah Khan v State of Bihar,* 2002 Cr LJ 3875 (Pat).

70. *Jarina Bibi v Bank Ray Riang*, AIR 1966 Tripura 22 .

71. *Anil Saran v State of Bihar*, AIR 1996 SC 204 : 1996 Cr LJ 408 : (1995) 6 SCC 142 .

72. *Pran Krishan Das v Shyam Sundar Sarkar*, (1950) 2 Cal 365 ; *Raghubansh Dubey v The State of Bihar*, AIR 1964 Pat 487 : 1964 Cr LJ 569 .

73. *Lolit Mohan Moitra v Surja Kanta Acharjee*, (1910) ILR 28 Cal 709.

74. *Chintamon Singh v The Emperor*, (1907) 35 Cal 243 ; *King Emperor v Munna*, (1901) 24 All 151 ; *Satish Chandra v Rajendra Narain*, (1895) 22 Cal 898 .

75. *Shanto Teorni v Belilias*, (1869) 12 WR (Cr) 53.

76. *Golapady Sheikh v Queen-Empress*, (1900) ILR 27 Cal 979; *Ajab Lal Khirher v The Emperor*, (1905) 32 Cal 783 ; *Amrit Majhi v Emperor*, (1919) ILR 46 Cal 854.
77. *Teacotta Shekdar v Ameer Majee, Hafiz Paikar*, (1882) 8 Cal 393 .
78. *Khandu Ganu*, (1896) Unrep CRC 383.
79. *Mathura v Kamta*, (1940) 15 Luck 468 .

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CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 193] Cognizance of offences by Courts of Session.—

Except as otherwise expressly provided by this Code, or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

The object of restricting a Sessions Court from taking cognizance of any offence, except in certain cases, unless the case has been committed to it by a Magistrate serves the purpose of securing a preliminary inquiry, however restricted, so that the accused becomes acquainted with the circumstances of the offence. Thus, the accused gets some information about the case he is to meet.

[s 193.1] "Except as otherwise expressly provided by this Code".—

The expression "except otherwise expressly provided" means except positively provided differently in clear and unambiguous language.[80.] Except in cases in which a Court of Session is expressly empowered to take cognizance of an offence as a Court of original jurisdiction, it has no power to do so unless a commitment has been made by a Magistrate duly empowered in that behalf.[81.] A Sessions Judge can well proceed against a person, though not committed for trial by a Magistrate, if his involvement in the commission of crime *prima facie* appears from the record, even when no evidence has been recorded in the case.[82.] Where the Sessions Court received orders from the Supreme Court, cognizance of the offence by it without the committal proceedings was valid.[83.]

Once the case is committed to the Sessions, bar of section 193 CrPC is lifted and the Sessions Court is invested with complete unfettered jurisdiction of the Court of original jurisdiction to take cognizance of the offence which includes summoning of the persons whose complicity in the commission of crime is *prima facie*, gathered from the available material.[84.]

There is a Supreme Court ruling to the following effect.[85.]:

> Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid before the Special Court under the Act.[86.]

1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

80. *Gangula Ashok v State of AP*, AIR 2000 SC 740 : 2000 Cr LJ 819 : (2000) 1 KLT 609 : (2000) 2 SCC 504 .

81. *Emperor v Moula Khan*, (1907) 27 AWN 178.

82. *Kishun Singh v State of Bihar*, (1993) 2 SCC 16 : 1993 Cr LJ 1700 (SC); *Ranjit Singh v State of Punjab*, AIR 1998 SC 3148 : (1998) 7 SCC 149 : 1998 Cr LJ 4618 , Sessions Court does not have the power to summon an additional accused under section 193.

83. *Ravi Shankar Mishra v State of UP*, 1991 Cr LJ 213 (All).

84. *Nisar v State of UP*, (1995) 2 SCC 23 : 1995 Cr LJ 2118 (SC).

85. *Gangula Ashok v State of AP*, (2000) Cr LJ 819 : (2000) 1 Rec Cri R 797 : AIR 2000 SC 740 : (2000) 2 SCC 504 .

86. The view taken by the High Courts of Madhya Pradesh (*Meerabai v Bhujbai Singh*, (1995) Cr LJ 2376 (MP); *Pappu Singh v State of UP*, (1995) Cr LJ 2803 (All); *Jhagur Mahto v State of Bihar*, (1993) (1) Crimes 643 (Patna); *Jyoti Arora v State of Haryana*, 1998 (2) All CLR 73 : (1998) Cr LJ 2662 (P&H); *Referring Officer Rep By State of AP v Shekar Nair*, (1999) Cr LJ 4173 (AP) on the aforesaid question was approved by the Hon'ble Supreme Court. *Vidhyadharan v State of Kerala*, AIR 2004 SC 536 : (2004) 1 SCC 215 : 2004 Cr LJ 605 , a special Court remains an ordinary Court of session, there can be no cognizance unless the case is committed by a Magistrate.

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A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 194] Additional and Assistant Sessions Judges to try cases made over to them.—

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

This section gives to the Sessions Judge the power of distribution of business. The word "cases" does not include appeals.[87.] The High Court also may, by special order, direct the Additional Sessions Judge or Assistant Sessions Judge to try cases.[88.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

87. *Abdur Razzak*, (1915) 37 All 286 .

88. *Keshar Singh v State (Delhi Administration)*, 1989 Cr LJ 1 : AIR 1988 SC 1883 : (1988) 3 SCC 609 .

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CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 195] Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.—

(1) No Court shall take cognizance—

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence,

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

[89.] **[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.]**

(2) Where a complaint has been made by a public servant under clause (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court no further proceedings shall be taken on the complaint:

Provided **that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.**

(3) In clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or

Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

***Provided* that—**

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

Sections 195 to 199 are exceptions to the general rule that any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence.[90.] This section must be read along with section 340, *infra*.

The operation of this section is only confined to certain offences under the IPC.

The Supreme Court has held that this section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, on the ground that the latter offence is a minor one of the same character, or by describing the offence as one punishable under some other section of the IPC, though in truth and substance, the offence falls in the category of sections mentioned in this section.[91.] It is applicable even in a case initiated on a police report and is not restricted to those started on private complaints.[92.] Where a complaint indicates that the accused is guilty of offences enlisted in section 195 along with other offences not so enlisted, it was held that prosecution for those other offences falling outside the purview of section 195 can be made without a complaint from a public servant.[93.] For example, section 186 IPC is applicable to a case where the accused voluntarily obstructs a public servant in the discharge of his public functions, but under section 353 IPC, the ingredients of assault or use of criminal force against a public servant while he is doing his duty are necessary. The quality of the two offences is different, and section 195 does not bar the trial of an accused for an offence under section 353, though it may practically be based on the same facts as are required for the prosecution under section 186 IPC. Thus, a complaint by the public servant envisaged by section 195 of the Code was not necessary for cognizance of an offence under section 353 IPC.[94.] Prosecution of an informant...written complaint of the concerned police officer to whom false information was given.[95.] Where no separate and distinct offence under section 419/420 IPC was made out, it was held that no cognizance on a private complaint could be taken.[96.]

Where however the offences were inseparable and were based on identical facts and circumstances, complaint by a Court being necessary in respect of one, a trial should not be proceeded in the absence of such complaint as was required by section 195 of the Code.[97.] Where the complaint was made by an authority incompetent in terms of section 195 CrPC, the Supreme Court held it unsustainable in law.[98.]

[s 195.1] Object.—

The object of the section is to stop private person from obtaining sanction as a means of wreaking vengeance and to give the Court full discretion in deciding whether any prosecution is necessary or not. Now sanction to prosecute cannot be granted to a private person.[99.] Private prosecution, in every case, is more likely to be inspired by the avenging spirit and, indeed, in a system of criminal administration, where the party wronged, rather than a public official, is given the conduct of prosecution, the vice of over-eagerness to obtain the convictions predominates. The evil may not be avoided altogether. But, at least in the case of offences where the act to a great extent affects the dignity and prestige of the Courts concerned, it is deemed inexpedient to allow such acts to be the sports of personal passions.[100.]

The Supreme Court has held that every incorrect or false statement does not make it incumbent upon the Court to order prosecution. The Court should exercise judicial discretion in the light of all relevant circumstances. The Court orders prosecution in the larger interest of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or serve the ends of a private party.[101.] Where a minor girl was in the custody of a person who was called upon to produce the girl before the Madras High Court, the person having produced a substituted girl identifying her and asserting her to be the same girl, the High Court lodged a complaint for giving false evidence and misleading the High Court.[102.] In *Dhiren Dave v Surat Dyes*,[103.] the Supreme Court accepted the unconditional apology tendered for false statements before Company Court and also quashed the contempt proceedings.

[s 195.2] Scope.—

The scope of this section as regards the making of complaints is not restricted to the Courts detailed in section 476, namely civil, revenue and criminal Courts. There may be Courts outside the three classes, which may properly come under this section.[104.] See sub-section (3) where "Court" is explained to include a Tribunal; but the Tribunal should be declared by the Act which constitutes it to be a Court for the purposes of the present section.

The provisions of this section do not apply to defamation and a person who is defamed by a witness when in the witness box is at liberty to file a complaint against his defamer. It is not necessary that the Court should itself complain or that the sanction of the Court should be obtained.[105.]

While prosecuting an accused for an offence mentioned under section 195, it is mandatory to follow the procedure prescribed therein, else such action is rendered void *ab initio*.[106.] The Supreme Court explained it as follows:

"Provisions of section 195 are mandatory and no Court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section. It is settled law that every incorrect or false statement does not make it incumbent upon the Court to order prosecution, but requires the Court to exercise judicial discretion to order prosecution only in the larger

interest of the administration of justice." Section 340 CrPC prescribes the procedure as to how a complaint may be preferred under section 195 CrPC. A complaint outside the provisions of section 340 CrPC cannot be filed by any civil, revenue or criminal Court under its inherent jurisdiction.[107.]

[s 195.3] "No Court shall take cognizance" [*Sub-section (1)*].—

This section merely prohibits the entertainment of a complaint in a Court governed by the Criminal Procedure Code without a complaint in writing of the public servant as required by clause (a) or the Court as required by clause (b). The Court cannot assume cognizance without such complaint by a competent public servant. The charges framed without such complaint and conviction made on its basis were held as liable to be quashed.[108.]

A Magistrate may take cognizance of an offence under section 45 of the Advocates Act, 1961 on a private complaint, wherein it was alleged that the accused was practising without enrolment, but he cannot take cognizance of an offence under section 467 IPC as the jurisdiction is barred under section 195(1)(b)(ii) of the Code, unless a complaint by the Court is made, where the alleged forged document has been filed.[109.]

[s 195.3.1] Clause (a).—

The offences referred to in this clause relate to contempt of the lawful authority of public servants (Chapter X, IPC) and also of attempt to commit or conspiracy to commit such offence or abetment thereof. This clause requires a complaint in writing of the public servant concerned or of some public servant to whom he is administratively subordinate, before a Court can take cognizance of these offences.

The expression "complaint" in this section is used in the ordinary sense of a report in writing disclosing an offence and not in the technical sense of excluding the report of a police officer, as defined in section 2(d).[110.]

The power of police to investigate into an FIR filed in relation to an offence committed in Court proceedings is not controlled or circumvented by the embargo under section 195 against prosecution of public servants. The Court cannot take cognizance after completion of investigation in view of the embargo in section 195.[111.]

The bar under section 195(1)(b)(ii) is not applicable to a case in which the forgery of a document was committed before the document was produced before the Court.[112.] It applies to a document which is still in the custody of the Court.[113.]

In *Kailash Mangal v Ramesh Chand,*[114.] the Supreme Court held that the object of the bar under section 195(1)(b)(ii) to take cognizance of offence punishable under section 193 IPC unless written complaint is made by the court concerned is to stop private persons from wreaking vengeance.

[s 195.4] "Except on the complaint in writing of the public servant, *etc*."—

"Public servant" is defined in section 21 IPC. The responsibility for prosecution under the present section rests upon the public servant or Court entirely, such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party and merely sanctioned by the Court.

The complaint is to be made *in writing* in order to remove the inconvenience, which might be felt if it were made incumbent on the public servant to attend the Court and to appear before the Magistrate in order to lodge the complaint.

Where the utterances complained of could not be claimed to have been done in the purported exercise of the official duties of the accused, the cognizance can be taken by the Court even in the absence of sanction. The gravity of the offence is absolutely irrelevant in claiming the protection.[115.]

A complaint in writing by the public servant concerned is a condition precedent to the cognizance being taken by a Magistrate of an offence under this section and that condition must be strictly complied with. A complaint not by the public servant concerned or by some public servants to whom he is administratively subordinate, but by a person who is merely authorised in writing to file a complaint in his own name is not a good substitute for the requisite complaint so as to confer jurisdiction upon the Magistrate. This section does not permit any delegation of authority by the public servant concerned.[116.]

An investigation initiated on the basis of information received should not be quashed at the initial stage. This should be particularly so when the charges are of grave nature. The bar contemplated by section 195 can be gone into after taking cognizance of the offence.[117.]

In a case of tendering false evidence before the Rent Controller, where a private complaint was filed, it was held by the Supreme Court that Rent Controller discharges quasi-judicial function and is not a Court in the conventional sense. Therefore, the Rent Controller cannot make a complaint under section 340 CrPC Thus, the private complaint in respect of tendering false evidence before Rent Controller was held to be maintainable.[118.]

[s 195.5] "Or of some other public servant to whom he is administratively subordinate".—

The word "subordinate" means inferior and bound to obey lawful orders of his official superior. Although police officers in a district are generally subordinate to the District Magistrate, the subordination contemplated by this section is not such subordination. That subordination contemplates some superior officer of police.[119.] A Subordinate Judge can grant a sanction to prosecute in respect of an offence committed before a Commissioner appointed by him.[120.]

[s 195.6] "In, or in relation to, any proceeding in any Court" [*Sub-section (1)(b)*].—

The offence must have been committed "in, or in relation to, any proceeding in any Court".[121.] These words are very general and are wide enough to cover a proceeding in contemplation before a criminal Court, though it may not have begun at the date when the offence was committed.[122.] They should not be construed narrowly. An offence which is committed in or in relation to any proceeding in the trial Court is also committed "in relation to" the appeal in the appellate Court. For example, the offence of perjury, although it was committed in the trial Court, must be deemed to have been also committed in relation to the appeal in the Appellate Court, because the person

committing it does it with the intention of influencing the proceedings in the trial Court as well as in subsequent proceedings if there was an appeal.[123.]

The Court before whom the offences specified in this clause are committed or the Court to which such Court is subordinate must file a complaint in writing if it is of opinion that proceedings should be taken in the interest of justice.[124.]

Where a complaint was filed under sections 465, 471, 120B and 201 IPC for using forged documents in a Civil Suit, which was still pending, it was held that section 195(1)(b)(ii) CrPC would have no application if the forgeries had been committed before they were produced in the Court in the Civil Suit.[125.]

For attracting section 195(1)(b)(ii), it is necessary that the offences enumerated in the section must be committed during the time that the document was in *custodia logis*. Section 195 is not a penal provision. The rule of strict construction does not apply. It includes documents forged prior to their submission in the Court under section 195. It would render the victim of the offence remediless.[126.] In *George Bhaktan v Rabindra Lele,*[127.] it was held that the view taken by the Constitution Bench in *Iqbal Singh Marwah*[128.] was the correct law and the reliance by High Court on *Gopalakrishna Menon*[129.] was misplaced.

In a case of forgery of judicial records of Allahabad High Court, the accused persons claimed to have obtained an order from the High Court in a writ petition, where in fact no such writ petition was filed in the High Court. The Lucknow Bench of Allahabad High Court directed the State Government to act in accordance with law. Accordingly, a complaint was filed against the accused persons under sections 420, 120B, 196 and 193 IPC. This complaint was filed by an official of the High Court without any sanction or approval of the High Court, and this fact was stated in the affidavit filed by the High Court before the Supreme Court. As such, it was held that the complaint was filed without any authority, and the Magistrate cannot take cognizance of the case as there was no valid complaint before him.[130.]

[s 195.7] "Offence committed in respect of a document produced or given in evidence".—

The offence must be committed in respect of a document produced or given in a proceeding in any Court. The question, therefore, whether it is committed by a party to the proceeding or any witness becomes irrelevant for the purpose of the Court being the complainant. Furthermore, even in cases of any criminal conspiracy to commit or attempt to commit or abetment of such offences (i.e., offences mentioned in sections 463, 471, 475 or 476 of the Indian Penal Code), the provisions are attracted.

The document must be produced or given in evidence in a proceeding in any Court. Where, therefore, the Magistrate orders an investigation under section 156(3) of the Code and the alleged forged receipt is produced by the accused in the inquiry by the police and is then seized by them, then the forged document cannot be held to have been produced in a proceeding before any Court.[131.] But the forgery may be committed even after the initiation of proceedings.[132.] Held, that the offence of conspiracy committed during preparation of paper book for appeal to the Supreme Court did not attract section 195(1)(b)(ii) as such paper book was not a document given in evidence.[133.] Where the accused produced a copy of the partnership deal forged by him, the original partnership deed not having produced, it was held that the bar under section 195(1)(b)(ii) was not attracted.[134.] This section has no application to a case in which a document is fabricated prior to its production.[135.]

The Privy Council has held that this clause refers to a document alleged to be forged and not a copy of it[136.] or, as held by the Supreme Court, an attested copy of it.[137.] In a case under sections 167/205/420/465/466/467/471 and 477A, IPC, the accused were alleged to have forged certain documents and filed a suit on their basis, it was held that procedure contemplated in section 195(2)(b) CrPC must necessarily be followed as offences under sections 474 and 477A IPC are integral parts of the offences covered by section 195 CrPC and form part of the same transaction. The Court said that section 195(1)(b)(ii) CrPC covers an offence alleged to have been committed in respect of a document produced in any Court, even prior to the initiation of the proceedings in a Court.[138.]

The Supreme Court has held that the section gets attracted when the original document is produced in the Court. Where, however, the cognizance was taken before the filing of the original, the Court was not debarred from proceeding with the case.[139.]

As to the definition of "document", see section 3 of the Indian Evidence Act, 1872 The word "produced" will cover every document that has been filed or put into Court. The "production" of a document in Court is not the same thing as "giving it in evidence". A document produced in Court means one which is produced for the purpose of being tendered in evidence or for some other purpose.[140.] A document is "given in evidence" when it is handed over by the person tendering it to the Court, even though on inspection the Court rejects it as evidence for insufficiency of stamp or want of registration,[141.] or returns it to the party producing it and does not take it on the file.[142.]

The document in connection with which the offences are alleged to have been committed must have been actually produced in Court in the suit in which the offences are said to have been committed. If the document is not produced in Court but is disclosed in an affidavit filed therein and is filed in the office of the Translator of the High Court for translation, no complaint by the Court is necessary.[143.] Where forgery was committed by fabricating a sale-deed, although fabricated deed could not be produced in the Court, an FIR was lodged and investigation proceeded and a civil suit was also filed for cancellation of the deed, it was held that police had all the powers to investigate such a case as forgery was committed in respect of the sale-deed prior to its production in evidence, and the civil suit did not affect the criminal case.[144.]

[s 195.7.1] Prosecution for fabricating false evidence.—

The provisions of sections 195 and 340 do not circumscribe the power of police to investigate. Section 195 becomes applicable once investigation is completed. The Court can then file a complaint under section 340 on the basis of FIR and material collected during investigation. The respondent could not be said to be deprived of the right of appeal as provided under section 341. Section 195 is not applicable at the stage of investigation. The non-consideration of the question whether section 195 is applicable or not could be a ground for quashing FIR.[145.]

[s 195.7.2] Sections 191 and 192, IPC.—

Sections 191 and 192 IPC are sections which define offences for which punishment is provided in section 193 IPC, and section 193 is mentioned in section 195(1)(b)(i) CrPC. The provisions of section 195(1)(b)(i) CrPC are applicable to offences under sections 191 and 192 IPC.[146.]

Prosecution for perjury is required only where perjury appears to be deliberate and conscious and conviction is reasonable, probable or likely. Thus, where complaint is

filed after about 4 years on the basis of mere impression that deposition on affidavit by respondent is false, it was held that it cannot be said that there was deliberate and conscious attempt to mislead the Court. Hence, the dismissal of application under section 340 read with section 195(1)(b) of the Code was proper and no interference was called for.[147.]

In a complaint of forgery, where the High Court in its affidavit filed before the Supreme Court stated that the complaint was filed by person without the sanction or approval of the High Court, it was held that the complaint was without authority and the Magistrate cannot take cognizance of the case and proceed with the matter as there was no valid complaint before him.[148.]

[s 195.7.3] Private Complaint.—

Where a forged document which was produced before the investigating officer was produced in Court by way of evidence, and a private complaint as regards the offence of forgery was filed on the basis of which the person who allegedly committed the offence was tried, the bar under section 195(1)(b)(ii) did not apply.[149.]

[s 195.8] "That Court".—

The words "that Court" include the successor of the Judge before whom the offence is alleged to have been committed.[150.] When a suit is tried by a Judge of the High Court, the term "Court" must be taken to mean the High Court.[151.] The complaint required by this section is the complaint of the Court in which the documents were given in evidence and not of the trial Judge only and there is nothing to prevent any Judge of the High Court from dealing with the matter.[152.] The sales tax officer was held not to be Court.[153.] The "Court" means civil, revenue or criminal Court and includes a tribunal, constituted by and under a Central or State Act, if declared by that Act to be a Court. The Registrar of Co-operative Societies held to be not "Court" for the purpose of this section.[154.] A commission of inquiry under the Commissions of Inquiry Act was not "Court".[155.]

The words "that Court" mean the very Court before which the document is alleged to have been produced or given in evidence.[156.]

Where the forged affidavit was filed before the Supreme Court, it was held that the Supreme Court could not try and punish the accused. The order of the Supreme Court convicting him and sentencing him to three months' imprisonment was set aside. There is no original jurisdiction with the Supreme Court to try such an offence. However, no direction was given to the competent Court to try the case because the accused had already served out his imprisonment of 3 months.[157.]

[s 195.9] "Some other Court to which that Court is subordinate".—

The Legislature has not confined the right to complain to the Court before which the offence is committed, but has conferred it also on the Court to which it is subordinate. The word "subordinate" is explained in sub-section (4). Thus, it had been held that the Court of an Assistant Collector is not subordinate to that of the Magistrate of the district,[158.] but he is subordinate to the District Judge.[159.] A Full Bench of the Patna

High Court held that a Special Judge under Prevention of Corruption Act (49 of 1988) is not subordinate to Sessions Judge.[160.]

[s 195.10] Meaning of term "Court" [*Sub-section (3)*].—

The use of the word "includes" shows that the meaning of the word "Court" has been deliberately made wider.[161.] The question whether a tribunal is also a Court for purposes of the present section will be determined by the Act which constitutes such tribunal stating whether it is so.

The Supreme Court has observed:

> The clear language of s. 195(3), Cr.P.C. unmistakably depicts the restrictive intent of the legislature and if the intent was otherwise to include an Arbitral Tribunal within the fold of s. 195(3) of the Code, that is to say, if the legislature wanted to confer such a status there was no difficulty as such in incorporating thereunder a provision as is contained in the Debt Recovery Act (*vide* Section 22); Income Tax Act (*vide* Section 136); Motor Vehicles Act [*vide* Section 169(2)]; Administrative Tribunals Act [*vide* section 22(3)]; Consumer Protection Act; MRTP Act; and Companies Act *etc*. since these statutes have definitely included and declared the Tribunal being ascribed to be a Court within the meaning of s. 195 of the Criminal Procedure Code. The inclusion of explanatory provision by way of sub-s. (3) makes the situation abundantly clear.[162.]

The word "Court" does not include the Compensation Officer appointed under the Bihar Land Reforms Act, 1950, for the purpose of determining compensation for divesting the proprietor, tenure-holder or intermediary of his right in the estate or tenure under the Act. The Supreme Court said in the case *Keshab Narayan Banerjee v State of Bihar*:

> The word "Court" is a word of very wide connotation. In legal parlance, it indicates a place where justice is judicially administered. But for the purposes of s. 195(1)(b) of the Code, definition of "Court" contained in sub-s. (3) of s. 195 of the Code has to be seen. The term "Court" had a wider meaning under the old Code but under the new Code it is given a restricted meaning. Now the word "Court" in s. 195 does not include all the judicial bodies and authorities constituted for administering justice. The Courts contemplated now by s. 195 are only civil Courts, revenue Courts and criminal Courts and those tribunals which are required by the Acts constituting them to be Courts for the purposes of s. 195.[163.]

[s 195.11] Subordinate to Court to which appeals ordinarily lie [*Sub-section (4)*].—

This subsection applies only where a complaint has been made under sub-section (1)(b) by a Court and not when a complaint has been made under sub-section (1)(a) by a public servant.[164.] Where offences alleged were under sections 192, 193, 423, 465, 466, 467 and 468 in a proceeding filed by a private complainant in respect of agreement of sale, it was held that bar under section 195(1)(b) would prevent cognizance of offences other than those under sections 423 and 468.[165.]

[s 195.12] "Appeals ordinarily lie".—

The Court which hears appeals only on transfer by a superior Court is not such a Court to which appeals ordinarily lie.[166.] A decree in a special instance may be appealable to the High Court; still, if appeals from the Court of the First Class Subordinate Judge ordinarily lie to the District Court, the former is subordinate to the latter Court.[167.]

A Magistrate who has been directed and/or empowered to hear appeals under some provisions of the Code is not the "Court" to which appeals ordinarily lie.[168.] Where a public servant is acting as a Court, he is subordinate to the Court to which appeals lie from his Court. For subordination of Magistrates and Judges, see Chapter II.

The Court of a single Judge of the High Court is subordinate to the Division Bench of the High Court hearing appeals from such Court in certain cases.[169.]

[s 195.12.1] Jurisdiction where appeals lie in two Courts [*Proviso, clause (a)*].—

Where appeals from a Court lie in two different appellate Courts, one of which is of inferior jurisdiction, then the appellate Court of inferior jurisdiction is the Court to which the original Court is subordinate.[170.]

[s 195.12.2] Subordination in dual jurisdiction [*Proviso, clause (b)*].—

Appeals from a Court may in certain cases go to a civil Court and in other cases to a revenue Court. When there is dual jurisdiction, the question of subordination must be decided according to the nature of the case in connection with which the offence is alleged to have been committed.

[s 195.12.3] Cognizance of offences committed in Court.—

Where a Magistrate initiated criminal proceedings against few persons for the offences committed before him in his Court under sections 172, 173, 176, 177, 187, 193 read with sections 107 and 120B IPC, it was held that the complaint ought to have been filed under section 195(1) CrPC and not under section 190(1)(c). The Court said that section 352 gives few exceptional cases in which the Court can itself take cognizance of the offences committed before him. However, the Court is not competent to lay a complaint before itself and take cognizance of the offences complained of. The legal maxims *Nemo debet esse judex in propria causa* (No man can be judge in his own cause) and *Nemo potest esse simul actor et judex* (No man can be at once judge and suitor) were quoted in support of the order.[171.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

89. Subs. by Act 2 of 2006, sec. 3, for "except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate" (w.e.f. 16-4-2006).

90. *Re Ganesh Narayan Sathe*, (1889) 13 Bom 590.

91. *Basir-ul-Huq v State of West Bengal*, (1953) SCR 836 : AIR 1953 SC 293 : 1953 Cr LJ 1232 ; *Durgacharan v State of Orissa*, AIR 1966 SC 1775 : (1966) 3 SCR 636 : 1966 Cr LJ 1491 ; *Murugesan v State of TN*, 1990 Cr LJ 1833 (Mad); *Manoranjan v State of Orissa*, 1990 Cr LJ 183 (Ori); *HN Manjegowda v State of Karnataka*, 1988 Cr LJ 807 (Karn).

92. *Vindhya Basini Prasad v State of UP*, 1982 Cr LJ 2177 .

93. *M Chacko v State of Kerala*, 1985 Cr LJ 120 (Ker).

94. *Shankarvappa Sangappa Walikar v Allisab*, 1977 Cr LJ (NOC) 218 (Kant); *State of Karnataka v Hema Reddy*, 1981 Cr LJ 1019 : AIR 1981 SC 1417 .

95. *Krishanagopal v Purushottam*, 1987 Cr LJ 1946 (MP); *Daulatram v State of Punjab*, AIR 1962 SC 1206 : (1962) 2 Cr LJ 286 ; *State of Punjab v Brij Lal Palta*, AIR 1969 SC 355 : 1969 Cr LJ 645 .

96. *Padohi Ram v State of UP*, 1990 Cr LJ 495 (All).

97. *Basappa Basavantappa Sureban v Ningangouda*, 1978 Cr LJ 460 (Kant).

98. *Babita Lila v UOI*, (2016) 9 SCC 647 .

99. *Re Gafur Daud Saheb*, (1924) 26 Bom LR 1235 : 85 Ind Cas 64.

100. *Kedar Nath Sen v Amulya Ratan Sanyal*, (1942) 1 Cal 278 : AIR 1942 Cal 79 .

101. *Santokh Singh v Izhar Hussain*, AIR 1973 SC 2190 : 1973 Cr LJ 1176 : (1973) 2 SCC 406 .

102. *R Rathinam v Kamla Vaiduriam*, 1993 Cr LJ 2661 (Mad).

103. *Dhiren Dave v Surat Dyes,* (2016) 6 SCC 253 .

104. *Hari Charan Kundu v Kaushi Charan De*, (1940) 2 Cal 14 : AIR 1940 Cal 286 .

105. *Nallappa Goundan v Chinnammal*, (1942) Mad 158 : (1941) 2 Mad LJ 618; *Satish Chandra Chakrawarti v Ram Doyal De*, (1920) 48 Cal 388 (SB); *Muhammad Isa v Nazim Husain*, (1940) All 314 : AIR 1940 All 246 ; *Mst Binia v Crown,* ILR (1937) Nag 338 ; *Chotalal v Phulchand*, (1947) Nag 425. In *Narasimaiah v State of Karnataka*, 2002 Cr LJ 4795 (Kant), it was held that police could investigate into the offence of forgery and for that purpose, filing of a complaint was not necessary. Court would not come into picture till the alleged offence of forgery was fully investigated by police and charge-sheet was laid before Court.

106. *Saloni Arora v State of NCT of Delhi,* AIR 2017 SC 391 : [2017] 2 MLJ (Crl) 2017 : LNIND 2017 SC 23 .

107. *MS Ahlawat v State of Haryana*, AIR 2000 SC 168 : 2000 Cr LJ 388 : (2000) 1 SCC 278 .

108. *C Muniappan v State of TN*, AIR 2010 SC 3718 : (2010) 9 SCC 567 ; *Mukesh Chand Sharma v State of UP*, AIR 2010 SC 812 : (2009) 15 SCC 519 : 2010 Cr LJ 890 , another example of abuse under the section.

109. *Rajendra Singh v Surendra Singh*, 1992 Cr LJ 3749 (MP) : 1992 (0) MPLJ 650 .

110. *Judhistir Ganda v State,* (1956) Cut 470 : AIR 1956 Ori 211 : 1956 Cr LJ 1420 ; *Re Periasami Nadan*, AIR 1965 Mad 526 : 1965 Cr LJ 780 .

111. *State of Punjab v Raj Singh*, AIR 1998 SC 768 : 1998 Cr LJ 1104 : (1998) 6 SCC 404 .

112. *Sachida Nand Singh v State of Bihar*, AIR 1998 SC 1121 : 1998 Cr LJ 1565 ; *Punjab State Co-op Supply and Marketing and Federation Ltd v BS Aulakh*, AIR 1997 SC 2001 : (1997) 2 Serv LR 565, investigation ordered into forged document filed in the Court. In *Sada Singh v State of UP*, 2002 Cr LJ 3686 (All), forgery committed before the documents were filed in the Court. *Srinivasa Rao v State of AP*, 2002 Cr LJ 3880 (AP), forgery before filing. *Tukaram Annaba Chavan v Machindra Yeshwant Patil*, AIR 2001 SC 994 : 2001 Cr LJ 1164 , a private complaint before the criminal Court related to election of Board of directors of an Education Society was registered under Bombay Public Trusts Act. The allegation was that the accused persons got affixed bogus fake signatures for showing that a new executive body was resolved to be set up. The matter was pending before the Assistant Charity Commissioner who was competent to determine the validity of a change report. Criminal proceeding was stayed.

113. *Ram Khelawan v State of UP*, 1998 Cr LJ 2331 (All—FB).

114. *Kailash Mangal v Ramesh Chand,* (2015) 15 SCC 729 : 2015 (2) Scale 615 .

115. *Namdeo Kashinath Aher v HG Vartak,* (1969) 71 Bom LR 758 : AIR 1970 Bom 385 : 1970 Cr LJ 1427 : ILR 1970 Bom 464 .

116. *Krishna Tukaram Jadhav v Secretary to the Chief Minister, Bombay State,* (1954) 57 Bom LR 151 : 1955 Cr LJ 1156 : 1955 ILR (Bombay) 402. In *Karan Singh v State of MP*, 2003 Cr LJ 1787 (MP), disobedience of an order duly promulgated by a public servant was observed. There was a complaint against misuse of water from a public tank for purposes of irrigation. The Court said that the complaint could only be filed by the Authority which had passed the order. The proceedings initiated on the complaint of a subordinate officer were liable to be quashed.

117. *Manohar M Galani v Ashok N Advani*, (1999) 8 SCC 737 : AIR 2000 SC 202 : 2000 Cr LJ 406 .

118. *Iqbal Singh Narang v Veeran Narang,* AIR 2012 SC 466 : (2012) 2 SCC 60 : (2012) 1 SCC (Cri) 740 .

119. *Ramasory Lall v Queen-Empress*, (1900) ILR 27 Cal 452.

120. *Emperor v Nana Khanderao*, (1927) 29 Bom LR 1476 : AIR 1927 Bom 647 . In *Buddhi Kota Subbarao v K Parasram*, AIR 1996 SC 2687 : 1996 Cr LJ 3983 , an ex Navy Captain, detained on charges of carrying atomic secrets abroad, consent by AG of India for prosecution and authorisation by the Department of Atomic Energy.

121. *Govind Padurang*, (1920) 45 Bom 668 : 22 Bom LR 1239 : AIR 1921 Bom 366 .

122. *Re Vasudeo*, (1922) 24 Bom LR 1153 .

123. *Ketki Kunwar v Sheo Narain Jafa*, (1941) 53 All 799 ; *Emperor v Hasam*, (1934) 36 Bom LR 221 : AIR 1934 Bom 185 .

124. *Maneklal*, (1926) 28 LR 1296 .

125. *T Govindraju v State of Karnataka*, 1995 Cr LJ 1491 (Knt).

126. *Iqbal Singh Marwah v Meenakshi Marwah*, AIR 2005 SC 2119 : (2005) 4 SCC 370 : 2005 Cr LJ 2116 .

127. *George Bhaktan v Rabindra Lele,* (2014) 15 SCC 227 : 2014 (11) Scale 613 .

128. Supra.

129. *Gopalakrishna Menon v D Raja Reddy,* (1983) 4 SCC 240 : AIR 1983 SC 1053 : 1983 (2) Scale 236 .

130. *CBI, Lucknow, UP v Indra Bhushan Singh*, AIR 2014 SC 1907 : (2014) 12 SCC 100 .

131. *Nirmaljit v State of West Bengal*, AIR 1972 SC 2639 : 1973 Cr LJ (SC) 237 : (1973) 3 SCC 753 .

132. *Vivekanand v State*, 1969 Cr LJ 460 : AIR 1969 All 189 .

133. *Dr SLGoswami v High Court of Madhya Pradesh at Jabalpur*, AIR 1979 SC 437 : 1979 Cr LJ 193 : (1979) SCC (Cri) 311 . **Also see** *Legal Remembrancer of Govt of WB v Haridas Mundva*, AIR 1976 SC 2225 : 1976 Cr LJ 1732 : (1976) 1 SCC 555 .

134. *Sushil Kumar v State of Haryana*, 1988 Cr LJ 427 : AIR 1988 SC 419 ; *Gurbachan Singh v Sant Singh*, 1988 Cr LJ 99 (P&H); *Ramnarain v State of Rajasthan*, 1989 Cr LJ 760 (Raj).

135. *Harbans Singh v State of Punjab*, 1986 Cr LJ 1834 (P&H).

136. *Sanmukhsing v The King*, (1949) 52 Bom LR 465 : 77 IA 7; *Budhu Ram v State of Rajasthan*, (1963) 3 SCR 376 : (1963) 2 Cr LJ 698 .

137. *Budhu Ram, ibid*

138. *Andhra Bank v Station House Officer, Pattabhipuram, Crimes Police Station, Guntur*, 1996 Cr LJ 277 (AP).

139. *Surjit Singh v Balbir Singh*, AIR 1996 SC 1592 : 1996 Cr LJ 2304 : (1996) 3 SCC 533 .

140. *Re Gopal Sidhesvar*, (1907) 9 Bom LR 735 , approved in *Nirmaljit v State of West Bengal*, AIR 1972 SC 2639 : (1973) SCC (Cri) 521 .

141. *Queen Empress v Nagindas*, (1886) *Unrep* CRC 242, Cr R No. 10 of 1886.

142. *Emperor v Gulabchand Rupji*, (1925) 27 Bom LR 1039 : 49 Bom 799.

143. *Munisamy Mudaliar v Rajaratnam Pillai*, (1922) 45 Mad 928 (FB).

144. *Ram Singh v State of UP*, 1996 Cr LJ 96 (All).

145. *M Narayandas v State of Karnataka,* AIR 2004 SC 555 : (2003) 11 SCC 251 : 2004 Cr LJ 822 .

146. *Premjit Kaur v Harsinder Singh*, (1982) 2 SCC 167 (167) : 1982 SCC (Cri) 379 (1).

147. *Ashok Kumar Aggarwal v UOI,* AIR 2014 SC 1020 : (2013) 15 SCC 539 : 2014 Cr LJ 1213 ; *Karunakaran v TV Eachara Warrier,* AIR 1978 SC 290 : 1978 Cr LJ 339 ; *KTMS Mohd v UOI,* AIR 1992 SC 1831 : 1992 Cr LJ 2781 ; *Iqbal Singh Marwah v Meenakshi Marwah,* AIR 2005 SC 2119 : 2005 Cr LJ 2161 ; *RS Sujatha v State of Karnataka*, (2011) 5 SCC 689 : (2011) 5 SCC 689 —Ref.

148. *CBI, Lucknow, UP v Indra Bhushan Singh,* AIR 2014 SC 1907 : (2014) 12 SCC 100 .

149. *Bagh Singh v Iqbal Singh*, 2002 Cr LJ 1891 (P&H).

150. *Bahadur v Eradatullah*, (1910) ILR 37 Cal 642 FB; *Nawal Singh*, (1912) 34 All 393 ; *Rathi Ram v State*, AIR 1960 Pat 206 ; *Ramautar v Rajindra Singh*, (1961) 2 Cr LJ 139 . But **see** contra *Ramzani v State*, AIR 1960 All 350 : 1960 Cr LJ 774 .

151. *Bai Kasturbai v Vanmalidas*, (1925) 49 Bom 710 : 27 Bom LR 616.

152. *Varadarajulu*, (1937) Mad 612.

153. *Jagannath Prasad v State of UP*, AIR 1963 SC 416 : (1963) 1 Cr LJ 330 .

154. *Raghunath v Satyabadi*, 1988 Cr LJ 1554 (Ori).

155. *Baliram v Justice B Lentin*, 1989 Cr LJ 306 : AIR 1988 SC 2267 : (1988) 4 SCC 419 .

156. *Nirmaljit v The State of West Bengal*, AIR 1972 SC 2639 : 1973 CLR (SC) 237.

157. *Randhir Singh v State of Haryana*, AIR 2000 SC 544 : 2000 Cr LJ 755 : (2000) 1 SCC 760 .

158. *Empress v Narotam Das*, (1883) 6 All 98 .

159. *Shankar Dial v AM Venables*, (1896) 19 All 121 .

160. *Ravi Nandan Sahai, Sessions Judge, Patna, Re*, 1993 Cr LJ 2436 (Pat) (FB).

161. *Shiv Kumar v State*, AIR 1963 All 395 : 1963 Cr LJ 118 ; *Hridayangshu Bhattacharjee v State of Jharkhand*, 2003 Cr LJ 624 (Jhar). Section 195 is closely related to section 340. Even if any forged document had been produced in civil case as alleged, an enquiry will be held in accordance with section 340. Any Court as described under section 195(3) would be empowered to hold the enquiry if any application is filed under section 195(1)(b)(ii).

162. *Manohar Lal v Vinesh Anand*, AIR 2001 SC 1820 at p 1826 : 2001 Cr LJ 2044 .

163. *Keshab Narayan Banerjee v State of Bihar*, (2000) 1 SCC 607 : AIR 2000 SC 485 : 2000 Cr LJ 595 .

164. *Maini Missir v Emperor*, (1927) ILR 6 Pat 39 : AIR 1927 Pat 111 .

165. *Kodat Ramana alias Venkrama Rao v Station Home Officer*, 1992 Cr LJ 680 (AP).

166. *Subbamma*, (1904) 27 Mad 124; *Ram Charan v Taripulla*, (1912) 39 Cal 774 .

167. *Anant Ramchandra*, (1886) 11 Bom 438; *Maduray Pillai v Elderton*, (1895) 22 Cal 487 .

168. *Eroma Variar v Emperor*, (1903) 26 Mad 656.

169. *Duraiswami v Sivanupandia*, (1944) Mad 643; *Naraindas v The State of Uttar Pradesh*, (1961) 1 SCR 676 : AIR 1961 SC 181 : (1961) 1 Cr LJ 317 .

170. *Imperatrix v Lakshman Sakharam*, (1877) 2 Bom 481; *Anant Ramchandra*, (1886) 11 Bom 438.

171. *S Dashmantha Reddy v State of AP*, 1996 Cr LJ 1804 (AP).

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CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1]

[172][s 195A] Procedure for witnesses in case of threating *etc*.—

A witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code (45 of 1860).]

This new provision was inserted in the Code by amending in 2009. The provision empowers a witness or any other person to file a complaint in relation to an offence under section 195A IPC for threatening to give false evidence.

1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

172. Ins. by Act 5 of 2009, section 17 (w.e.f. 31-12-2009).

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CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 196] Prosecution for offences against the State and for criminal conspiracy to commit such offence.—

(1) No Court shall take cognizance of—

(a) any offence punishable under Chapter VI or under section 153A, [173.] [section 295A or sub-section (1) of section 505] of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in section 108A of the Indian Penal Code (45 of 1860),

except with the previous sanction of the Central Government or of the State Government.

[174.][**(1A) No Court shall take cognizance of—**

(a) any offence punishable under section 153B or sub-section (2) or sub-section (3) of section 505 of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence,

except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.]

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under section 120B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit [175.][an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:

Provided **that where the criminal conspiracy is one to which the provisions of section 195 apply, no such consent shall be necessary.**

(3) The Central Government or the State Government may, before according sanction [176.][under sub-section (1) or sub-section (1A) and the District Magistrate may, before according sanction under sub-section (1A)] and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being

below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of section 155.

The offences described in this section are, in the main, offences against the State or the nation and conspiracy to commit such offences. The object is to prevent prosecution by private persons. This is again another example of the exception to the general rule that Courts can be set in motion by any person having knowledge of the commission of an offence.

The object of section 196 of the Code is to ensure prosecution only after due consideration by the appropriate authority so that frivolous or needless prosecutions are avoided. Sanction of a prosecution must be expressed with sufficient particularity to indicate clearly the matter which is to be the subject of the proceeding, and it should be apparent from the order of sanction that the authority had applied its mind to the facts constituting the offence. In according or withholding the sanction, the Government acts purely in an executive capacity and not in a judicial capacity. The sanction need not be based on any legal evidence, nor is it necessary that the authority should give reasons for sanctioning or withholding the prosecution.[177.] However, such sanction should be based on consideration by the sanctioning authority of the basic facts. Where sanction to prosecute under section 3 of the Import and Export Control Act was given even when basic facts constituting the offence were not placed before such authority, the order granting sanction was held bad.[178.] The Trial Court deciding that it would decide whether sanction was necessary after gathering materials and evidence was held to be legal. The High Court refused to interfere with it.[179.] A criminal conspiracy to suppress evidence of commission of offence or to screen the offenders from legal punishment does not attract section 196(2).[180.] A perusal of sub-sections (1A) and (2) of section 196 of the Code, as reproduced above, would show that sanction was not required for criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards.[181.]

[s 196.1] Court which can take cognizance [*Sub-section (1)*].—

Under this sub-section, the following offences, *viz.*, offence against the State (Chapter VI, Indian Penal Code), offence of promoting enmity between groups (section 153A, Indian Penal Code), imputations prejudicial to national integration (section 153B, Indian Penal Code), outraging of religious feelings (section 295A, Indian Penal Code), statements conducing to public mischief (section 505, Indian Penal Code), criminal conspiracy to commit such offences and abetment in India of such offences committed outside India, cannot be taken cognizance of by any Court except with the prior sanction of the Central Government or of the State Government.

A prosecution was launched under section 295A of the IPC (Outrage to religious feelings) without sanction under section 196(1) CrPC. It was held that the prosecution was liable to be quashed.[182.]

[s 196.2] Converting to Christianity [*Section 196 (1A)*].—

The allegation was instigating Hindus to convert to Christianity. It was held that cognizance of such offence could be taken only with the sanction of the Central Government. This bar applies only to taking cognizance. The bar does not apply against registration of the criminal case or investigation by police. The police arrested

the accused and produced him before the Magistrate. The Magistrate remanded the accused to judicial custody under section 167. The Supreme Court held that the passing of the order of remand did not amount to taking cognizance.[183.] The Court further held that the inherent power under section 482 could not be used to interfere with the statutory power of police to conduct investigation into a cognizable offence.[184.]

[s 196.3] Consent of District Magistrate [*Sub-section (2)*].—

In cases of criminal conspiracy punishable under section 120B, Penal Code, other than one to commit a cognizable offence punishable with death, imprisonment for life or rigorous imprisonment for two years or above, no Court should take cognizance except where either the District Magistrate or the State Government consents to the initiation of the proceedings in writing. Where the previous section is applicable, consent becomes unnecessary.[185.]

Both the State Government and the Central Government and also the District Magistrate may, before according sanction or giving assent, as the case may be, order an investigation for finding out whether such sanction should be given, or assent accorded. The investigation shall be conducted by a police officer not below the rank of an Inspector.

The question whether the committal Magistrate takes cognizance of the offence while committing the case to Session Court and, therefore, it is necessary that the order granting sanction for prosecution has to be produced before the Magistrate or is it the Sessions Court which takes cognizance after committal of the case to it and therefore, the order granting sanction has to be produced before it was not considered to be necessary to decide since in any event, Sessions Court takes cognizance of the offence irrespective of whether earlier the committal Magistrate had taken cognizance of the same offence for committal of the case. In this case, the contention that the order of sanction having not been produced before the committal Magistrate the entire proceedings were vitiated, was raised for the first time before the High Court in revision and since even considering that contention, on facts, it was not possible to grant substantial relief to the petitioner. The Special Leave Petition was not granted.[186.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

173. Subs. by Act 63 of 1980, section 3(a), for "section 153B, section 295A or section 505" (w.r.e.f. 23-9-1980).

174. Ins. by Act 63 of 1980, section 3(b) (w.r.e.f. 23-9-1980).

175. Subs. by Act 45 of 1978, section 16, for "a cognizable offence" (w.e.f. 18-12-1978).

176. Subs. by Act 63 of 1980, section 3(c), for "under sub-section (1)" (w.r.e.f. 23-9-1980).

177. *Inguva Mallikarjuna Sharma v AP*, 1978 Cr LJ 392 (AP—DB).

178. *UOI v Samarathmal*, 1990 Cr LJ 1153 (MP).

179. *Bakshish Singh v Gurmej Kaur*, 1988 Cr LJ 419 : AIR 1988 SC 257 .

180. *TV Sharma v Meeriah*, AIR 1980 AP 219 (DB).

181. *State of Punjab v Sunder Singh*, 1992 Cr LJ 1330 (P&H).

182. *Manoj Rai v State of MP*, AIR 1999 SC 300 : (1999) 1 SCC 728 .

183. *State of Karnataka v Pastor P Raju*, AIR 2006 SC 2825 : (2006) 6 SCC 728 : 2006 Cr LJ 4045 .

184. *Ibid*

185. *Nar Bahadur Bhandari v State*, (2003) Cr LJ 2799 (Sikk), consent was not necessary for prosecution under the prevention of Corruption Act, 1988, when the offence under sections 5(2) and 5(1)(d) was punishable with imprisonment up to 7 years.

186. *Dharmesh v State of Gujarat*, 2002 SCC (Cr) 1327 : AIR 2002 SC 2784 : (2002) 6 SCC 370 .

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A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 197] Prosecution of Judges and public servants.—

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction [187.][save as otherwise provided in the Lokpal and Lokayuktas Act, 2013]—

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

[188.] [*Provided* that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted;]

[189.] [*Explanation.*— For the removal of doubts it is hereby declared that no sanction shall be required in case of public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, [190.][section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB] or section 509 of the Indian Penal Code (45 of 1860).]

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

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[191][(3A) **Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.**

[192](3B) **Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.]**

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

[s 197.1] State Amendments

Assam.—*The following amendments were made by Assam (President's Act 3 of 1980, section 3) (w.e.f. 5-6-1980)*.

S 197.—In its application to State of Assam for section 197(3) substitute the following:—

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply,—

(a) to such class or category of the members of the forces charged with the maintenance of public order, or

(b) to such class or category of other public servants (not being persons to whom the provisions of sub-section (1) or sub-section (2) apply) charge with the maintenance of public order,

as may be specified in the notification, wherever they may be serving, and thereupon the provisions of sub-section (2) shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" was substituted.

Manipur. —*The following amendments were made by Manipur Act 3 of 1983 (w.e.f. 3 of 1983).*

S 197. — In its application to State of Assam for section 197(3) substitute the following:—

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply,—

(c) to such class or category of the members of the forces charged with the maintenance of public order, or

(d) to such class or category of other public servants (not being persons to whom the provisions of sub-section (1) or sub-section (2) apply) charge with the maintenance of public order,

as may be specified in the notification, wherever they may be serving, and thereupon the provisions of sub-section (2) shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" was substituted.

Maharashtra.—*The following amendments were made by Maharastra Act 60 of 1981, section 2 (w.e.f. 5-10-1981)*.

S 197A.—In its application to the State of Maharashtra after section 197, section 197A inserted:—

S 197A.—**Prosecution of Commissioner or Receiver appointed by Civil Court.**—When any person who is a Commissioner or Receiver appointed by a Court under the provisions of the Code of Civil Procedure, 1908, is accused at any offence alleged to have been committed by him while acting or purporting to act in the discharge of his functions as Commissioner or Receiver, no Court shall take cognizance of such offence, except with the previous sanction of the Court, which appointed such person as Commissioner or Receiver as the case may be.

This section is intended to guard against vexatious proceedings against Judges, Magistrates, public servants, not removable from office except by or with the sanction of the Government, and members of the Armed Forces without the sanction of higher authorities. The privilege of immunity from prosecution without sanction only extends to acts which can be shown to be in the discharge of official duty.[193.]

This section applies where the act or omission on the part of a public servant complained of is closely and inseparably connected with the duties which such public servant has to perform and such act or omission amounts to an offence.[194.] For the applicability of section 197, it is not enough to be merely a public servant. "It has to be further shown (i) that such a public servant is or was removable from office by or with the sanction of the Government, and (ii) that the alleged offence should have been committed by him while acting or purporting to act in discharge of his duties."[195.]

[s 197.2] Criminal Law (Amendment) Act, 2013.—

The present amendment has been inserted on the recommendation of the Justice JS Verma Committee. The "explanation" inserted after sub-section (1) of section 197, seeks to do away with the requirement of sanction for prosecuting a public servant for offences alleged to have been committed by him under the sections enumerated in the explanation. Thus, a public servant who commits sexual offences or offences under sections 166A and 166B, cannot claim the protection of sanction.

[s 197.3] Criminal Law (Amendment) Act, 2018.—

In section 197(1) of the Code of Criminal Procedure, in the Explanation, for the words, figures and letters "section 376A, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB" have been substituted. The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of section 197.

[s 197.4] Scope.—

The protection given by this section applies not only to a person who is still a public servant at the time the prosecution is launched, but it extends also to a person who is no longer a public servant at that particular time, but, was in office when the offence charged with, was said to have been committed. The protection is necessary as much after retirement as before; otherwise, a private person harbouring a grievance against the public official may wait until he retires and then lodge a complaint. If the ultimate object is to see that there are no vexatious proceedings for things done in exercise of official duty, then protection should be accorded equally to those who have retired. Where a former minister was charged with corruption and conspiracy, it was held that since the accused ceased to be a public servant at the time when the Court was asked to take cognizance, the question of previous sanction did not arise.[196.] The protection under section 197 is available to a public servant even after retirement in respect of offences punishable under IPC. But sanction to prosecute a public servant for the offences under Prevention of Corruption Act is not required if the public servant had already retired on the date of cognizance by the Court. However, the prosecution cannot wait for a public servant to retire before proceeding.[197.]

Sanction of the Central Government for the prosecution of its employee for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty is necessary only when such employee is not removable from his office save by or with the sanction of the Central Government.[198.] Sanction is necessary if acts complained of a public servant are so integrally connected with the duties attached to the office, as to be inseparable from them. But if there is no necessary connection between them and the performance of the duties, then no sanction is necessary.[199.]

Sanction under this section is not necessary before a public servant could be prosecuted for an offence of bribery under section 161 of the Penal Code.[200.]

The special protection afforded by section 197 should be strictly construed and unless material is placed before the Court in support of a claim for its protection, ordinarily the accused should be treated by ordinary law.[201.] In order to determine whether in a particular case a public servant is entitled to the protection of section 197 CrPC, all that has to be considered is whether the act complained of against the public servant which is alleged to constitute the offence was committed by him while discharging his official duty and that such act had a reasonable connection with his official duty. It is not material whether in discharging such official duty, the public servant acted somewhat in excess of his limits. One safe and sure test for determining whether there was a reasonable connection between the act complained of and the official duty of the public servant would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his

official duty.[202.] The question whether the act was in excess would not be relevant when it is found that it had some correlation with the duty. When there is no correlation, sanction would not be necessary.[203.]

There are three facets in the consideration of the protection given by section 197 to the acts done by public officers. (1) Where there is something in the nature of the act complained that attaches to it the official character of the person doing it; (2) where the official character or status of the accused gave him an opportunity of doing the act and (3) where the offence is committed at a time when the accused was engaged in his official duty. The first is the correct facet to which section 197 applies.[204.] Question whether sanction is required is one of fact to be determined on the basis of duties to be discharged and relations of such duties to be act complained of.[205.] Offences relating to pollution of water or air could not be taken cognizance of without the sanction of the Board constituted under the Water (Prevention and Control of Pollution) Act, 1974 sections 49 to 60 and Air (Prevention and Control of Pollution) Act, 1981.[206.] Sanction for prosecution is also required in respect of Class III and IV employees of the Police force.[207.]

However, where a Magistrate wrote in a letter to the District Judge that an advocate was "rowdy", "a big gambler" and "a mischievous element", a criminal complaint against him by the advocate did not require sanction for prosecution under section 197.[208.] It has been held that absence of sanction to prosecute as required by section 197 vitiates the trial.[209.] Without such a sanction, a complaint cannot be entertained.[210.]

The requirement of prior sanction is a matter of procedure. It does not go to the root of the jurisdiction. Section 19(3)(c) of the Prevention of Corruption Act, 1988 further reduces the rigour of the prohibition under section 19(1) by providing that in cases of public servants under the Act, sanction is automatic. Sanction under section 197 CrPC depends on facts. Section 19 of the Prevention of Corruption Act and section 197 of the Code thus operate in different fields.[211.]

Principles emerging from various pronouncements have recently been summarised in *Devinder Singh v State of Punjab through CBI* as follows:[212.]

The principles emerging from the aforesaid decisions are summarized hereunder:

I. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

II. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 Cr.P.C. has to be construed narrowly and in a restricted manner.

III. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under section 197 Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

IV. In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under Section 197 Cr.P.C. but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was

incomplete without proving, the official act, ordinarily the provisions of Section 197 Cr.P.C. would apply.

V. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.

VI. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before Appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

VII. Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

VIII. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

IX. In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial.

[s 197.5] "Not removable from his office save by...Government" [*Sub-section (1)*].—

These words refer to "public servant" and not to "Judge" or "Magistrate". Sanction of the Government is necessary for the prosecution of a Judge, but in the case of a public servant, he must come within the category of public servants not removable from their office without the sanction of Government. The section does not apply to public servants whom some lower authority has by law or rule or order been empowered to remove. It clearly intends to draw a line between public servants and to provide that only in the case of the higher ranks should the sanction of the State Government to their prosecution be necessary. Thus, an honorary organiser of Co-operative Credit Societies,[213.] or a police constable or a Sub-Inspector of police,[214.] a receiver appointed by a Civil Court,[215.] or a Vice-President of a municipality governed by the Bombay Act III of 1909,[216.] or a Chairman of the Standing Works and the Town Planning Committee under Calcutta Municipal Act, 1951,[217.] does not come in this category and can be prosecuted without a sanction as contemplated by this section. A police inspector is removable from office without the sanction of the State Government. Hence, he cannot have protection from prosecution under section 197(1).[218.] No sanction is required for the prosecution of officers of the State Electricity Board as they are not employed in connection with the affair of the State Government.[219.] No sanction is required for the prosecution of employees of a nationalised bank.[220.] Sanction held not necessary for the prosecution of Sarpanch and Secretary of the Gram Panchayat for misappropriation of funds.[221.] Where a Civil Court Amin was prosecuted on a private complaint under sections 148, 149, 427, 107, 114, 453, 448 and 398 IPC and the complaint *prima facie* disclosed the offence, the

order of the Magistrate discharging the accused on the ground that sanction from the Government for his prosecution was required under section 197(1) CrPC was set aside, and it was held that no sanction was required for prosecution of Amin working in District Munsif's Court because for his removal from service, the Government need not pass any orders. Sanction under section 197(1) CrPC is required only when the public servant can be removed only by the order of the Government.[222.]

Where many employees and other persons associated with the Madras Corporation were prosecuted for various offences, the Supreme Court held that sanction for their prosecution accorded by a superior authority than the appointing authority was a valid sanction.[223.]

[s 197.5.1] ***Semi Government agencies.—***

For the prosecution of a peon of the Oriental Insurance Co., who could be removed by the Divisional Manager or Manager of the Company, no sanction was required.[224.] The appellant, a Government Officer, was working on deputation as the managing director of a Cooperative Society. He was held to be not a public servant within the meaning of section 21 of IPC, nor deemed to be a public servant within the meaning of section 123 of the Haryana Cooperative Societies Act, 1984.[225.] The Supreme Court[226.] has held that employees of a corporation are not public servants for the purposes of section 197 and cannot claim protection under it.

[s 197.6] "While acting or purporting to act in the discharge of his official duty" [*Subsection (2)*].—

A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to be within the scope of his official duty. Thus, a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government Medical Officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that what he does is in virtue of his office.[227.] The former Nagpur High Court has held that the section applies to acts committed by a public servant under the cloak of his official position, although those acts were not part of his duties.[228.] The Patna High Court has held that an act which is the very contrary of the duties of a public servant cannot be said to be done by a public servant while acting or purporting to act in the discharge of his official duties,[229.] e.g., where a public servant retains Government money with himself without entering it in cash book.[230.] The act of taking a bribe is not an act done in the execution of duty or purporting to be done in the execution of duty.[231.] The offence must be so connected with the official act as to form part of the same transaction.[232.] The mere fact that an opportunity to commit an offence is furnished by the official duty cannot even remotely justify the view that the acts complained of are within the scope of official duty.[233.]

The real test to be applied to attract the applicability of section 197(3) is whether the act which is done by a public officer and is alleged to constitute an offence was done by him whilst acting in his official capacity, though the act was neither a part of his duty nor within his right as such public officer. The act complained of may be in exercise of the duty or in dereliction of the duty; if the act complained of is done while acting as a public officer and in the course of the same transaction in which the official duty was performed or purported to be performed, the public officer would be protected. The offence in this case was the failure to produce the detinues within 24 hours before a

Magistrate. This was held to be a failure which was a natural part of the official duty.[234.]

The act and the official duty should be so inter-related that it can be reasonably postulated that the act was done in performance of official duty, though possibly in excess of the needs and requirements of the situation.[235.] As an act can be performed both in the discharge of official duty and in dereliction of it, one must see that there is a reasonable connection between the act and the discharge of official duty.[236.] The Privy Council has held that the sanction of the Government under sub-section (1) is not necessary for the prosecution of a public servant charged under section 161 of the Penal Code with accepting a bribe.[237.] Where a Deputy Magistrate was engaged in demanding taxes from the inhabitants of a village for maintaining an additional police force and immediately after he had threatened the defaulters he turned towards the complainant and assaulted him, it was held that the alleged offence was so connected with the official duty as to become inseparable from it, and that the sanction was necessary.[238.] Where a Magistrate took cognizance without prior sanction of an offence under section 304A IPC for the death of a woman due to negligence of a Government doctor, it was held that if a public servants' act is connected with his duties, advance sanction would be necessary, if there is no nexus between the act complained of and his official duties, no sanction would be necessary.[239.]

In *NK Ganguly v CBI, New Delhi,*[240.] it was held that for purpose of obtaining previous sanction from appropriate Government under section 197 CrPC, it is imperative that alleged offence is committed in discharge of official duty by the accused. It was also held important for courts to examine allegations against accused to decide whether previous sanction is required to be obtained from appropriate Government before taking cognizance of alleged offence against accused.

In *Rajib Ranjan v R Vijaykumar,*[241.] the Supreme Court held that even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of section 197 will not be attracted.

Where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him, is not while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences. Such being the position, the provisions of this section are inapplicable and no sanction is necessary.[242.] Committing an offence of criminal breach of trust cannot be said to be in discharge of the official duty and hence no sanction for prosecution is required.[243.] Sanction was held not required for prosecution of a police officer for causing death of a person in custody through the use of third-degree methods.[244.] No sanction is required for prosecuting a public servant for conspiracy and bribery.[245.]

In *Inspector of Police v Battenapatla Venkata Ratnam,*[246.] the Supreme Court held that public servants have been treated as a special category under section 197 to protect them from malicious or vexatious prosecution, and the same cannot be treated as a shield to protect corrupt officials. The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty and provisions of section 197 were held inapplicable.

The Supreme Court has again stated that the test to determine is whether the alleged action which constituted an offence had a reasonable and rational nexus with the

official duties required to be discharged by the public servant. If the answer is in affirmative, then sanction for his prosecution is required to be obtained.

[s 197.6.1] Complaint of police excess in search.—

The search of the house of the complainant was conducted by the police after obtaining warrant from competent authority and under the supervision of an executive Magistrate. No complaint whatsoever was made to the Magistrate at the time. Subsequently, a complaint was filed that the police abused and assaulted the housewife. The Supreme Court held that no cognizance of the alleged offence could be taken without proper sanction of the Government.[247.]

[s 197.6.2] Police excess in election duty.—

The appellant, a police officer in-charge of a police station, was on duty to prevent any breach of law and maintain order on the polling day. The complaint was that the deceased was beaten to death by a police constable on the election date at the instance of the appellant. It was held by the Supreme Court that the act in question was committed by the appellant during the performance of his duty and therefore sanction was necessary for his prosecution. The sanctioning authority cannot postpone decision on the matter.[248.]

[s 197.6.3] Removal of tea stall.—

The accused (appellant) removed the tea stall of the complainant. The act was done in pursuance of a policy decision of the State Government and order passed by the executive engineer. The statement of executive engineer on the basis of which the accused was charge-sheeted did not disclose any offence. No allegation was there in the complaint that the accused had transgressed his authority or committed the alleged crime. The Court said that even if the statement of the executive engineer was taken as correct, sanction for the prosecution should have been obtained.[249.]

[s 197.6.4] Burden of proving act done in official course.—

The Magistrate issued process for appearance of the accused on being satisfied that there was a sufficient ground for proceeding. The accused pleaded before the Magistrate that the offence happened to be committed in the discharge of official duty and that the Court had no power to take cognizance without sanction. It was held that the accused could produce relevant material to establish the necessary ingredients for invoking section 197.[250.]

[s 197.7] "Take cognizance" [*Sub-section (1)*].—

No Court can take cognizance of an offence committed by a Judge or a public servant in his public capacity without a sanction. Sanction order is necessary to give jurisdiction to the Court for taking cognizance of an offence.[251.] But the complainant can be examined without a sanction. The accused cannot be summoned or evidence against him cannot be taken without a sanction. Until the sanction is obtained, the tribunal by which the offence is triable has no jurisdiction, and a conviction founded on

evidence taken without sanction is bad.[252.] Mere fact that the accused proposes to raise a defence of the act having been done in exercise of duty will not itself be sufficient to justify the dismissal of the case for want of sanction. The necessity for sanction may be established by facts proved.[253.]

[s 197.8] "Sanction" [*Sub-section (1)*].—

A sanction is an order directing the prosecution of a certain person, and in the ordinary way, that order is conveyed to the authorities who are responsible for initiating prosecution in the locality in question.[254.] In a corruption case against a police officer, the Supreme Court held, when the sanctioning authority had personally scrutinized the file and arrived at the required satisfaction, which was evident from the sanctioning order itself, it could not be said that there was non-application of mind on the part of the sanctioning authority.[255.]

Grant or refusal of sanction for prosecution is not a quasi-judicial function. Therefore, the competent authority is not required to hear the person for whose prosecution sanction is sought before taking a decision in the matter. What is required to be seen by the Competent Authority is whether the facts placed before it, *prima facie* disclose commission of an offence by such public servant. If the Competent Authority is satisfied that the material placed before it is sufficient for prosecution of the public servant, then it is required to grant sanction, otherwise it can refuse sanction.[256.]

[s 197.9] Stage for obtaining sanction [*Sub-section (1)*].—

The Supreme Court has observed that the point of the requirement of sanction could be raised at any time after cognizance of the offence is taken, may be even at the time of the conclusion of the trial or even after conviction.[257.] The Court said: "It is well settled that question of sanction under section 197 of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether the claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

It has been held that the sanction is mandatory where the act has been done by the public servant in the course of his service or in the discharge of his duty. Protection under section 197 is not available, if the act complained of is not in connection with the discharge of official duty.[258.]

In a case relating to grant of sanction to prosecute a public servant under the Prevention of Corruption Act, 1988, the Supreme Court held that the contention that the question of grant of sanction for prosecution of a public servant charged with an offence under the PC Act, 1988, arises only at the stage of taking cognizance and not before that, is untenable. The scheme of section 197 CrPC is different from that of section 19 of the PC Act, 1988, and both sections operate in different fields.[259.]

[s 197.10] Sanction for prosecution, Assam Amendment.—

The Assam Amendment Act was passed in 1984. Sanction for prosecution was refused in the police case but granted in the complaint case. The certificate issued under sub-section (6) was to the effect that the accused police officer and other personnel were acting in the discharge of their official duty. The complainant was aware that sanction had been granted but did not appeal against it. It was held that the right to be discharged was not taken away by reason of section 3 of the Assam Repealing Act. The State in enacting the 1996 Act did not have any intention of depriving a person of his accrued or vested right. The doctrine of eclipse was not attracted.[260.]

[s 197.10.1] *Sanction by incompetent authority.—*

Sanction accorded by an authority not competent to do so is no sanction in the eye of law, and such defect vitiates the proceedings.[261.] The power to grant sanction cannot be delegated. Also, sanction cannot be granted on the basis of report given by some other officer or authority.[262.]

[s 197.11] Cognizance of offences by members of Armed Forces [*Sub-sections (2) and (3)*].—

The provisions of these sub-sections are for the protection of the members of the Armed Forces while acting or purporting to act in the discharge of their official duties. As in extreme cases, the Armed Forces are employed for the maintenance of public order, a duty which in ordinary course falls on the police, sub-section (4) empowers the State Government in such cases to accord sanction.

There is no provision of protection in respect of Princes or Rulers as their privileges were abolished by the 26th Amendment of the Constitution.

The provisions of sub-section (2) can be extended by a State Government by Notification so as to provide that the sub-section would apply to such class or category of the members of the forces charged with the maintenance of public order as may be specified in the Notification. The State Government will take care of the rest of the matters instead of the Central Government.

[s 197.11.1] *Extension by Notification.—*

A notification issued under the section provided that the sub-section (2) shall apply to police officers as defined in the Bombay Police Act, 1951 charged with maintenance of public order. It was held by the Supreme Court that expression "public order" should be understood in the wider sense as including "law and order" also and not in the narrower sense ascribed to it in the context of preventive detention. The Court said: "Police Officers do discharge duties relating to maintenance of public order. Finding in each case, whether a particular act of a police officer pertained to maintenance of public order or not is not a correct approach for determining applicability of the notification. By virtue of the notification, all public officers as defined in Bombay Police Act, save the excepted categories, if any specified in the notification, would be entitled to protection of sub-section (2) if the offence alleged had been committed by any of them "while acting or purporting to act in the discharge of his official duty."[263.]

[s 197.12] Prosecution of Judge, Magistrate [*Sub-section (4)*].—

This sub-section overrides the general rule in section 177 as regards the Court of trial. The sub-section does not require that the sanction should be addressed to any particular Court or Officer, or that orders under it should necessarily be passed in every case.[264.] The Privy Council has held that it is not open to the Governor of a State, while according a sanction to prosecute, to specify a Court under this sub-section unless he has given the sanction under sub-section (1) of this section. He has no power to specify a Court in any other case. He cannot acquire power to specify a Court in a case to which sub-section (1) does not apply, by coupling the specification with an unnecessary sanction.[265.] Sanction for prosecution based on falsified fact could be assailed. Such prosecution would be void.[266.] Where a prosecution was pending for 14 years, the Supreme Court quashed it without going into the question of requirement of sanction under section 197.[267.] Sanction is valid only if it is given after applying the mind by the authority.[268.]

[s 197.13] Prosecution of officers of Government Companies or of Public Undertakings.—

Protection of the section by way of sanction has been held to be not available to officers of Government Companies or those of public sector undertakings. This will be so even in cases in which a public sector undertaking comes within the meaning of the word "State" under Article 12 of the Constitution by reason of deep pervasive Government control.[269.]

[s 197.14] Complaint case.—

The Supreme Court stated the pre-requisites of sanction for prosecution, namely the act or omission must have been done by a public servant in the discharge of his duty. The concept of section 197 does not get immediately attracted on the institution of a complaint case.[270.]

[s 197.15] Sanctioning Authority.—

Where the sanctioning authority for the prosecution of the Chief Minister of the State was the Governor, and the question before the Supreme Court was whether he was to exercise the power at his own discretion or at the advice of the Council of Ministers, the Supreme Court referred the matter to the Constitution Bench.[271.] Where allegations of misrepresentation were made against the officer of the State Accounts Department and prosecution was by the Police, it was held that the Home Department alone was competent to sanction the prosecution. The power was not allocated to any other Department by the Governor under the Constitution.[272.]

The sanctioning authority has to do complete and conscious scrutiny of the whole record placed before it. The sanction order should show that the authority has considered all relevant facts and applied its mind. The prosecution is under an obligation to place the entire record before the sanctioning authority and satisfy the Court that the authority has applied its mind.[273.] Dr BS Chauhan J (speaking for the Bench), observed as follows:

> Grant of sanction is not a mere formality. Therefore, the provisions in regard to the sanction must be observed with complete strictness keeping in mind the public interest and the

> protection available to the accused against whom the sanction is sought. It is to be kept in mind that sanction lifts the bar for prosecution. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage vexatious proceedings and is a safeguard for the innocent, though not a shield for the guilty.[274.]

There was to be prosecution of Ministers for offences under the Prevention of Corruption Act and also for the offence of criminal conspiracy. A *prima facie* case was made on the basis of the report of *Lokayukta*. The decision of the Council of Ministers refusing to grant sanction was held to be *ex facie* irrational and based on non-consideration of the relevant factor. The Governor could act on his own discretion and grant sanction.[275.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

187. Ins. by Act 1 of 2014, section 58 and Schedule, Part IV (w.e.f. 16-1-2014, *vide* S.O. 119(E), dated 16th January, 2014).).

188. Added by Act 43 of 1991, section 2(a) (w.r.e.f. 2-5-1991).

189. Ins. by the Criminal Law (Amendment) Act, 2013 (13 of 2013), section 18 (w.e.f. 3-2-2013).

190. Subs. by Act No. 22 of 2018, section 15, for "section 376A, section 376C, section 376D" (w.r.e.f. 21-4-2018).

191. Ins. by Act 43 of 1991, section 2(b) (w.r.e.f. 2-5-1991).

192. Ins. by Act 43 of 1991, section 2(b) (w.r.e.f. 2-5-1991).

193. *Pichai Pillai v Balasundara Mudaly*, (1935) ILR 58 Mad 787 : AIR 1935 Mad 442 ; *Hari Ram v PB Sood*, (1956) Raj 821 ; *Shrilal v Manmath Kumar*, AIR 1960 Raj 173 : 1960 Cr LJ 996 ; *Rizaplida v State of Assam*, 1992 Cr LJ 621 (Gau); *RR Chari v State of UP*, AIR 1962 SC 1573 : (1962) 2 Cr LJ 510 ; *K Reddy v A Radha*, 1991 Cr LJ 498 (AP); *Ravindra v VK Parmer*, 1989 Cr LJ 191 (MP); *Pritam Singh v Delhi Adm*, 1987 Cr LJ 872 (Del); *Mohan Tiwari v Arunachal Pradesh*, 1992 Cr LJ 737 (Gau).

194. *Shankarrao v Burjor Engineer*, (1962) 64 Bom LR 130 : AIR 1962 Bom 198 ; *Abani Ch Biswal v State of Orissa*, 1988 Cr LJ 1038 (Ori); *Dwarki Prasad v State of UP*, 1989 Cr LJ 772 (AP).

195. *Bihari Lal v State*, 2002 Cr LJ 3715 (Del).

196. *R Balkrishna Pillai v State of Kerala*, 1995 Cr LJ 963 (Ker).

197. *State of Punjab v Labh Singh*, (2014) 16 SCC 807 .

198. *Ghanairam v The State*, (1954) Nag 661; *K Ch Prasad v J Venalatha Devi*, 1987 Cr LJ 697 : AIR 1987 SC 722 : (1987) 2 SCC 52 ; *Ad General, Hyderabad v RS Rao*, 1991 Cr LJ 613 (AP); *Nagaraj v State of Mysore*, AIR 1964 SC 269 : (1964) 1 Cr LJ 161 .

199. *Mohd Pasha v State of Hyderabad*, (1956) Hyd 191; *Baij Nath Gupta v State of Madhya Pradesh*, AIR 1966 SC 220 : 1966 Cr LJ 179 .

200. *Lumbhardar Zutshi v The King*, (1949) 52 Bom LR 480 : (1950) Bom 470 : 77 IA 62.

201. *Binod Kumar Singh v State of Bihar*, 1985 Cr LJ 1878 (Pat); *Mukunda Boral v Godavaris Mishra*, 1980 Cr LJ 1215 (Ori).

202. *Darshan Kumar v Sushil Kumar Malhotra*, 1980 Cr LJ 154 (HP).

203. *Ashok v Prahlad*, 1983 Cr LJ 78 (Bom).

204. *Public Prosecutor, HC of AP, Hyderabad v TV Sharma*, 1978 Cr LJ NOC 205 (AP); *SB Saha v MS Kochar*, AIR 1979 SC 1841 : 1979 Cr LJ 1367 : (1979) 4 SCC 177 .

205. *Dhulamani Behara v State of Orissa*, 1988 Cr LJ 1027 (Ori).

206. *Abdul Hamid v Gwalior RS Mfg*, 1989 Cr LJ 2013 (MP).

207. *Dadamchand v Ramcharan Singh*, 1988 Cr LJ 1506 (MP).

208. *BS Sambhu v TS Krishnaswamy*, 1983 Cr LJ 158 : AIR 1983 SC 64 : (1983) 1 SCC 11 .

209. *Haryana v Iqbal Singh*, 1978 Cr LJ 46 (DB).

210. *Re Ramchandra*, 1980 Cr LJ 349 (Mad); *Koya v Muthukoya*, 1978 Cr LJ NOC 46 (Ker).

211. *Paul Varghese v State of Kerala*, AIR 2007 SC 2618 : (2007) 4 SCC 783 .

212. *Devinder Singh v State of Punjab through CBI,* Criminal Appeal No. 190/2003 as decided on 25 April 2016.

213. *Emperor v Gulabmiya Dagumiya*, (1930) 32 Bom LR 1134 .

214. *Pichai Pillai v Balasundara Mudaly*, (1935) ILR 58 Mad 787 : AIR 1935 Mad 442 ; *Maqbool Hussain*, (1947) 22 Luck 428 ; *Nagraj v State of Mysore*, AIR 1964 SC 269 : (1964) 1 Cr LJ 161 .

215. *Maung Saw Maung v Ma Me Shwe*, (1939) Ran 117.

216. *Vishvamohan v Mahadu*, (1964) 66 Bom LR 28 : AIR 1964 Bom 191 : 1964 Cr LJ 272 . **But see** *State of Maharashtra v Moreshwar Govinda*, (1971) 73 Bom LR 823 ; *Naoroze Dorabji v Labshankar*, (1972) 75 Bom LR 493 .

217. *Ganapati Sur v The State*, 1971 Cr LJ 107 .

218. *Bhikaji Vaghaji v LK Barot*, 1982 Cr LJ 2014 (Guj).

219. *Rangesh Sharma v State of UP*, 1990 Cr LJ 861 (All).

220. *Bhagawan P Saxena v State of UP*, 1988 Cr LJ NOC 18 (All).

221. *Goura Chandra Naik v State of Orissa*, 1992 Cr LJ 275 (Ori).

222. *Kannan alias Krishna Rajan v RA Varadrajan*, 1995 Cr LJ 3059 (Mad).

223. *State of Tamil Nadu v T Thulasingam*, AIR 1995 SC 1314 : 1995 Cr LJ 2080 : 1994 (2) Scale 1065 .

224. *Bihari Lal v State*, 2002 Cr LJ 3715 (Del).

225. *NK Sharma v Abhimanyu*, AIR 2005 SC 4303 : (2005) 13 SCC 213 : 2005 Cr LJ 4529 .

226. *Punjab State Warehousing Corp v Bhushan Chander*, AIR 2016 SC 3014 : 2016 Cr LJ 3579 : 2016 (6) Scale 84 .

227. *Gill v The King*, (1948) 50 Bom LR 487 : 75 IA 41; *Phanindra Chandra Neogy v The King*, (1949) 51 Bom LR 440 : (1949) 2 Cal 451 : 76 IA 10; *Biswabhusan Naik v State*, (1952) Cut 344; *Chimanbhai Kashibhai v Jashbhai*, AIR 1961 Guj 57 : 1961 Cr LJ 499 ; *Bisweswar v Swetakumar*, 1966 Cr LJ 494 ; *Raghava Chandra v Tarvinder Kaur*, 2003 Cr LJ 2205 (MP), acts in question were done in discharge of official duty, protected, criminal proceedings were liable to be quashed. The issue of protection to be decided at first stage; *Suresh Ruprao Khandar v State of Maharashtra*, 2003 Cr LJ 2219 (Bom), interpolation in marksheets for recruitment tests done by junior clerks, held to be not part of official duty; *Sharda Devi v State of Bihar*, 2002 Cr LJ 866 (Pat), forcibly snatching bags from the hands of the complainant without any ostensible reason, not an act done in discharge of official duty; *Ramesh Kumar Verma v State of Bihar*, 2003 Cr LJ 617 (Jhar), excesses by Commercial Tax Officer in search of business premises part of official duty, sanction required; *Abdul Gaffar v Raman Das*, 2003 Cr LJ 1145 (Gau), no part of duty of a Range Officer to take away a person and force him to sign blank papers; *Uttam v Om Prakash*, 2002 Cr LJ 437 (Bom), a promoter of the Government Scheme of Family Planning obtained money by showing fake operations, no sanction necessary; *P Palanisamy v Shenbagathottam Rasidents' Assn*, 2002 Cr LJ 704 Mad, there must be reasonable and rational nexus between the official duty and the act alleged to constitute of offence; *Nirmal Puri (Lt Gen) v UOI*, 2002 Cr LJ

158 (Del), an army man in access of secrets, trading with a company for those secrets through his wife and subsequently, taking voluntary retirement, joined the company, held, no part of official duty; *Prakash Singh Badal v State of Punjab*, AIR 2007 SC 1274 : (2007) 1 SCC 1 , meaning of "official duty" explained. Necessity of sanction has to be determined from the different stagesof the case.

228. *SY Patil v Vyankatswami*, (1939) Nag 419.

229. *Afzalur Rahman v Emperor*, (1942) 22 Pat 76.

230. *Abdul v State*, 1972 Cr LJ 88 .

231. *Province of Bihar v Rameshwar*, (1944) 23 Pat 738; *Huntely v Emperor*, (1944) FCR 262 : AIR 1944 FC 66 : 23 Pat 517.

232. *Ram Singh v SA Rizvi*, (1934) 14 Pat 299; *Todar Singh Premi v State of UP*, 1992 Cr LJ 1724 (All).

233. *Dhananjay v MS Upadhaya*, AIR 1960 SC 745 : 1960 Cr LJ 1153 .

234. *Rizwan Ahmed Javed v Jamal Patel*, 2001 Cr LJ 2897 (SC) : AIR 2001 SC 2198 : 2001 (4) Scale 205 : (2001) 5 SCC 7 : JT 2001 (Suppl 1) SC 32.

235. *Prabhakar v Shanker*, AIR 1969 SC 686 : 1969 Cr LJ 1057 : (1969) 2 SCR 1013 .

236. *BP Srivastava v NP Mishra*, AIR 1970 SC 1661 : (1970) 2 SCC 56 .

237. *Phanindra Chandra Niyogi*, (1969) 2 Cal 451 : (1948) 51 Bom LR 440 : 76 IA 10.

238. *Ram Singh v SA Rizvi*, (1934) 14 Pat 299.

239. *Jagannath Sahu v Sasibhushan Rath*, 1995 Cr LJ 4070 (Ori).

240. *NK Ganguly v CBI, New Delhi,* (2016) 2 SCC 143 : 2016 Cr LJ 371 : 2015 (12) Scale 500 : (2016) 1 SCC (LS) 290.

241. *Rajib Ranjan v R Vijaykumar,* (2015) 1 SCC 513 : 2015 Cr LJ 267 : 2014 (12) Scale 150 .

242. *K Satwant Singh v The State of Punjab*, (1960) 1 Punj 504; *Bakhshish Singh Dhaliwal v State of Punjab*, AIR 1967 SC 752 : 1967 Cr LJ 656 ; *State of Kerala v V Padmanabhan Nair*, AIR 1999 SC 2405 : 1999 Cr LJ 3696 : (1999) 5 SCC 690 , charges under sections 406 and 120B IPC, the Supreme Court said no sanction was necessary. Even otherwise, the officer in question had ceased to be public servant by retirement on the date on which the Court took cognizance of the offence; *Shambhoo Nath Misra v State of UP*, AIR 1997 SC 2102 : 1997 Cr LJ 2491 : 1997 All LJ 1089 : (1997) 5 SCC 326 , fabrication of record and misappropriation of public fund by the public servant held by the Supreme Court to be not a part of the official duty, hence sanction for prosecution not necessary; *SA Azeez v Pasam Hari Babu*, 2003 Cr LJ 2462 (AP), allegation that the police officer illegally detained an accused against whom a non-bailable warrant was issued for one week and also that the officer assaulted him. Such acts were held to be not a part of the official duty and therefore no sanction for his prosecution was necessary.

243. *Mahesh Chander v R Prasad*, 1991 Cr LJ 73 (Pat); *Jagannath Sadangi v Sambari Sourani*, 1989 Cr LJ 629 (Ori).

244. *Mohammad Sarda v State of HP*, 1988 Cr LJ NOC 80 (HP).

245. *Ronald Wood Matrama v State of WB*, AIR 1954 SC 455 : 1954 Cr LJ 1161 .

246. *Inspector of Police v Battenapatla Venkata Ratnam,* (2015) 13 SCC 87 .

247. *State of Bihar v Kamla Pd Singh*, AIR 1998 SC 2379 : 1998 Cr LJ 3601 : (1998) 5 SCC 690 .

248. *Sankaran Moitra v Sadhna Das*, AIR 2006 SC 1599 : (2006) 4 SCC 584 .

249. *Jaya Singh v KK Velayutham*, AIR 2006 SC 2407 : (2006) 9 SCC 414 : 2006 Cr LJ 3272 .

250. *Suresh Kumar Bhikam Chand v Pandey Ajay Bhushan*, AIR 1998 SC 1524 : 1998 Cr LJ 1242 : (1998) 1 SCC 205 .

251. *Mohd Rashid Khan v State of West Bengal*, 1994 Cr LJ 2699 (Cal).

252. *Beg v Parshram Keshav*, (1870) 7 BHC (CRC) 61.

253. *Pukhraj v State of Rajasthan*, AIR 1973 SC 2591 : 1973 Cr LJ 1795 : 1973 (2) SCC 701 ; *Birendra K Singh v State of Bihar*, (2000) 8 SCC 498 : JT 2000 (8) SC 248 , cognizance was taken by the Magistrate without sanction. The accused raised objections before the Supreme Court. He could do so before the sessions Court after the case was committed to it; *State v BL Verma*, (1997) 10 SCC 772 : (1998) 1 JCC (SC) 27, where sanction is necessary, it is mandatory, the High Court rightly directed dropping of the proceedings, but they can be reactivated after obtaining sanction.

254. *Rudra Datt Bhatt v Emperor*, (1933) 55 All 798 : AIR 1933 All 543 .

255. *State of Maharashtra v Ishwar Piraji Kalpateri*, AIR 1996 SC 722 : 1996 Cr LJ 1127 : (1996) 1 SCC 542 .

256. *Dr Subramanian Swamy v Dr Manmohan Singh*, AIR 2012 SC 1185 : (2012) 3 section 64 : (2012) 1 SCC (Cri) 1041 : (2012) 3 SCC 64 .

257. *PK Pradhan v State of Sikkim*, AIR 2001 SC 2547 : (2001) 6 SCC 704 ; *Birendra K Singh v State of Bihar*, (2000) 8 SCC 498 : (2000) 8 JT 248 ; *Abdul Wahab Ansari v State of Bihar*, (2000) 8 SCC 500 : 2000 Cr LJ 4631 , the plea can be raised at any stage of the proceedings and it need not raised only at the stage of framing of charge; *Om Prakash v State of Jharkhand,* (2012) 12 SCC 72 : (2013) 3 SCC Cri 472 ; *DT Virupakshappa v C Subash,* (2015) 12 SCC 231 .

258. *Raj Kishor Roy v Kamleshwar Pandey*, (2002) 6 SCC 543 : 2002 SCC (Cri) 1423 : AIR 2002 SC 2861 ; *Gopikank Chowdhary v State of Bihar*, (2000) 9 SCC 55 : AIR 2000 SC 1945 : JT 2000 (1) SC 185 , there was over payment by an officer to the contractor, according to the Rules of Business, the Minister-in-charge of the Department had to sanction prosecution. He refused it after considering materials on record. The officer retired. Some three years thereafter, the Chief Minister accorded sanction. Nothing new was found against the officer in the meantime. Under the Rules, the CM had not to see the file at all. The Supreme Court said that for a small sum of Rs 2,750, prosecution so many years after the incident and after retirement was uncalled for.

259. *Dr Subramanian Swamy v Dr Manmohan Singh,* AIR 2012 SC 1185 : (2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 .

260. *Mohan Raj v Dimbeswari Saikia*, AIR 2007 SC 232 : (2007) 15 SCC 115 .

261. *Mahendra Kumar v State of Rajasthan*, 2002 Cr LJ 1667 (Raj); *Pradeep Kumar v State of Jharkhand*, 2002 Cr LJ 3796 (Jhar), prosecution of motor vehicle inspector, being a public servant, sanction taken from the Secretary, Transport Department, held Competent Authority, and a *prima facie* case was also made out.

262. *CBI v Ashok Kumar Aggarwal,* AIR 2014 SC 827 : (2014) 14 SCC 295 : 2014 Cr LJ 930 (SC).

263. *Rizwan Ahmed Javed Shaikh v Jammal Patel*, 2001 Cr LJ 2897 : AIR 2001 SC 2198 : (2001) 5 SCC 7 .

264. *Emperor v Desaibhai*, (1937) 39 Bom LR 1056 .

265. *TA Menon v The King*, (1949) 52 Bom LR 463 : 77 IA II : (1951) 1 Cal 164 .

266. *Jagjit Singh v State of Punjab*, 1988 Cr LJ NOC 79 (Punj).

267. *SC Narain v UOI*, AIR 1992 SC 603 : 1992 Cr LJ 560 : (1995) 4 Supp SCC 552 .

268. *State of Tamil Nadu v Damodaran*, 1992 Cr LJ 522 : AIR 1992 SC 563 .

269. *Mohd Hazi Raja v State of Bihar*, AIR 1998 SC 1945 : 1998 Cr LJ 2826 : (1998) 5 SCC 91 .

270. *Center for Public Interest Litigation v UOI*, AIR 2005 SC 4413 : (2005) 8 SCC 202 .

271. *J Jayalalitha v M Chenna Reddy*, (1998) 8 SCC 601 : 1999 SCC (Cr) 78.

272. *MP Muniratappa v State of Karnataka*, 2003 Cr LJ 2641 (Kant).

273. *CBI v Ashok Kumar Aggarwal*, AIR 2014 SC 827 : (2014) 14 SCC 295 ; *Gokulchand Dwarkadas Morarka v King*, AIR 1949 PC 82 ; *Jaswant Singh v State of Punjab*, AIR 1958 SC 124 : 1958 Cr LJ 265 ; *State through Anti Corruption Bureau, Govt of Maharashtra v Krishanchand*

Khusalchand Jagtiani, AIR 1996 SC 1910 : 1996 Cr LJ 2510 ; *Satyavir Singh Rathi, ACP v State*, AIR 2011 SC 1748 : 2011 Cr LJ 2908 ; *State of Maharashtra v Mahesh G Jain*, AIR 2013 SC (Cri) 1466 : (2013) 8 SCC 119 : 2013 Cr LJ 3092 —Ref.

274. *CBI v Ashok Kumar Aggarwal*, AIR 2014 SC 827 : (2014) 14 SCC 295 (para 7) at p 831.

275. *Madhya Pradesh Special Police Establishment v State of MP*, AIR 2005 SC 325 : (2004) 8 SCC 788 .

The Code of Criminal Procedure, 1973

CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 198] Prosecution for offences against marriage.—

(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860), except upon a complaint made by some person aggrieved by the offence:

***Provided* that—**

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under [276.][section 494 or section 495] of the Indian Penal Code (45 of 1860), is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister [277.][, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption].

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code:

***Provided* that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.**

(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause

notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under [278.][eighteen years of age] if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.

This section is also an exception to the general rule that any person, having knowledge of the commission of an offence, may set the law in motion. Chapter XX, Penal Code, relates to offences against marriage.

[s 198.1] Complaint.—

The complaint must be made by the person aggrieved. The person aggrieved is the person affected or injured. "Complaint" means a complaint as defined in section 2(d) of the Act. It should be of the specific offence falling under Chapter XX of the Indian Penal Code and not of any offence.

[s 198.2] "Person aggrieved".—

It is impossible to lay down any inflexible rule for determining in every case whether the complainant is a person aggrieved by the offence alleged; it must be determined in each case according to its own circumstances whether the complainant can be said to be in a legal sense a person aggrieved.

The grievance referred to in the words "person aggrieved" does not contemplate any fanciful or sentimental grievance; it must be such a grievance as the law can appreciate; it must be a legal grievance and not a *stat prorationе voluntas reason*.[279.]

Where a complaint in connection with a marriage offence was filed not by the person aggrieved but by someone else and it happened to comprise of allegation constituting one cognizable offence and one non-cognizable, the Supreme Court held that its quashing on that ground alone was not proper. The police could have investigated the

non-cognizable offence also by taking it to be cognizable irrespective of the fact as to who filed the complaint.[280.]

Section 494 of IPC does not restrict the right of filing complaint to the first wife. Complaint can also be filed by the person with whom second marriage takes place which is void by reason of its taking place during the life of first wife. Non-filing of complaint by first wife does not mean that the offence is wiped out. Thus, till the marriage is declared a nullity by a competent court, the second wife continues to be wife within the meaning of section 494 IPC and would be entitled to maintain the complaint against her husband.[281.]

Offence under section 495 is aggravated form of bigamy provided in section 494. The aggregation is the concealment of the fact of former marriage to person with whom the second marriage is contracted after concealment of former marriage. This would entitle the second wife to lodge a complaint under section 495 IPC, and she would be "person aggrieved" within the meaning of section 198 of the Code.[282.]

[s 198.3] Sub-section (2) Adultery.—

In *Joseph Shine v UOI*, a constitution bench of the Supreme Court decriminalised adultery and held section 497 of the Indian Penal Code as violative of Articles 14 and 21 of the Constitution. The Supreme Court also held that the procedure laid down in section 198(2) as it relates to adultery is a blatantly discriminatory, because it is the husband alone or somebody on his behalf is deemed to be aggrieved person who can file a complaint against another man for offence of adultery and accordingly declared the procedure in section 198 CrPC unconstitutional.[283.]

[s 198.4] "Some other person" allowed under specific conditions [*Proviso (a)*].—

Under certain specific circumstances, that is where the person aggrieved is under eighteen, or is a lunatic, or an idiot, or is incapable of making a complaint because of sickness or infirmity or because she does not appear in public, then in respect of offences punishable under Chapter XX of the Indian Penal Code, 1860, some other person may, with the leave of the Court, make a complaint on behalf of that person. If there is a guardian already appointed, the Court should order notice to be given to him.

[s 198.5] On behalf of one in Armed Forces after complying with rules laid hereunder [*Proviso (b)*].—

This proviso applies in the case of members of the Armed Services and should be read with sub-section (4).

[s 198.6] Where "wife" aggrieved—Bigamy [*Proviso (c)*].—

In cases of bigamy, where the person aggrieved is the wife, a complaint is allowed to be made by her father, mother, brother, sister, father's brother, father's sister, mother's brother, mother's sister, son or daughter.

The Supreme Court in *Ashwin Nanubhai's* case has held that where after filing a complaint charging the accused under sections 493 and 496 of the Penal Code, the aggrieved spouse dies, her mother can be substituted to carry on the prosecution.[284.] In a case of bigamy against the wife, complaint was filed by the attorney holder of the husband, it was held that the Magistrate was not entitled to take cognizance of such complaint as it was husband only who is an aggrieved party in such a case.[285.]

The person having the right to make a complaint would have to identify himself on the basis of the personal law applicable to the parties to the marriage. Mere conversion does not dissolve the marriage automatically. The couple continues to be husband and wife.[286.]

In a complaint against the husband for the offence of bigamy, filed by father of the subsequent wife allegedly on her behalf but against her express desire, stated in her sworn written statement that she was a major when she married of her own free will and she was living happily and peacefully thereafter. It was held by the Supreme Court that initiation of prosecution in such circumstance was improper and the Magistrate was not justified in taking cognizance of the said offence. Since the husband and his wife were staying together happily, further prosecution would only harass the accused. Consequently, the proceedings were quashed.[287.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

276. Subs. by Act 45 of 1978, section 17(i), for "section 494" (w.e.f. 18-12-1978).

277. Ins. by Act 45 of 1978, section 17(ii) (w.e.f. 18-12-1978).

278. Subs. by Act 5 of 2009, section 18, for "fifteen years of age" (w.e.f. 31-12-2009).

279. *Daem Sardar v Batu Dhali*, (1905) 3 Cal LJ 38 ; *MP Narayan Pillai v MP Chacko*, 1986 Cr LJ 2002 (Ker); *C Narsimhan v TN Chokkappa*, AIR 1972 SC 2609 : 1973 Cr LJ 52 .

280. *State of Orissa v Sharat Chandra Sahu*, AIR 1997 SC 1 : (1996) 6 SCC 435 .

281. *A Subhash Babu v State of AP,* AIR 2011 SC 3031 : (2011) 7 SCC 616 : (2011) 3 SCC (Cri) 267 .

282. *Ibid*

283. *Joseph Shine v UOI*, AIR 2018 SC 4898 : 2018 (11) Scale 556 .

284. *Ashwin Nanubhai Vyas v State of Maharashtra,* (1966) 69 Bom LR 308 : AIR 1967 SC 983 : 1967 Cr LJ 943 : 2018 (11) Scale 556 .

285. *Raxaben v State of Gujarat*, 1992 Cr LJ 2946 (Guj).

286. *Lily Thomas v UOI*, AIR 2000 SC 1650 : 2000 Cr LJ 2433 : (2000) 6 SCC 224 .

287. *Manish Das (Dr) v State of UP*, (2006) 6 SCC 536 : (2006) 3 SCC (Cri) 113 .

The Code of Criminal Procedure, 1973

CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

288.[[s 198A] Prosecution of offences under Section 498A of the Indian Penal Code.—

No Court shall take cognizance of an offence punishable under section 498A of the Indian Penal Code (45 of 1860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.]

This provision was introduced by the Criminal Law (Amendment) Act, 1983, to provide for the offence of cruelty or harassment of women committed under the newly added section 498A of IPC. It gives *locus standi* to the father, mother and other near relations of the woman who is or has been the victim of such cruelty or harassment to complain.

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

288. Ins. by Act No. 46 of 1983, section 5 (w.e.f. 25-12-1983).

The Code of Criminal Procedure, 1973

CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

289.[[s 198B] Cognizance of offence.—

No court shall take cognizance of an offence punishable under section 376B of the Indian Penal Code (45 of 1860) where the persons are in a marital relationship, except upon *prima facie* satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.]

This new provision has been introduced by the Criminal Law (Amendment) Act, 2013, on the recommendations of the Justice JS Verma Committee. A new offence under section 376 was created where by sexual intercourse by a husband upon his wife during separation has been made punishable. The present procedural provision lays down the conditions for the court to take cognizance of the offence under section 376B IPC.

1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .

289. Ins. by Act 13 of 2013, section 19 (w.r.e.f. 3-2-2013).

The Code of Criminal Procedure, 1973

CHAPTER XIV CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

A Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in this Chapter are fulfilled; otherwise, the Court does not obtain jurisdiction to try the offence.[1.]

[s 199] Prosecution for defamation.—

(1) **No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:**

Provided **that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf.**

(2) **Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (45 of 1860) is alleged to have been committed against a person who, at the time of such commission, is the President of India, the Vice-President of India, the Governor of a State, the Administrator of a Union territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions a Court of Session may take cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.**

(3) **Every complaint referred to in sub-section (2) shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him.**

(4) **No complaint under sub-section (2) shall be made by the Public Prosecutor except with the previous sanction—**

- (a) **of the State Government, in the case of a person who is or has been the Governor of that State or a Minister of that Government;**
- (b) **of the State Government, in the case of any other public servant employed in connection with the affairs of the State;**
- (c) **of the Central Government, in any other case.**

(5) **No Court of Session shall take cognizance of an offence under sub-section (2) unless the complaint is made within six months from the date on which the offence is alleged to have been committed.**

(6) Nothing in this section shall affect the right of the person against whom the offence is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognizance of the offence upon such complaint.

The section relates to prosecution for defamation of persons in general (sub-section (1)], and of some named officials (sub-section (2)] in particular. In case of ordinary persons, the complaint should be made by the person aggrieved, not necessarily the person defamed. In the other class of cases, that is to say, in cases of high dignitaries where the defamation is in respect of conduct in discharge of public functions, a Court of Session can take cognizance upon a complaint in writing by the Public Prosecutor. The complaint should be made within a period of six months of the alleged commission of the offence. The Public Prosecutor can lodge such complaint only with the previous sanction of the State or the Central Government. The complaint should give facts which constitute the offence, nature of the offence and necessary particulars so that the accused gets sufficient notice of it. It is not necessary that besides the Public Prosecutor, the complaint should also be signed by the person aggrieved.[290.]

The right of the person defamed to make a complaint to the Magistrate is not taken away (sub-section (6)].

[s 199.1] Complainant suffering from infirmity [*Sub-section (1) proviso*].—

If the person aggrieved is under eighteen, or is a lunatic or idiot, or incapable of lodging a complaint because of sickness or infirmity or is a *pardanashin* lady, then with the permission of the Court, the complaint may be made by another person.

The word "infirmity" in proviso to section 199(1) cannot be read down to mean infirmity resulting from ill-health or age. It comprehends "any deficiency, debility, disability or inadequacy, which the Court finds to be reasonable and sufficient to dispense with the personal appearance of the complainant to present the complaint". A person, who is away in a foreign country, suffers from infirmity and, therefore, he could present the complaint through his power of attorney.[291.]

In *Subramanian Swamy v UOI,*[292.] a challenge to constitutional validity of sections 499 and 500 of the IPC, 1860, and section 199 of the CrPC was made. The main challenge to the provision was that "some person aggrieved" was on a broader spectrum, and it allows all kinds of persons to take recourse to defamation. The other challenge was that when a complaint is made to a Court of Sessions, it curtails the right to appeal. It was held that both the said challenges have already been adhered too and section 199 was held to be constitutionally valid.

[s 199.2] "Person aggrieved".—

For defamation of his wife, the husband is an aggrieved person.[293.] Where the defamation is of imputing unchastity to a widow, her brother, with whom she is residing at the time, is a "person aggrieved".[294.] It was held that a disciple of a person who was alleged to have been defamed was not "a person aggrieved" for the purpose of this section.[295.] Where defamation of an indefinite group of people was alleged, a complaint by one who was a member of that group was not maintainable since he could not be called a person aggrieved. He must show specific injury to himself.[296.] Where a complaint for defamation of Abiwasi Brahman Community was filed, the

complainant being dead and the community not being a definite, particularised identifiable collection of persons, it was held that the advocate of the deceased complainant could not be allowed to conduct prosecution and continue the proceedings.[297.] Where a Kerala newspaper published the fact of insufficiency of sandalwood pieces for the cremation of Rajiv Gandhi, the President of Indian National Congress, it was held that the news item did not affect the reputation of the complainant, a member of the Congress Party, hence he had no *locus* to file a complaint for defamation.[298.] Where a defamation complaint was filed by a Co-operative Society against an Assamese Weekly, which published a news-item mentioning the Society's Managing Director as "thief", it was held that the Society, not being an aggrieved person, had no *locus standi* to file the complaint.[299.]

In order to fall within the purview of section 199(2), it is not enough if a person aggrieved by commission of any offence included in Chapter XXI IPC is a public servant. He must also be a public servant employed in connection with the affairs of the State. Those conditions must be strictly fulfilled. The satisfaction of the requirements in section 199(2) should be with reference to the position which the public servant at the relevant time of the commission of the alleged offence occupied. Where at the time of the publication of the defamatory article, the person aggrieved worked as Block Development Officer, it was held that he was not a public servant connected with the affairs of the State and hence the requirements of sub-section (2) of section 199 were not applicable.[300.]

In a complaint for defamation, there was the submission that the imputations were mainly against the father of the complainant and therefore the complaint should have been made by his father. This was held to be not tenable as the Court found that similar defamatory words were used against the complainant also. His right to lodge the complaint could not be challenged.[301.]

[s 199.3] Aggrieved person, reason to feel hurt.—

The Supreme Court has held that even if the libellous imputations are not made directly against a person, but he has reason to feel hurt on account of the same, he has *locus standi* to file a complaint. The Court further said that where defamatory remarks are published against a private limited company, its directors can file a complaint. The Supreme Court observed:

> The collocation of the words "by some persons aggrieved" in s. 199 definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the Court depending upon the facts of each case. If a company is described as engaging itself in nefarious activities, its impact would certainly fall on every director of the company and hence he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it. As the hospital against which imputations were published in the present case was a private limited company, its directors, would naturally fell aggrieved on account of pejoratives hurled at the company.[302.]

In a statement to a news magazine, the accused called for the need of social acceptance of pre-marital sex. This was held to be not an attack on the reputation of anyone in particular. It did not amount to defamation. The complainant was not an aggrieved person. His complaint was to be quashed.[303.]

[s 199.4] Complaint within time period [*Section 199(5)*].—

While computing the period of six months within which a complaint under sub-section (2) has to be made, the time required for obtaining sanction of the Government as provided in clause (4) will not be excluded.[304.]

[s 199.5] Previous sanction [*Clause (2)*].—

Previous sanction of the Secretary to Government who is authorised on their behalf is necessary before a complaint of defamation against a newspaper is filed by the Public Prosecutor.[305.]

[s 199.6] Clause (4).—

It has been held that section 199(4) does not indicate that in order to initiate criminal proceedings against the accused, the public servant needs to obtain sanction from the State Government in respect of each one of the persons against whom the same transaction of offence is alleged and the names of the accused are required to be mentioned specifically in the sanction order accorded by the State Government. It is sufficient, if one sanction is accorded to prosecute all the concerned persons involved in that occurrence.[306.]

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1. *Mohammad Safi v State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 : 1965 SCR (3) 467 .
290. *PC Joshi v The State of Uttar Pradesh*, AIR 1961 SC 387 : 1961 Cr LJ 566 .
291. *Fr Thomas Maniankerikalam v Thomas J Padiyath*, 2003 Cr LJ 945 (Ker).
292. *Subramanian Swamy v UOI,* (2016) 7 SCC 221 : AIR 2016 SC 2728 : 2016 Cr LJ 3214 : 2016 (5) Scale 379 .
293. *Chhotalal v Nathabhai*, (1900) 25 Bom 151 : 2 Bom LR 665 (FB); *Chellam Naidu v Ramasami*, (1891) 14 Mad 379; *Gurdit Singh*, (1924) 5 Lah 301.
294. *Thakur Das Sar v Adhar Chandra Missri*, (1904) 32 Cal 425 .
295. *Ganesh Nand Ghela v Swad Dayanand*, 1980 Cr LJ 1036 (Del).
296. *Aruna Asaf Ali v Purna Narayana*, 1984 Cr LJ 1121 (Gau).
297. *Vishwanath v Shambhu Nath Pandeya*, 1995 Cr LJ 277 (All).
298. *P Karunakaran v C. Jaysooryan*, 1992 Cr LJ 3540 (Ker).
299. *Homen Bargohain v BVRH Weavers' Co-operative Society*, 1995 Cr LJ 2357 (Gau).
300. *S Dasaratharami Reddi v AH Dara*, 1980 Cr LJ 377 (AP).
301. *Ram Swarup v Mohd Javed Razack*, AIR 2005 SC 2005 : (2005) 10 SCC 393 : 2005 Cr LJ 1725 .
302. *John Thomas v K Jagadeesan (Dr)*, (2001) 6 SCC 30 : (2001) 106 Com Cas 619 : AIR 2001 SC 2651 .
303. *S Khushboo v Kanniammal*, AIR 2010 SC 3196 : (2010) 5 SCC 600 : 2010 Cr LJ 2828 .
304. *V Veeraswami v State of TN*, 1985 Cr LJ 572 (Mad).
305. *Gour Chandra Rout v Public Prosecutor, Cuttak*, AIR 1963 SC 1198 : (1963) 2 Cr LJ 194 .

306. *Rajdeep Sardesai v State of AP,* (2015) 8 SCC 239 : AIR 2015 SC 2182 : 2015 (6) Scale 598 .

The Code of Criminal Procedure, 1973

CHAPTER XV COMPLAINTS TO MAGISTRATES

[s 200] Examination of complainant.—

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

***Provided* that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—**

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

***Provided further* that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the later Magistrate need not re-examine them.**

This Chapter lays down the procedure which a Magistrate empowered to take cognizance of an offence should follow when a complaint is made to him [*vide* section 190(1)(a)]. It has been held by Supreme Court that the power to arraign new accused is exercisable on the basis of evidence recorded during trial. The exercise of the power during enquiry is limited to adding of persons mentioned in Column 2 of the charge-sheet or a person who might be accomplice.[1.]

[s 200.1] "A Magistrate taking cognizance of an offence on complaint shall examine upon oath".—

The Magistrate must examine the complainant even though the facts are fully set out in the written complaint.[2.] The object of the examination is to find out whether the complaint is justifiable or whether it is frivolous or vexatious.[3.] The Magistrate must not refer the complainant to a police officer. He is bound to receive the complaint, and, after examining the complainant, to proceed according to law. A different course would foster abuses, and defeat the purpose of the law, which is to give to persons who have been assured an access to justice independent of the police.[4.] Cognizance of offence may be taken first, and thereafter the complainant and his witnesses present be examined. It should also be recorded whether other witnesses were present in Court or not. Thereafter, the question of issuance of summons would be coming in.[5.] A Magistrate is bound to examine the complainant and then can either issue summons to the accused, or order an inquiry under section 202 or dismiss the complaint under section 203.[6.] He must give the complainant or his pleader an opportunity of being heard.[7.] Under section 200, it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant, and neither section 200 nor section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against.[8.] The Magistrate after issuing

proceedings for closing a case cannot to be cognizance subsequently on the basis of private complaint.[9.]

Once the Magistrate kept the complaint with himself and directed the complainant to produce his witnesses for recording statements under sections 200 and 202, he cannot send the complaint later on under section 156(3) to the police for investigation, as he has taken cognizance on the complaint.[10.]

The Supreme Court restated the duty of Magistrate under section 200. The Court said that the words "sufficient ground" as used in section 204 point to the satisfaction that a *prima facie* case has been made out for taking cognizance and not that a sufficient ground for conviction has been made out.[11.] There is no bar of taking cognizance after examination of witnesses and the complainant.[12.]

[s 200.1.1] Accused has no right to be heard at the admission stage.—

The accused has no right to be heard at the stage of the examination of the complainant or to cross-examine his witnesses.[13.] It has been categorically ruled that Magistrate while taking cognizance of an offence under section 200 whether such cognizance is the basis of the inquiry or investigation in terms of section 202 is not required to notify the accused to show cause why cognizance should not be taken and process issued against him to provide an opportunity to him to cross-examine the complainant or his witnesses at that stage.[14.]

[s 200.1.2] Omission to examine complainant.—

Where the accused is not prejudiced, the omission to examine the complainant may be treated as an error of procedure falling within the purview of section 464.[15.] Such a course is irregular but does not vitiate the entire proceedings.[16.] The failure to examine the complainant before issuing a process is not an irregularity which like those mentioned in section 461 makes the proceeding null and void. Such a breach does not affect the jurisdiction of the Magistrate but affects the subsequent proceedings only if the accused is said to have been prejudiced thereby or there has been failure of justice thereof.[17.] Where the Magistrate without taking cognizance sent the complaint to the police for investigation and, on receiving the police report, discharged the accused relying upon such report, it was held that the procedure adopted by him was not contrary to that prescribed by sections 201, 202 and 203.[18.]

Where in a complaint case, the Magistrate, who ought to have himself examined the complainant on oath, allowed the complainant's Advocate to examine him, the Karnataka High Court held that it was only an irregularity violative of section 200 CrPC, but it was curable under section 465 CrPC and refused to set aside the order issuing process on that score.[19.]

[s 200.1.3] "Upon oath".—

Under the Indian Oaths Act, 1969 section 6, an affirmation would do in the case of Hindus or Mahomedans. But where an accused person appears voluntarily before a Magistrate to answer a charge, the want of a complaint on oath becomes immaterial.[20.] Non-examination of the complainant "upon oath" amounts to irregularity and is not fatal.[21.]

The word "oath" has not been defined. It has to be taken in its plain and ordinary meaning, that is, dictionary meaning. A solemn declaration with or without invoking God, a deity, *etc*., can be the definition of the word "oath". The statement of the complainant (under section 138, NI Act, 1881 for dishonour of cheque) was recorded on solemn affirmation. It satisfied the requirement of section 280.[22.]

[s 200.2] "Complainant".—

There has been a difference of opinion between the Madras and Allahabad High Courts as to whether the word complainant used in singular in section 200 can be interpreted to mean complainants. The Madras High Court in *Narayan Swami v Egappa*[23.] held that a joint complaint by two or more persons is not contemplated by the Code, whereas the Allahabad High Court in *Sital Chandra v Babu Ram*[24.] has held that applying the provisions of section 13 of the General Clauses Act, 1977 the word can also mean "complainants." Where the Magistrate took cognizance of offences under sections 323 and 341 Indian Penal Code (IPC) on a private complaint, which was lodged by two complainants jointly, it was held that joint complaint is not maintainable, but the Court has jurisdiction to treat the complaint by one of the complainants at their option, and since no option was exercised in the case, cognizance was held vitiated.[25.]

[s 200.2.1] Joint complaint.—

Joint complaint filed by two persons is not maintainable. However, one of the complainants can get himself deleted, and the other complainant can proceed with the case to get over the technical defect.[26.]

[s 200.3] "The substance of such examination shall be reduced to writing".—

The substance of the examination of the complainant should be reduced to writing and signed by the complainant.

[s 200.4] "Shall be signed by the complainant."—

If the complainant refuses to sign, he commits an offence under section 180 of the IPC.

A complaint presented by complainant's advocate and not by the complainant himself was held to be not barred; rather it is a proper presentation of the complaint.[27.]

[s 200.5] Examination of public servant on official duties [*Proviso (a)*].—

When a complaint is made in writing by a Court or a public servant, e.g., a police officer,[28.] the examination of the complainant is not necessary. WWhenever a complaint alleging commission of some offence is filed against a Public Servant, the Court has to examine whether the alleged act was done in performance of the duty or otherwise. The action of the Special Magistrate of issuing directions for investigation by *Lokayukt*, without going into the complaint and looking to the provisions of law, was contrary to law.[29.]

A Government company made a complaint about the dishonour of a cheque. It was held that an examination of the complainant and witnesses was not necessary since the employees representing the Government company were public servants.[30.]

[s 200.6] Examination by Magistrate to whom case transferred [*Proviso (b)*].—

When the complaint is in writing and the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192, then also he need not examine the witnesses or the complainant. In view of proviso (b) to section 200 which is in the nature of an exception, where the Magistrate makes over the case for enquiry or trial to another Magistrate under section 192, the former is not required to examine the complainant on oath.[31.] To obviate unnecessary delay when once the Magistrate has examined the complainant and the witnesses, they need not again be examined by the Magistrate to whom the case is transferred.

[s 200.7] Petition for reopening case.—

Where a protest petition was filed before a Magistrate for reopening a case, it was held that no notice to the accused was contemplated till the Magistrate took cognizance of the offence.[32.]

[s 200.8] Delay in filing complaint.—

A mere statement that the police did not take action was held to be hardly an explanation for delay.[33.]

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1. *Hardeep Singh v State of Punjab,* AIR 2014 SC 1400 : (2014) 3 SCC 92 : 2014 Cr LJ 1118 (SC) (Five-Judge Constitution Bench).
2. *Satya Charan Ghose v The Chairman of the Uterparah Municipality*, (1897) 3 Cal WN 17.
3. *Girdhari Lal v Emperor*, (1911) PR No. 11 of 1911.
4. *Re Jankidas Guru Sitaram*, ILR (1888) 12 Bom 161 ; *Lokenath Patra v Sanyasi Charan Manna*, (1903) ILR 30 Cal 923.
5. *Nitin Bhimani v AR Basu*, 1995 Cr LJ 1974 (Cal).
6. *Umer Ali v Safer Ali*, (1886) 13 Cal 334 .
7. *Fani Bhushan Banerjee v Kemp*, (1906) 10 Cal WN 1086.
8. *Ranjit Singh v People*, AIR 1959 SC 843 : 1959 Cr LJ 1124 .
9. *Pratap v State of UP*, 1991 Cr LJ 1669 (All); *PV Krishna Prasad v KVN Koteshwar Rao*, 1991 Cr LJ 341 (AP); *Manojbhai Bhagwandas Shah v State of Gujarat*, 2002 Cr LJ 2134 (Guj), once the final report is rejected, the Magistrate has to comply with the requirements of sections 200 to 204 before issuing process.

10. *Dilip Saharan v State of Rajasthan*, 2002 Cr LJ 4169 (Raj).
11. *SW Palanitkar v State of Bihar*, (2002) 1 SCC 241 : 2002 Cr LJ 548 .
12. *Vidavaduru Balaramaiah v State of AP*, 2003 Cr LJ 3192 (AP).
13. *State of UP v Surinder Mohan*, AIR 2000 SC 1862 : 2000 Cr LJ 1429 : (2000) 2 SCC 396 .
14. *Sunil Mehta v State of Gujarat*, (2013) 9 SCC 209 : JT 2013 (3) SC 328 : 2013 (2) Scale 686 .
15. *Queen-Empress v Monu*, (1888) ILR 11 Mad 443; **See** *Chidambaram Pillai v Emperor*, (1908) ILR 32 Mad 3 : 19 Mad LJ 81; *Moba Maring v Angba Maring*, (1963) 2 Cr LJ 464 ; *Gurdial Singh v Abhey Dass*, AIR 1967 Punj 244 .
16. *Emperor v Bateshar*, (1915) ILR 37 All 628 : AIR 1915 All 417 ; *Queen-Empress v Murphy*, (1887) 9 All 666 ; *Triloki Nath Sinha v State*, AIR 1962 Raj 94 .
17. *Jasman Raj v Smt Sonamaya Rai*, 1980 Cr LJ 500 .
18. *Md Hasib v Imamuddin Haji*, 1985 Cr LJ 1530 (Cal).
19. *Mallappa Sangappa Desai v Laxmanappa Basappa Whoti*, 1995 Cr LJ 715 (Kant).
20. *Sadashivappa Pandurangappa*, (1868) 5 BHC (CRC) 29.
21. *Bhuneshwar Singh v State*, 1971 Cr LJ 131 ; *Durvasa v Chandrakola*, 1994 Cr LJ 3765 (Kant).
22. *Paramjeet Kour v J&K State Financial Corp*, AIR 2007 NOC 2124 J&K.
23. *Narayan Swami v Egappa,* AIR 1962 Mad 443 .
24. *Sital Chandra v Babu Ram,* AIR 1967 All 150 : 1967 Cr LJ 307 .
25. *Zain Sait v Intex Painter*, 1993 Cr LJ 2213 (Ker).
26. *Zac Poonen v Hidden Treasure Literature Incorporated in Canada*, 2002 Cr LJ 481 (Kant).
27. *Hotline Shares & Securities Ltd v Dinesh Ganeshmal Shah*, 2002 Cr LJ 3291 (Kant).
28. *Safdar Hussain v Abdul Rahim*, AIR 1967 Mad 4 : 1967 Cr LJ 84 .
29. *Prabhanshu Kamal v Awadhesh Singh Bhadoriya*, 2002 Cr LJ 4532 (MP).
30. *National Small Industries Corp Ltd v State (NCT of Delhi)*, AIR 2009 SC 1284 : (2009) 1 SCC 407 : 2009 1 SCC 407 : 2009 Cr LJ 1299 .
31. *Md Abdullah Khan v State of Bihar*, 2002 Cr LJ 3875 (Pat).
32. *L Ramesh Kumar v L Lalitha*, 2003 Cr LJ 2477 (AP).
33. *Dilawar Singh v State of Delhi*, AIR 2007 SC 3234 : (2007) 12 SCC 641 : 2007 Cr LJ 4709 .

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CHAPTER XV COMPLAINTS TO MAGISTRATES

[s 201] Procedure by Magistrate not competent to take cognizance of the case. —

If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,—

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court.

Where the Court acquitted the accused on the ground that it had no jurisdiction to take cognizance of the complainant, the order of acquitting the accused would be illegal as the Court ought to have returned the complaint for presentation to the proper Court instead of acquitting the accused.[34.] Where the Magistrate ordered investigation by police in a complaint, in revision, the High Court directed the Magistrate to consider the matter afresh whether he had jurisdiction where any investigation is pending in respect of similar accusation in some other police station or in respect of enquiry before any other Court.[35.]

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34. *Rajendra Singh v State of Bihar*, 1989 Cr LJ 2277 (Pat).

35. *Brij Kishore Singh v Nutan Singh*, 1995 Cr LJ 1486 (Ori).

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CHAPTER XV COMPLAINTS TO MAGISTRATES

[s 202] Postponement of issue of process.—

(1) **Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [36][and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:**

Provided **that no such direction for investigation shall be made,—**

(a) **where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or**

(b) **where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.**

(2) **In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:**

Provided **that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.**

(3) **If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.**

[s 202.1] CrPC (Amendment) Act, 2005 [*Clause (19)*].—

False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused. (*Notes on Clauses*).

COMMENT

The duty of a Magistrate receiving a complaint is set out in this section and consists in finding out whether there is any matter which calls for investigation by a Criminal

Court. This section empowers a Magistrate, if he sees reason to distrust the truth of a complaint of an offence, to postpone the issue of process for compelling the attendance of the person complained against and to direct a local investigation to be made by a police officer for the purpose of deciding whether there is sufficient ground for proceeding.[37.] Instead of directing investigation by a police officer, the Magistrate may inquire into the case himself or direct investigation by such other person as he thinks fit. Where no cognizance was taken because the police submitted final report after investigation, the Magistrate was fully empowered to take cognizance of the offence on the basis of the complaint and material produced before him, and the order taking cognizance did not suffer from any infirmity.[38.]

The scope of the inquiry under section 202 is extremely limited—only to the ascertainment of the truth or falsehood of the allegations made in the complaint (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a *prima facie* case for the issue of process has been made out and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In proceedings under section 202, the accused has got absolutely no *locus standi* and is not entitled to be heard on the question whether the process should be issued against him or not.[39.] Where the High Court quashed a complaint for bigamy under section 494 IPC, the Supreme Court set aside the quashing order holding that the High Court exceeded the scope of enquiry contemplated under section 202 in going into sufficiency of evidence for conviction. During enquiry, the Enquiry Officer has to satisfy himself simply whether a *prima facie* case has been made out, so as to put the proposed accused on regular trial.[40.]

Where the Magistrate before issuing the process did not consider the police report and the enclosed statements of the complainant and the witnesses, which constituted material on record under section 203 CrPC, it was held that ignoring the material on record and taking cognizance amounted to abuse of the process of the Court and could not be sustained.[41.]

The police cannot, where the Magistrate orders an investigation under this section, say that the Commission of Judicial Enquiry appointed by the Government had held an inquiry into the matter; they must comply with the section and submit a report of their investigation.[42.]

[s 202.2] Taking evidence on oath [*Section 202(2)*].—

An order of the Magistrate directing the police to investigate an offence under section 202 is not invalid merely on the ground that he had not examined the complainant and his witnesses.[43.] An order of the Chief Judicial Magistrate directing Executive Magistrate to make enquiry was not invalid simply because the word "enquiry" was used instead of "investigation".[44.] For Magistrate, the scope of enquiry under section 202 is to determine whether the process should issue.[45.] A Magistrate taking recourse to an inquiry under the proviso to section 202(2) in a case triable exclusively by the Court of Sessions is bound to call upon the complainant to produce all the witnesses and examine them.[46.] This provision is mandatory and a process cannot be issued without such an examination.[47.] It was held by the Supreme Court that the proviso to section 202(1) does not bar the Magistrate from ordering police investigation under section 156(3) in respect of an offence exclusively triable by the Court of Sessions.[48.]

Procedure of section 202 CrPC is not mandatory, where the complainant is a public servant. But even in such cases, the Magistrate may call upon such complainant and

his witnesses to make statement on oath to find out if sufficient grounds existed to proceed in the matter.[49.]

[s 202.3] "If he thinks fit".—

The Magistrate's discretion is judicial. Even though there are no words like "for reasons to be recorded", it is desirable for the Magistrate to state his reasons in writing so that a Court of revision can ascertain whether the discretion was properly exercised. The issue of process is a judicial determination.[50.]

[s 202.4] "Postpone the issue of process against the accused".—

The Magistrate may, before issuing the process, under this section, take any preliminary steps for finding out whether the complaint is worth proceeding with. He may call upon the accused to show cause why a process should not issue against him. The accused may appear or not in obedience to that, whereas under a process issued under this section, the accused is bound to appear.[51.] The practice which prevailed in the Courts of Presidency Magistrates (now Metropolitan Magistrates), Bombay, of issuing a notice to the accused before issuing a process against him, had been held to be legal. If the Magistrate is satisfied with the accused's explanation, he should dismiss the complaint.[52.] The Madras High Court has in a Full-Bench case held that unless a Magistrate is satisfied from an examination of the complainant and his witnesses that there is a *prima facie* case against the accused justifying the issue of a process under section 204, the Magistrate is not entitled to call upon the accused to appear before him even optionally and to have his say against the complaint.[53.]

[s 202.5] "Inquire into the case himself".—

The Magistrate may inquire into the case himself before directing any investigation by a police officer or some other person as he thinks fit. The inquiry need not be confined to the evidence of the complainant himself. The Magistrate may examine such witnesses as he thinks fit.[54.] The complainant must be given an opportunity to prove the truth of his complaint. But the accused should not be made a party to the proceedings; nor allowed to cross-examine the prosecution witnesses, or to adduce evidence for the defence.[55.] Where the Magistrate allows an accused to cross-examine the complainant before issue of process, the error is not curable under section 464 or 465 of the Code.[56.] The CrPC does not envisage participation of the accused at an enquiry stage before cognizance has been taken.[57.]

The inquiry under the section is a limited one. The standard to be adopted by the Magistrate in scrutinizing the evidence is also not the same as the one which is to be kept in view at the stage of framing charges.[58.]

The object of enquiry under section 202 is to prevent harassment of innocent persons by indiscriminate issue of process, where there is no sufficient material for proceeding against them.[59.]

An accused has no right to participate in enquiry under section 202 at the pre-summoning stage.[60.]

[s 202.6] "Direct an investigation to be made by a police-officer or by such other person as he thinks fit".—

Where a Magistrate directs an investigation by the police, the police are bound to make a report to the Magistrate as to the result of their investigation.[61.] Where the complaint is of a non-cognizable offence against persons the complainant cannot trace, the Magistrate should cause an inquiry to be made before he can dismiss the complaint under section 203.[62.]

The direction for investigation by the Magistrate under section 202, while dealing with a complaint, though at a post-cognizance stage, is in the nature of an inquiry to derive satisfaction as to whether the proceedings initiated ought to be furthered or not. Such a direction for investigation is not in the nature of further investigation, as contemplated under section 173(8).[63.]

Where a Magistrate directed investigation by the police on receiving a complaint, made enquiry himself and also called for a report from the Joint Director of Agriculture and after considering all the materials and dismissed the complaint as in his opinion sufficient grounds did not exist to proceed with the complaint, the MP High Court held that obtaining report from the Joint Director was illegal as the CrPC prescribes only two methods, either to get the case investigated by the police or such other person as may be prescribed or to make enquiry himself.[64.] On a private complaint, the police report was called for, although statement of the complainant under section 200 CrPC was recorded, but subsequently without waiting for the police report, the Magistrate issued process against the accused. The High Court quashed the order issuing the process and directed the Magistrate to order the police to submit report within 8 weeks and on its receipt and following due procedure to decide whether the accused be summoned or not.[65.]

The Magistrate may direct an inquiry or an investigation to be made by any person even though he is a clerk.[66.] A Judicial Magistrate exercising powers under section 202(1) CrPC at the pre-cognizance stage may also direct an Executive Magistrate to investigate the matter for deciding whether sufficient grounds exist to proceed with the complaint, as "Executive Magistrate" is included in "such other person", but "Judicial Magistrate" is not included.[67.]

Where a Judge was successfully maneuvered by the complainant to order investigation by Central Bureau of Investigation without producing any additional material, it was held that the subordinate Courts are not empowered to entrust investigation to any party other than those referred to in the CrPC.[68.]

Where a Magistrate directed police investigation on a complaint for dishonour of a cheque under section 138 of the Negotiable Instrument Act, 1881 and took cognizance of the offence only on the police report, the AP High Court quashed the order of taking cognizance and directed the Magistrate to proceed further with the case in accordance with Chapter XV CrPC as no Court can take cognizance of the offence punishable under section 138 of NI Act except upon a complaint made in writing by the payee under section 142(a) of the NI Act.[69.]

The Supreme Court[70.] has held that the police of its own cannot exercise its power of arrest in the course of making its report in pursuance of direction under section 202.

[s 202.7] Where the accused resides in an area beyond the jurisdiction of Magistrate.—

The amendment in sub-section (1) of section 202 inserted by CrPC (Amendment) Act, 2005 (w.e.f. 23-6-2006), clearly stipulates that in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, the Magistrate shall postpone the issue of process against the accused and shall either inquire into the case himself or direct an investigation to be made, for the purpose of deciding whether or not there is sufficient ground for proceeding.

It has been held by the Supreme Court that where the accused is a resident of an area outside the territorial jurisdiction of the Magistrate, the inquiry mandated under section 202 is necessary before issuing summons against the accused.[71.] Explaining the proposition, CK Prasad, J, speaking for the Bench, observed as follows:

> The word 'shall' is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word 'shall' in all circumstances is not decisive. Bearing in mind aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression 'shall' and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

[s 202.8] Triable exclusively by Sessions Court [*Proviso (a)*].—

If the Magistrate finds that the offence is triable exclusively by the Sessions Court, he need not issue order for investigation but shall himself hold an inquiry under sub-section (2). Where in a complaint case, wholly triable by the Court of Sessions, the Magistrate did not examine one of the witnesses named earlier, but who was dropped subsequently, it was held that enquiry held by the Magistrate and the cognizance order passed by him did not stand vitiated because of the non-examination of such a witness.[72.]

[s 202.9] Examination of [*Proviso (b)*].—

The Magistrate is bound to examine the complainant in order to ascertain the truth of the complaint where such examination is prescribed by the Code.

[s 202.10] Taking evidence on oath [*Sub-section (2)*].—

This sub-section serves the purpose of preliminary inquiry as regards private complaints triable exclusively by a Court of Session. Where a complaint alleging a non-cognizable offence is made, the Magistrate cannot assign it to the police for investigation without taking cognizance himself.[73.] The Magistrate must conduct enquiry under section 202(2) if the complaint discloses the offence exclusively triable by the Sessions Court.[74.] Proviso to sub-section (2) is petted against the parent sub-section (2) and not sub-section (1), and as such, it can hardly be constructed as controlling or fettering the discretion which vests in the Magistrate under sub-section (1). The proviso is intended to quote sub-section (2) to which it is appended and makes it obligatory upon the Magistrate to call upon all witnesses and examine them on oath if it be offence alleged is triable.[75.]

Where a Magistrate examined only one witness in a complaint case for offences exclusively triable by the Session Court, and committed the case to Sessions, and the

Assistant Sessions Judge remanded the case back for recording the statements of all the witnesses, it was held that in the absence of examination of witnesses listed in the complaint, taking cognizance of the offence was illegal and the Sessions Court had no power to remand the case back for rectifying the defect and the accused stood discharged.[76.]

On a plain reading of the proviso to sub-section (2) of section 202, it is clear that it mandates that the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. Where the complaint was dismissed for non-examination of the complainant himself, it was held that opportunity to examine the complainant should be given. "All witness" means "each witness" the complainant chooses to examine to further his case. It does not necessarily mean all witnesses named in the complaint.[77.] The underlying principle behind it is that since the offence alleged is of serious nature and is to be tried by a Court of Session, it is necessary that all the witnesses whom the complainant intends to examine in support of his case should be examined in the enquiry under section 202 CrPC so that the accused will be aware of the evidence against him. The provision neither expressly nor impliedly prescribes any requirement that it is mandatory for the complainant to examine each one of the persons named in the complaint petition as witnesses and further that the Magistrate is duty bound to ensure compliance of this requirement. Indeed, the Magistrate cannot compel the complainant to examine any witness.[78.] Where in a murder case on complaint, the complainant produced only five witnesses from amongst the witnesses cited in the complaint, the Allahabad High Court held that there was no illegality in summoning the accused as it was a judicial discretion on the basis of available evidence, which the Magistrate had properly exercised.[79.]

The Full Bench of the AP High Court has held that it was not necessary for a complainant to produce all his witnesses at the inquiry stage.[80.]

[s 202.11] Magistrate's inquiry [*Sub-section (2) Proviso*].—

Speaking of the legislative intent behind the proviso, THOMAS J of the Supreme Court observed that the placement of the proviso with sub-section (2) and not under section 200 is not the sole criterion for ascertaining the legislative purpose. Indications can be gathered from other provisions also for taking the contrary view. The learned judge took into consideration the provisions of sections 204 and 208 and 41st Report of the Law Commission and held that the proviso was intended to be mandatory.[81.] The learned judge, however, added that the omission to follow the proviso would not by itself vitiate the proceedings and that if an objection is raised at a belated stage, a decision has to be taken in the light of section 465 CrPC SHAH J was of the view that the provision is discretionary and, therefore, there is no question of proceedings being vitiated.[82.]

[s 202.12] Investigation by person other than Police Officer [*Sub-section (3)*]. —

This sub-section restricts the power of the person other than a police officer making an investigation in that he is not entitled to arrest any person without a warrant. It will be advisable for the Magistrate to look into the matter whether it would be necessary to arrest a person. If in a given case a question of identification also arises, then it will be better for the Magistrate to entrust investigation to the police.[83.]

[s 202.13] Magistrate not accepting final report.—

A Magistrate, who does not accept the final report submitted by the police which investigated the matter on the basis of the FIR, can still take cognizance of the complaint and proceed with the matter.[84.]

[s 202.14] Pendency of Civil Suit.—

The mere existence or pendency of a civil suit cannot constitute a bar to the launching of a criminal prosecution or proceeding with an existing prosecution.[85.]

[s 202.15] Child Marriage Restraint Act, 1929.—

It has been held that in a case alleging violation of the Act, a preliminary enquiry under section 202 CrPC is necessary before issue of summons to the accused.[86.]

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36. Ins. by Act 25 of 2005, section 19 (w.e.f. 23-6-2006).
37. *Golap Jan v Bholanath Khettry*, (1911) ILR 38 Cal 880, 887.
38. *Jagannath Das v State of Orissa*, 1992 Cr LJ 2204 (Ori).
39. *Nagawwa v Veeranna Shivallngappa Konjalgi*, 1976 Cr LJ 1533 (8) : AIR 1976 SC 1947 : 1976 SCR 123 : (1976) SCC (Cri) 507 ; *Chandra Deo Singh v Prokash Chandra Bose*, AIR 1963 SC 1430 : (1963) 2 Cr LJ 397 ; *Sita Ram v Shakutvatta Devi*, 1992 Cr LJ 2164 (P&H); *Lakshmi Kishore Tonsekar v State of Maharashtra*, 1993 Cr LJ 2772 (Bom).
40. *Mohinder Singh v Gulwant Singh*, AIR 1992 SC 1894 : 1992 Cr LJ 3161 : (1992) 2 SCC 213 .
41. *Daleep Singh v Magan*, 1996 Cr LJ 190 (Raj).
42. *Mariam Bee v The Commissioner of Police, Madras, (Madras)*, 1971 Cr LJ 180 .
43. *Ramappa*, 1985 Cr LJ 410 (Kant).
44. *Ramesh Chandra v State of Bihar*, 1989 Cr LJ 476 (Pat).
45. *Pramatha Nath v Saroj Ranjan Sarkar*, AIR 1962 SC 876 : (1962) 1 Cr LJ 1165 .
46. *M Govindraj Pillai v Thangavelu Pillai*, 1983 Cr LJ 917 (Mad).
47. *Shyamkant Wamanrao Pawar v State of Maharashtra*, 1980 Cr LJ 1388 (Bom); *Hari Singh v State of UP*, 1992 Cr LJ 1802 (All).
48. *Devarapalli Lakshminarayana Reddy v V Narayana Reddy*, 1976 Cr LJ 1361 : AIR 1976 SC 1672 : (1976) 3 SCC 252 .
49. *Chubbi Ekwealcoh v AK Sekar*, 1995 Cr LJ 2238 (Bom); *Dudh Nath Mishra v State of UP*, 2003 Cr LJ 1087 (All), only 12 out of 16 witnesses mentioned in the complaint were examined. This was held to be a sufficient compliance of the requirements of the proviso to section 202(2). *Kishore Singh v Sudama Prasad*, 2002 Cr LJ 202 (MP), the complainant may produce witnesses he wishes to, and the Magistrate may examine them.

50. *Rajendra Nath v Dy Supdt of Police, Purulia*, AIR 1972 SC 470 : 1972 Cr LJ 268 : (1972) 1 SCC 450 .
51. *Re Tukaram*, (1904) 6 Bom LR 91 .
52. *Virbhan Bhagaji v Unknown*, (1928) 30 Bom LR 642 : 52 Bom 448 : AIR 1928 Bom 290 .
53. *Appa Rao Mudaliar v Janaki Ammal*, (1926) 49 Mad 918 (FB).
54. *Kankuchand*, (1893) Unrep CRC 669, Cr R No. 27 of 1893.
55. *Bhim Lal Sah v Emperor*, (1913) ILR 40 Cal 444; *Jagdish Prasad v Parmeshwar Prasad*, AIR 1966 Pat 33 : 1966 Cr LJ 54 ; *Jamarati Mian v Bisheshwar Prasad*, AIR 1967 Pat 361 : 1967 Cr LJ 1562 ; *Mangharam v State*, AIR 1965 Raj 210 : 1965 Cr LJ 681 .
56. *Hiralal Gulabchand Shah v Keshavlal Parekh*, (1963) 65 Bom LR 765 : AIR 1964 Bom 180 : 1964 Cr LJ 146 : ILR 1964 Bom 248 .
57. *Vishnu Dutt v Govind Dass*, 1995 Cr LJ 263 (Raj).
58. *Roxy v State of Kerala*, (2000) 2 SCC 230 : AIR 2000 SC 637 : 2000 Cr LJ 930 : 2000 (1) Scale 85 : JT 2000 (1) SC 84 .
59. *JK International v State*, 2002 Cr LJ 2601 (Del).
60. *JK International v State*, 2002 Cr LJ 2601 (Del).
61. *Narmahomed*, (1928) 31 Bom LR 84 : 53 Bom 339; *Isaf Nasya v Emperor*, (1927) 54 Cal 303 : AIR 1928 Cal 24 .
62. *Sevantilal S Shah v State of Gujarat,* AIR 1969 Guj 14 : 1969 Cr LJ 63 .
63. *Amrutbhai Shambhubhai Patel v Sumanbhai Kantibhai Patel,* AIR 2017 SC 774 : (2017) 4 SCC 177 : LNIND 2017 SC 646 .
64. *Radha Charan v Om Prakash Misra*, 1995 Cr LJ 67 (MP); *Ponnuswamy v Sreekumaran*, 1996 Cr LJ 3791 (Mad), private complaint alleged death at the hands of police personnel, police investigation ordered, delaying tactics delayed report stating mistake of fact, dismissal of complaint by Magistrate without applying his mind, held not proper.
65. *PK Ramkrishna v Neelkanth M Kamble*, 1996 Cr LJ 2119 (Bom).
66. *Kanchan Gorhi v Ram Kishun*, (1909) ILR 36 Cal 72.
67. *Aunant Charan Mallick v Sayed Goush Ali*, 1995 Cr LJ 209 (Ori).
68. *Indumati v NM Asra*, 1995 Cr LJ 918 (Guj).
69. *Y Venkateshwar Rao v Mahee Handlooms Pvt Ltd*, 1993 Cr LJ 2362 (AP).
70. *Ramdev Food Products Pvt Ltd v State of Gujarat*, (2015) 6 SCC 439 : AIR 2015 SC 1742 : 2015 Cr LJ 2382 : 2015 (3) Scale 622 : (2015) 6 SCC 439 .
71. *Vijay Dhanuka v Najima Mamtaj,* (2014) 14 SCC 638 : 2014 Cr LJ 2295 (SC); **Also see** *Udai Shankar Awasthi v State of UP*; (2013) 2 SCC 435 : JT 2013 (1) SC 539 : 2013 (1) Scale 212 .
72. *Sukanti Suna v Sashibhushan Mahakur*, 1993 Cr LJ 222 (Ori).
73. *Foils Pvt Ltd v State (Delhi Admn)*, 1991 Cr LJ 683 (Del).
74. *In the matter of State Circle Inspector of Excise v Unknown*, 1992 Cr LJ 570 (Ker).
75. *Harish D Gandhi v CB Yadav*, 1989 Cr LJ 2179 (Bom).
76. *Avertson Paul Fernandes v Rabindra AL Das*, 1996 Cr LJ 622 (Bom).
77. *Shanker Roul v Ramakant Swain*, 1992 Cr LJ 4020 (Ori).
78. *Rabindra Prasad Singh v Lili Bala Singh*, 1992 Cr LJ 1716 (Ori).
79. *Satya Pal v State of UP*, 1994 Cr LJ 3790 (All).
80. *Gottipati Subba Naidu v Talhiri Mahalakshmamma*, 2001 Cr LJ 1315 (AP—FB).
81. *Roxy v State of Kerala*, AIR 2000 SC 637 : 2000 Cr LJ 930 : (2000) 1 Ker LT 494 : (2000) 2 SCC 230 .
82. *Ibid*
83. *Bimal v The State*, 1969 Cr LJ 1473 : AIR 1969 All 591 .

84. *Kishore Kumar Gyanchandani v GD Mehrotra*, AIR 2002 SC 483 : (2011) 15 SCC 513 .
85. *Maratt Rubber Ltd v JK Marattukalam*, (2000) 9 SCC 547 : (2000) 242 ITR 706 .
86. *Muzaffar Ali Sajid v State of AP*, AIR 2005 SC 1393 : (2004) 4 SCC 764 .

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CHAPTER XV COMPLAINTS TO MAGISTRATES

[s 203] Dismissal of complaint.—

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

Under this section, a Magistrate may summarily dismiss a complaint if, after considering the statement on oath of the complainant and of the witnesses and the result of the investigation under section 202, he is of opinion that there is no sufficient ground for proceeding. If proceedings are once commenced against the accused, after he is summoned, a complaint cannot be dismissed under this section.[87.] Generally, the discharge of an accused person by a Magistrate does not operate as a bar to the institution of fresh criminal proceedings against him for the same offence, and it is competent for a Magistrate to entertain another complaint on the same facts and to enquire again into the case against the accused. This section enables a Magistrate to dismiss a complaint if there is no sufficient ground for proceeding. In coming to a decision, whether there is sufficient ground for proceeding with the complaint, the Magistrate must take into consideration previous proceedings, if any. Where an accused person has been discharged after consideration of all the evidence produced by the complainant and a fresh prosecution is instituted thereafter on the same facts, the Magistrate cannot be said to have sufficient ground for proceeding with the complainant unless he is satisfied that some additional evidence is forthcoming, of which the complainant was not previously aware or which it was not within his power to produce in the previous trial, or that there has been manifest error apparent on the face of the record or manifest miscarriage of justice.[88.] Where a complaint was dismissed on merits, it was held that a second complaint on almost identical facts could be entertained only in exceptional circumstances which did not exist in the case.[89.]

Where a private complaint under section 304A and 498A IPC was dismissed by the Magistrate mainly on the ground of unexplained delay of about 8 months, it was held that the unexplained delay cast serious doubts on the credibility and *bona fides* of the complainant, hence there was no infirmity in the dismissal order.[90.] Where the complainant was absent in a summons case on the date fixed, it was held that dismissal of the complaint was not illegal nor did it suffer on any count requiring interference of the Revisional Court.[91.]

The High Court or the Sessions Judge may order further inquiry to be made into any complaint dismissed under this section (*vide* section 398).

The dismissal of a complaint under this section does not amount to an acquittal: *vide* section 300, Explanation, *infra*. When the complainant has already been examined on oath, his absence on the date when a witness is examined cannot lead to the dismissal of the complaint.[92.] Under section 203, acquittal on the ground of lack of *mens rea* is not valid.[93.] sections 200 to 203 must be read together. A Magistrate may dismiss a

complaint under section 203 on any one of these three grounds. In the first place under section 203 if he, upon the statement made by the complainant, reduced to writing under section 200, finds that no offence has been committed; in the second place, if he distrusts the statement made by the complainant, he may also dismiss the complaint; and in the third place, if he distrusts the complainant's statement, but his distrust is not sufficiently strong to warrant him to act upon it, he may direct a further inquiry as provided in section 200, and he may either conduct this inquiry himself or depute a subordinate officer to conduct it. These are the three cases in which a Magistrate has power to dismiss a complaint under section 203 and refuse the issue of process.[94.]

The reasons for dismissing a complaint should be based on inferences arising from or disclosed by (1) the complaint, (2) the examination of the complainant, and (3) the investigation, if any, made under the powers conferred by section 202 of the Code. This provides a wide field. Anything outside it is extra-judicial and must be discarded.[95.] An order of dismissal of complaint though brief must be well reasoned and self-contained.[96.] Where the Magistrate dismissed the complaint against a few of the accused and also in respect of some of the offences alleged, the High Court held that it was mandatory for the Magistrates to record reasons for dismissal and the case was remitted back.[97.] Complaint cannot be dismissed under section 203 on the ground of lack of sanction under section 195. The proper course is to keep the question of sanction open till the accused enters appearance.[98.] The Magistrate may, however, dismiss a complaint by accepting the plea of self-defence supported by the report of the enquiry officer and statement of witnesses.[99.] No notice is required to be issued to the accused in a revision against the order dismissing the complaint under section 203.[100.]

[s 203.1] Fresh complaint.—

After the dismissal of a complaint, the Supreme Court held that a second complaint on the same set of same facts would be maintainable only in exceptional circumstances.[101.]

[s 203.2] Result of dismissal.—

Dismissal of complaint under this section does not entitle the accused to compensation under section 250.[102.] But he can prosecute the complainant for making a false charge under section 211 of the Indian Penal Code.[103.]

Where a complaint case was dismissed in default, even at the evidence stage, a Magistrate cannot exercise any inherent jurisdiction to restore the case.[104.]

[s 203.3] "After considering the statement on oath (if any) of the complainant". —

Whether there is no statement on oath, the Magistrate is bound to examine the complainant.[105.] An order dismissing the complaint without examining the complainant is illegal.[106.]

[s 203.4] "Result of the inquiry or investigation (if any) under section 202".—

The Magistrate must take into consideration the result of any investigation or inquiry. But the section empowers the Magistrate to dismiss the complaint without any investigation, if after examining the complainant he considers there is no sufficient ground for proceeding.[107.] The Court ought to apply its mind to the facts and cannot merely accept a police report and dismiss the complaint.[108.]

[s 203.5] "No sufficient ground for proceeding".—

The words "sufficient ground" mean the satisfaction that a *prima facie* case is made out against the person accused, by the evidence of witnesses entitled to a reasonable degree of credit; they do not mean sufficient ground for conviction.[109.] The order of dismissal should be made only on judicially sound grounds. But if a bare perusal of a complaint or the evidence led in support of it shows that the essential ingredients of the offence are absent or that the dispute is only of a civil nature or that there are patent absurdities in evidence, then it will be simply waste of time to proceed further.[110.] The words "sufficient ground" mean the satisfaction that a *prima facie* case was made out against the accused and not a sufficient ground for the purpose of conviction.[111.]

Merely because in the defamatory language alleged in the complaint, the accused had not mentioned the name of the complainant, the complaint was not to be dismissed *in limine*.[112.]

[s 203.6] "In every such case he shall briefly record his reasons for so doing".—

The Magistrate is bound to record his reasons where he dismisses the complaint; otherwise, it would be impossible for the High Court to consider whether the discretion vested in the Magistrate has been properly exercised or not. Failure to record reasons is a direct disobedience of law and not a mere irregularity which can be cured by section 464 or 465.[113.]

[s 203.7] Dismissal on complainant's default to appear.—

A Magistrate can dismiss a complaint where after holding inquiry under section 202, he finds that there is no sufficient ground for proceeding with the complaint. He has to record his reasons for doing so, though he need not write an elaborate judgment. The complainant can present a second complaint if the decision under the first complaint was not on merits, or there was no discharge, acquittal or conviction. A complaint cannot be filed again after decision on merits unless there are exceptional circumstances. On the facts of the case, the Supreme Court observed that the default of the complainant in appearing when the case was called was no reason to shut the door before her once and for all.[114.]

87. *Budhunbhai*, (1891) Unrep CRC 544.

88. *Hansabai Payagude v Ananda Payagude*, (1949) 51 Bom LR 585 : AIR 1949 Bom 384 .

89. *Poonam Chand Jain v Fazru*, AIR 2010 SC 659 : (2010) 2 SCC 631 : 2010 Cr LJ 1423 .

90. *Jagdish Chand v State*, 1995 Cr LJ 2253 (Del).

91. *Food Inspector v Ch Qadir Wani*, 1996 Cr LJ 1618 (J&K).

92. *Lily Thomas v VK Izuddin*, 1974 Cr LJ 734 .

93. *Excise Inspector v Raghvan*, 1989 Cr LJ NOC 75 (Ker).

94. *Baidya Nath Singh v Muspratt*, (1886) 14 Cal 141 , 145; *Lokenath Patra v Sanyasi Charan Manna*, (1903) ILR 30 Cal 923; *Subal Chandra v Ahadulla*, (1926) 53 Cal 606 .

95. *Mustafa v Motilal*, (1907) 9 Bom LR 742 .

96. *Abraham v M Thomas*, 1989 Cr LJ 705 (Ker).

97. *Kesari Prabhakar Rao v State of AP*, 1995 Cr LJ 1736 (AP).

98. *H Shivappa v Puttaswamy*, 1992 Cr LJ 167 (Ker).

99. *Vadilal Panchal v Dattatraya Dulaji*, AIR 1960 SC 1113 : 1960 Cr LJ 1499 .

100. *Richpal Laxminarayan v State of WB*, AIR 1955 NOC 200 (Cal).

101. *Poonam Chand Jain v Fazru*, AIR 2005 SC 38 : (2004) 13 SCC 269 : 2005 Cr LJ 100 .

102. *Bhagwan Singh v Harmukh*, (1906) 29 All 137 ; *Harphul v Manku*, (1906) PR No. 3 of 1906.

103. *Surjya Hariani v King-Emperor*, (1901) 6 Cal WN 295; *Gunamony Sapui v Queen-Empress*, (1899) 3 Cal WN 758.

104. *Sita Ram v Shakuntla Devi*, 1992 Cr LJ 2164 (P&H).

105. *Lokenath Patra v Sanyasi Charan Manna*, (1903) ILR 30 Cal 923.

106. *Re Ningappa Rayappa*, (1924) 48 Bom 360 : 26 Bom LR 183 : AIR 1924 Bom 321 .

107. *Nawazi Singh v Jadu Dhanuk*, (1917) 19 Cr LJ 228 .

108. *Basappa Mahadevappa v Balasaheb Shivarudrappakumar*, 1979 Cr LJ NOC 46 (Knt).

109. *Nirmaljit Singh Hoon v The State of West Bengal*, AIR 1972 SC 2639 : 1973 CLR 237 : (1973) 3 SCC 753 .

110. *Debendra Nath v State of West Bengal*, AIR 1972 SC 1607 : 1972 Cr LJ 1037 : (1972) 3 SCC 414 .

111. *SN Palanitkar v State of Bihar*, AIR 2001 SC 2960 : (2002) 1 SCC 241 ; *Rajinder Prasad v Bashir,* 2002 Cr LJ 90 : (2001) 10 SCC 88 , section not attracted unless there is a complaint.

112. *MN Meera v AC Mathew*, 2002 Cr LJ 3845 (Ker).

113. *Maniruddin Sircar v Abdul Rauf*, (1913) ILR 40 Cal 41; *Chandra Singh v Harihar Singh*, 1967 Cr LJ 1730 .

114. *Jatinder Singh v Ranjit Kaur*, AIR 2001 SC 784 : (2001) 2 SCC 570 .

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CHAPTER XVI COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

[s 204] Issue of process.—

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

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

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

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

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

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

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

[s 204.1] Commencement of proceedings before Magistrate.—

This Chapter relates to commencement of proceedings before Magistrates. Where an accused has been summoned to appear before a Magistrate, proceedings commence under this Chapter and the Magistrate cannot thereafter dismiss the complaint under section 203.[1.] This position does not hold good any longer. In a case, an advocate had lodged a complaint for defamation against the chief editor, the printer and publisher of a newspaper and process against the accused was issued. However, after appearance of the accused and before the case proceeded, the Magistrate dropped the proceedings against the chief editor on the ground that there was no averment that the item in question was published with his knowledge or consent. The Supreme Court held that the Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which accused could be tried. No specific provision is required for dropping the proceedings. The order issuing the process is an interim order and can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused.[2.] At the time of issuing the process, what the Court is required to find out is whether there is *prima facie* case. The existence of a

prima facie case depends upon the facts and circumstances in each case. It is the legal duty of a Magistrate to scan through the allegations and the evidence in order to see if the *prima facie* case exists, before he issues summons under section 204 CrPC.[3.] It need not and should not determine the adequacy of the evidence or the probability of the accused being guilty.[3] It has been held that it is subjective satisfaction of the Magistrate to summon the accused or not to summon him, although this discretion has to be exercised judiciously in accordance with law on the basis of sound reasoning and after perusal of evidence on record.[4.]

[s 204.2] Sufficient ground for proceeding.—

The Magistrate will issue process under this section if there be sufficient ground for proceeding. If there be no sufficient grounds, he will dismiss the complaint under section 203. The Magistrate in deciding whether process should issue must exercise a judicial discretion having regard to the materials duly placed before him.[5.] The Allahabad High Court refused to quash the complaint proceedings against the accused as it found that the Magistrate had sufficient material disclosing commission of an offence before issuing process as he had perused the complaint, statement of the complainant under section 200 CrPC and the police report after investigation and only then issued process. It was further observed that neither the Magistrate nor the High Court can look into the evidence of the accused nor can look into pros and cons of the complaint case or the credibility of witnesses at this stage.[6.] The Supreme Court has held that for issuing a process, the only consideration is whether allegations in the complaint make out a *prima facie* case; whether the accused would be liable. What defences, if any, are open to him are not the matters to be considered at that stage.[7.] Generally speaking, in summons cases, summons should be issued, and in warrant cases, warrant should be issued. But the provision of section 87 of this Code is not thereby affected.

Where a Magistrate ordered for a police investigation under section 202 CrPC in a complaint case and subsequently due to delay in police report, considered the material on record without waiting for the police report, and being satisfied that *prima facie* case was made out, issued the process against the accused, it was held that the Magistrate's order was justified in law. It was observed that sufficiency or insufficiency of the material for issuing process is for the Court, which is seized of the matter, to decide.[8.]

There is nothing in this section to prevent a Magistrate from issuing process at a later stage on perusal of the police diary, which he had not done before, despite the fact that he had discharged the accused persons at the time of the final report by the police, although there was no fresh petition of complaint or report by the police.[9.] In a consumer complaint under section 304A IPC, alleging medical negligence, the Supreme Court said that the Consumer Forum or Criminal Court should seek the opinion of expert doctor or committee of doctors and that notice should be issued only after such report.[10.] Where process is issued against the accused and he has to object to it, he must do so, at the earliest opportunity. An objection raised at the appellate stage to the issuance of the process is not sustainable.[11.] The accused has no right of audience in proceedings prior to the issue of process of summons.[12.]

The real purport of sub-sections (1), (2) and (3) is to give the accused person at the earliest opportunity a fair idea of the allegations that are made against him as also of the persons who are likely to support those allegations. Nothing more was intended by the Legislature than this. If the complainant is to be tied down inexorably to the list of witnesses mentioned in sub-section (2), merely because the list of witnesses had not

been appended to the complaint although no prejudice had been caused to the accused, the Madras High Court refused to quash the prosecution.[13.] Then that may, in effect, nullify the provisions of section 244(2) of the Code.[14.] Before issuing the process to the accused under section 204, the Court is no doubt bound to consider the contents of the complaint and the preliminary evidence but is not required to give detailed reasons for issuing the process to be accused.[15.] Where a complaint was dismissed by the Magistrate but the Sessions Judge in revision found sufficient material to proceed against the accused and gone order to that effect, the Magistrate must issue process under section 204.[16.]

In has been held by Supreme Court that once the Magistrate takes cognizance of a case and forms his opinion that there is sufficient ground for proceeding and issues summons under section 204, there is no question of going back following the procedure under section 201. In the absence of any power of review or recall of the order of issuance of summons, the Magistrate cannot recall the summons once the decision is taken.[17.]

It has been held by the Supreme Court that the words "sufficient grounds for proceedings" in section 204 suggest formation of opinion only after application of mind on the basis of sufficient material. Such formation of opinion has to be stated in the order itself. Thus, summoning of the appellants as accused without recording proper satisfaction by Special Judge was held liable to be set aside.[18.]

The order issuing process against the accused need not be a reasoned order. Absence of reasons, therefore, does not vitiate the order. The term used in section 204 merely lays down that there should be "sufficient ground for proceeding". The above expression is quite distinct from "sufficient to prove and establish guilt". Thus, in a case of murder, where the Magistrate rejected the closure report submitted by the investigating agency and the complainant himself was made accused, it was held by the Supreme Court that recording of reasons which prompted the Magistrate to issue process was justified.[19.] It was further held in the above case that at the time of issuance of process, the defences available to the accused need not be considered, particularly when the defences are based on factual inferences.[20.]

[s 204.3] Detailed order for issuing process not necessary.—

There is no legal requirement for the trial Court to pass a detailed order for issuing process whether it be the process of a summons or warrant case. Where the Sessions Judge has doubts about the process issued by the Magistrate, he should himself look into the complaint to form his own opinion instead of sending back the matter to the Magistrate.[21.] The alleged offence in this case[22.] was that the company in question had caused pollution of streams and rivers by discharging into them trade affluents. The Court said that at the stage of issuing of process, the Court can also look into the fact whether there were allegations in the complaint on the basis of which the managers and directors of the company could also be prosecuted along with the company which was alleged to be guilty of the offence.[23.]

If there is no legal requirement that the trial Court should write an order showing the reasons for framing a charge, there is no need to further burden the already burdened trial Courts with such extra work. The time has reached a stage where it has become necessary to adopt all possible measures to expedite the Court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in Trial Courts would

further be slowed down. A detailed order may be passed for culminating the proceedings, but it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial.[24.]

Section 204 CrPC does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if, in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists sufficient ground for summons to be issued, but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.[25.]

[s 204.4] List of witnesses [*Sub-section (2)*].—

This sub-section requires filing of the list of witnesses before the process can be issued. But it has been held that non-compliance with sub-section (2) does not affect the jurisdiction of the Magistrate either to issue process or to try the case.[26.]

There is the contrary ruling also. Where neither a list of prosecution witnesses had been filed nor was there any statement by the complainant that he was the only witness and he was not examining any other witness, there was no compliance with section 204(2) which demands absolute compliance.[27.]

[s 204.5] Copy of complaint [*Sub-section (3)*].—

This sub-section states that a copy of the complaint shall be furnished with the complaint. Sub-section (3) is directory in nature. Noncompliance with it does not vitiate the issue of process, and the copy of the compliant can be furnished to the accused before the proceedings actually start.[28.]

[s 204.6] Application of mind.—

The order must be capable of showing that the Magistrate applied his mind to the facts of the case and also considered the applicable law. There should be careful scrutiny of the evidence brought on the record. The Magistrate may, in order to satisfy himself, put questions to the complainant and his witnesses.[29.]

In *Mehmood ul Rehman v Khazir Mohammad Tunda,*[30.] the question posed before the Supreme Court was that how a Magistrate does, while taking cognizance of an offence on complaint, indicate his satisfaction regarding the ground for proceeding against the accused. It was held that the steps taken by the Magistrate under section 190(1)(a) of CrPC followed by section 204 of CrPC should reflect that the Magistrate has applied his mind to the facts and the statements, and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, *prima facie*, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. Application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in

a case where the Magistrate proceeds under section 190 or 204 of CrPC, the High Court under section 482 is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before criminal court as an accused is a serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.

It has also been reiterated by the court that while passing order of summons under section 204, the Magistrate must signify that he applied his mind to the facts of the case and law applicable thereto. Recording of this satisfaction as to the existence of a *prima facie* case against accused on the basis of specific allegations made in the complaint supported by satisfactory evidence and other satisfactory material on record is necessary.[31.]

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1. *Budhunbhai*, (1891) Unrep CRC 544; *State of HP v Hazara Singh*, 1989 Cr LJ NOC 66 (HP).
2. *KM Mathew v State of Kerala*, (1992) 1 SCC 217 : 1992 Cr LJ 3779 : AIR 1992 SC 2206 . *Nilamani Routray v Bennet Coleman & Co Ltd*, (1998) 8 SCC 594 , the matter referred to the Bench of three Judges.
3. *Jacob Harold Aranha v Vera Aranha*, 1979 Cr LJ 974 (Bom—DB); **Also** *Smt Nagawwa v Veeranka Shivalingappa*, 1976 Cr LJ 1533 : AIR 1976 SC 1947 : (1976) 3 SCC 736 ; *Inder Raj Malik v Sunita Malik*, 1986 Cr LJ 1510 (Del); *Kaunan v RA Varadrajan*, 1988 Cr LJ 605 (Mad); *Riyajat Ali v State of UP*, 1992 Cr LJ 1217 (All).
4. *Roshan Lal v P Hemchandran*, 1996 Cr LJ 2155 (Raj).
5. *Subal Chandra v Ahadulla Sheikh*, (1926) 53 Cal 606 .
6. *Kamta Prasad v State of UP*, 1993 Cr LJ 2002 (All).
7. *Anil Saran v State of Bihar*, AIR 1996 SC 204 : 1996 Cr LJ 408 : (1995) 6 SCC 142 .
8. *Vithal Vinayak Bhuskute v Narhari Pandurang Gandale*, 1995 Cr LJ 3733 (Bom).
9. *Jiban Krishna Samanta v State*, (1950) ILR 2 Cal 66.
10. *Martin F D'souza v Mohd Ishfaq*, AIR 2009 SC 2049 : (2009) 3 SCC 1 .
11. *Sat Pal v HP*, 1984 Cr LJ 271 (HP).
12. *Pullikkadan v Jayarajan*, 1989 Cr LJ NOC 124 (Mad); *Markandey Singh Kushwaha v State of UP*, 1995 Cr LJ 1635 (All).
13. *FA Poncha v M Meherjee*, 1995 Cr LJ 352 (Mad). *Promode Tamuly v Kanak Chandra*, 1996 Cr LJ 4249 (Gau), allegations in complaint showing *prima facie* the offence of cheating, cognizance and issue of process not to be quashed.
14. *Shyama Charan Saha v Nagendra Nath Rakshit*, (1958) ILR 1 Cal 242.
15. *Jagdish Singh v State of Haryana*, 1987 Cr LJ 1338 (P&H).
16. *Sharma's Nursing Home v State*, 1991 Cr LJ 140 (Del).
17. *Devendra Kishanlal Dagalia v Dwarkesh Diamonds Pvt Ltd*, AIR 2014 SC 655 : (2014) 2 SCC 246 .
18. *Sunil Bharti Mittal v CBI*, AIR 2015 SC 923 : (2015) 4 SCC 609 (Three-Judge Bench).
19. *Nupur Talwar v CBI,* AIR 2012 SC 1921 : (2012) 11 SCC 465 .
20. *Ibid*.

21. *UP Pollution Control Board v Mohan Meakins Ltd*, AIR 2000 SC 1456 : (2000) 3 SCC 745 : 2000 Cr LJ 1799 : 2000 All LJ 872; *Rakesh Devi v State of UP*, 2002 Cr LJ 1225 (All).
22. *Ibid*
23. *Ibid*
24. *Kanti Bhadra Shan v State of WB*, AIR 2000 SC 522 : 2000 Cr LJ 746 : (2000) 1 SCC 722 .
25. *Bhushan Kumar v State (NCT of Delhi),* AIR 2012 SC 1747 : (2012) 5 SCC 424 : (2012) 2 SCC (Cri) 872 .
26. *Pramila Mahesh Shah v ESIC*, 2002 Cr LJ 2454 (Bom).
27. *Fakirappa v Siddalingappa*, 2002 Cr LJ 1926 (Kant).
28. *Pramila Mahesh Shah v ESIC*, 2002 Cr LJ 2454 (Bom).
29. *Pepsi Foods Ltd v Special Judicial Magistrate*, AIR 1998 SC 128 : 1998 Cr LJ 1 : (1998) 5 SCC 749 .
30. *Mehmood ul Rehman v Khazir Mohammad Tunda,* (2015) 12 SCC 420 : AIR 2015 SC 2195 : 2015 Cr LJ 2856 : 2015 (4) Scale 381 .
31. *GHCL Employees v Stock Option Trust*, (2013) 4 SCC 505 : AIR 2013 SC 1433 : 2013 Cr LJ 2044 : 2013 (4) Scale 598 : JT 2013 (4) SC 567 .

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CHAPTER XVI COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

[s 205] Magistrate may dispense with personal attendance of accused—

(1) **Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.**

(2) (2) **But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.**

Under this section, a Magistrate issuing a summons may dispense with personal attendance of the accused. The section covers every case in which a summons is issued. It is not confined to summons cases only.[32.] The Magistrate may direct the personal attendance of the accused at any stage of the proceedings. But if a warrant is issued against an accused person, his personal attendance cannot be dispensed with.[33.] Exemption from personal attendance cannot be sought directly in the High Court under section 482. Remedies available before the trial Court should be first exhausted.[34.]

[s 205.1] "Dispense with the personal attendance of the accused".—

In criminal cases, *pardanashin* women are not as of right exempted from personal attendance at a Court.[35.] But, at the same time, the Court must reasonably use the discretion of granting such exemption under this section, after due consideration of all the attending circumstances including the social status, customs and practice of the accused and the necessity of her personal presence having regard to the nature of the offence and the stage of the trial.[36.] Where a Magistrate issued a summons to a *pardanashin* woman alleged to be of good position, who was accused of an offence, it was held that the Magistrate should have dispensed with the personal attendance of the accused, and permitted her to appear by pleader, until such time as he had before him clear, direct and reliable *prima facie* proof that the accused had a real charge to answer.[37.]

The power conferred under the section is discretionary, and no hard and fast rule can be laid down as to the manner in which it is to be exercised. The Court is to exercise the discretion after looking into all the relevant circumstances like inconvenience likely to be caused to the accused if he is required to be absent from his vocation, profession, trade, occupation or calling for attendance in Court, against prejudice likely to be caused if he does not appear. Where the case was pending for the last 16 years for the appearance of the accused/petitioner in the Court, and his attendance could not be secured despite issuance of warrants, it was held the Magistrate had not exercised his discretion improperly in rejecting the petition under section 205.[38.]

While considering an exemption application, one of the questions which the Court addresses itself is whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence.[39.]

The provisions of this section should ordinarily be exercised liberally in the case of Indian ladies as there is still a great prejudice in this country against appearance of females in Courts and public places. A Magistrate does not exercise his discretion properly under this section if he, without sufficient reason, directs a lady of advanced age, living at a very remote place and certified by a medical man as not in a fit physical condition to undertake a long journey, to appear personally in Court.[40.]

In trivial cases, technical cases where no moral turpitude is involved, where the accused are ladies, old and sickly persons, factory workers, labourers and busy business people, the Courts should exempt such persons from personal attendance.[41.] Where requests for exemption from personal attendance were refused, such orders were held invalid by the High Courts whenever no valid justification for such refusal was made out.[42.] Where grant of exemption is not likely to harm the complainant or the State, it is not generally refused.[43.] There is nothing in sub-section (1) of section 205 which gives even the remotest indication that in order to claim exemption from personally attendance, the accused must, at the first instance, appear personally in Court. On the contrary, the sub-section clearly shows that even at that stage the Magistrate may, if sees reasons so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. This discretion may be exercised by the Magistrate even in the absence of a prayer from the accused.[44.] Two *pardanashin* ladies were shown as absconders in the charge-sheet, so the Magistrate refused them exemption from personal attendance, and the High Court directed to dispense with their personal attendance as they were married ladies, residing with their in-laws and there was no scope of their absconding. It was also observed that the Courts should not take too technical or stringent view.[45.]

On exempting the accused from personal appearance, the complainant has no right to be heard.[46.] The Magistrate, however, must give reasons for granting exemption.[47.]

One of the accused persons pleaded that he was ill and under medical treatment, the other that he was old, the third contended that he was a student and had to face an examination and fourth that she was a lonely lady. None of them filed any certificate or affidavit. They were not allowed bail. Order of the Magistrate refusing exemption from personal attendance was not interfered with under section 482.[48.]

[s 205.2] "Appear by his pleader".—

The only person who can appear in a case in which the personal attendance of the accused is dispensed with is a pleader. The term "pleader" is defined in section 2(q), *supra*. The accused may appoint his manager to appear in his stead and plead and do other acts on his behalf.[49.]

Persons against whom proceedings are taken under Chapter VIII of this Code are accused persons, and they have a right to be defended by a pleader.[50.]

32. *Basumoti Adhikarini v Budram Kalita*, (1893) 21 Cal 588 .
33. *Abdul Hamid v King-Emperor*, (1923) ILR 2 Pat 793 : AIR 1923 Pat 1 ; *Vinod Kumar Chamaria v Bihar*, 1977 Cr LJ NOC 31 (Pat).
34. *S Madhava v Canbank Tractors Ltd*, 2003 Cr LJ 2568 (Kant).
35. *Farid-un-nissa*, (1883) ILR 5 All 92.
36. *Rajlakshmi Devi v The State*, (1953) 1 Cal 78 : AIR 1953 Cal 154 ; *K Narayan Patra v Gopinath Sahu*, 1991 Cr LJ 3219 (Ori); *Rameshchandra Lath v State of Orissa*, 1992 Cr LJ 2263 (Ori).
37. *Rahim Bibi*, (1883) 6 All 59 ; *re, Kandamani*, (1922) 45 Mad 359.
38. *Anam Charan Behera v State*, 2002 Cr LJ 381 (Ori).
39. *Shivani Sadanand v State*, 2002 Cr LJ 3384 (Del).
40. *Sushilabala Mitter v The State*, (1952) ILR 1 Cal 78.
41. *Mangarao v State of UP*, 1992 Cr LJ 1397 (All).
42. *Ravi Singh v State of Bihar*, 1980 Cr LJ 330 .
43. *Nafees Haider v State of UP*, 1991 Cr LJ 1690 (All).
44. *Ajit Chakraborty v Serampore Municipality*, 1989 Cr LJ 523 (Cal).
45. *Kaveri v State of Orissa*, 1995 Cr LJ 224 (Ori).
46. *Raghunath Das v Hari Mohan Pani*, 1988 Cr LJ 1573 (Ori).
47. *SR Jhunjhunwalla v BN Poddar*, 1988 Cr LJ 51 (Cal).
48. *Chanchala v Megh Singh,* 2003 Cr LJ 2480 (HP).
49. *Emperor v Dorabshah Bomanji*, (1925) 28 Bom LR 102 : 50 Bom 250 : AIR 1926 Bom 218 .
50. *Jhoja Singh v Queen-Empress*, (1896) ILR 23 Cal 493; *Emperor v Girand*, (1903) ILR 25 All 375.

The Code of Criminal Procedure, 1973

CHAPTER XVI COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

[s 206] Special summons in cases of petty offence.—

(1) If, in the opinion of a Magistrate taking cognizance of a petty offence, the case may be summarily disposed of under section 260 [51][or section 261], the Magistrate shall, except where he is, for reasons to be recorded in writing of a contrary opinion, issue summons to the accused requiring him either to appear in person or by pleader before the Magistrate on a specified date, or if he desires to plead guilty to the charge without appearing before the Magistrate, to transmit before the specified date, by post or by messenger to the Magistrate, the said plea in writing and the amount of fine specified in the summons or if he desires to appear by pleader and to plead guilty to the charge through such pleader, to authorise, in writing, the pleader to plead guilty to the charge on his behalf and to pay the fine through such pleader:

Provided **that the amount of the fine specified in such summons shall not exceed [52][one thousand rupees].**

(2) For the purposes of this section, "petty offence" means any offence punishable only with fine not exceeding one thousand rupees, but does not include any offence so punishable under the Motor Vehicles Act, 1939 (4 of 1939)[53], or under any other law which provides for convicting the accused person in his absence on a plea of guilty.

[54][**(3) The State Government may, by notification, specially empower any Magistrate to exercise the powers conferred by sub-section (1) in relation to any offence which is compoundable under section 320 or any offence punishable with imprisonment for a term not exceeding three months, or with fine, or with both where the Magistrate is of opinion that, having regard to the facts and circumstances of the case, the imposition of fine only would meet the ends of justice.]**

[s 206.1] CrPC (Amendment) Act, 2005 [*Clause (20)*].—

The provisions of section 206 are meant to enable a quick disposal of petty cases and to reduce congestion in the Court of Magistrates. Since the value of the money has gone down considerably, this clause seeks to amend sub-section (1) of that section to raise the limit of fine that can be specified in the summons from Rs 100 to Rs 1,000. (*Notes on Clauses*).

COMMENT

The procedure mentioned in this section permits the accused to plead guilty in *absentia* in case of petty offences. The petty offences are defined in sub-section (2). The procedure is compulsory; in cases where the Magistrate entertains a contrary opinion,

he should record his reasons in writing. The accused can also plead guilty through his pleader.

The whole idea behind this section is to foster quick disposal of cases which are numerous in number but are petty in nature. Where the petitioner accused was charged of a petty offence of overloading in the bus, insistence of on his personal appearance at the hearing was held to be wholly unwarranted.[55.]

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51. Ins. by Act 25 of 2005, section 20(a) (w.e.f. 23-6-2006).
52. Subs. by Act 25 of 2005, section 20(b), for "one hundred rupees" (w.e.f. 23-6-2006).
53. Now the Motor Vehicles Act, 1988 (59 of 1988).
54. Ins. by Act 45 of 1978, section 18 (w.e.f. 18-12-1978).
55. *Kamla Shankar v State of MP*, 1988 Cr LJ 659 (MP).

The Code of Criminal Procedure, 1973

CHAPTER XVI COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

[s 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.**

This section provides for furnishing to the accused relevant documents or extracts from them, in cases where proceeding has been instituted on a police report, so that the accused is able to know the charge brought against him and the materials by which the charge is going to be substantiated by the prosecution. It is the duty of the Magistrate to furnish to the accused without delay and free of cost the copy of (1) the police report; (2) the FIR; (3) statements of witnesses recorded under section 161(3) excluding those which the Magistrate after perusing the police request under section 173(6) does not think advisable to supply; (4) statements or confessions recorded under section 164 and (5) any other document on which the prosecution wants to rely or extracts therefrom. In the last case, if the document is voluminous, the Magistrate may, instead of furnishing a copy to the accused, allow him or his pleader inspection of the document in Court.[56.]

In a dowry-death case, dying declaration of the deceased was recorded thrice and statements of 8 witnesses were recorded, but the copies thereof were not supplied to the accused under section 207 of CrPC on the ground that the prosecution was not going to rely on them, the Bombay High Court held that sections 162, 173(4) and

207A(3) of CrPC impose an obligation upon the prosecution to supply the copies because the valuable rights of the accused under the proviso to section 162(1) of CrPC can be exercised only if all the copies are supplied to him. So also, it will be quite unfair to deny the copy of the dying declaration. If such dying declaration exists on the record, it will be the right of the accused to have the copy thereof.[57.]

It may be noted that the fact that a duty has been cast on the Magistrate to furnish to the accused without delay all relevant materials under the present section does not preclude the police officer investigating the case from furnishing to the accused relevant materials under section 173(7). Non-supply of the materials mentioned in section 207 by the Magistrate which are relied upon by the prosecution is a ground that can be successfully used for setting aside a conviction.[58.] It is not a rule that the accused must be given all copies of the investigation papers in English. However, if the accused makes a request as he would be entitled to be furnished with the copies of the investigation papers in English,[59.] no copy of the sanction order is required to be supplied to the accused since the sanction order is not a document mentioned in clauses (i) to (v) of section 207(1) of the Code.[60.]

The term, "without delay" does not mean either "immediately" or "forthwith". The Magistrate has to ensure supply of copies to the accused before committing him to Sessions or before the trial. The word "shall" is not mandatory but only "directory". Noncompliance of the provisions does not vitiate the trial.[61.]

[s 207.1] Framing of Charge and non-Compliance with Section 207.—

Having framed charges against an accused, a Magistrate has no jurisdiction in law to recall such order on the ground of non-compliance with the provisions of section 207. At the stage of framing of charge, the submissions on behalf of the accused have to be confined to the material produced by the investigating agency. Thus, where the prosecution produced some documents on the order of the court, it was held by the Supreme Court that the same cannot be relied upon to re-open the proceedings, once charge has been framed or for invocation of the High Court's powers under section 482 of CrPC.[92]

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56. *Kishor Singh v Sudama Prasad,* 2002 Cr LJ 802 (MP), the object is to apprise the accused of the whole case against him.

57. *Ramesh v State of Maharashtra*, 1995 Cr LJ 3424 (Bom).

58. *Gayadhar v State of Orissa*, 1985 Cr LJ NOC 108 (Ori).

59. *Harminder Singh Pritam Singh Viroli v State of Maharashtra*, 1991 Cr LJ 241 (Bom).

60. *Mohd Rashid Khan v State of West Bengal*, 1994 Cr LJ 2699 (Cal).

61. *Bhole v State of MP*, 1993 Cr LJ 2821 (MP). *State of Gujarat v Anirudhsing,* AIR 1997 SC 2780 : 1997 Cr LJ 3397 , where material evidence is necessary, the case is normally adjourned to enable the party to get the entire record. Where the evidence is not material for the purpose of the case, the Court may refuse to adjourn the case. Supreme Court Rules, O XX-ER 1(v).

The Code of Criminal Procedure, 1973

CHAPTER XVI COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

[s 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.**

This section provides for cases instituted otherwise than on a police report where the Magistrate issuing process under section 204 is of opinion that the case is triable exclusively by a Court of Session. In such a case, he will furnish to the accused the documents mentioned in clauses (i), (ii) and (iii).

The Supreme Court has held that the provision requiring the Magistrate to furnish to the accused, free of cost, a copy of the documents specified in the section is mandatory.[62.]

62. *Roxy v State of Kerala,* AIR 2000 SC 637 : 2000 Cr LJ 930 : (2000) 2 SCC 230 : (2000) 1 Ker LT 494 .

The Code of Criminal Procedure, 1973

CHAPTER XVI COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

[s 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—

[63] **[(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.

[s 209.1] State Amendments

Gujarat.—*The following amendments were made by Gujarat Second Amendment Act (President's Act 30 of 1976) section 2 (w.e.f. 7-7-1976).*

S 209.—In its application to the State of Gujarat, for section 209, in clause (a) substitute the following:—

"(a) commit the case, after complying with the provisions of section 207 or section 208, as the case may be, 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."

Uttar Pradesh.— *The following amendments were made by UP Act 16 of 1976, section 6 (w.e.f. 1-5-1976).*

S 209.—In its application to the State of Uttar Pradesh, section 209, clauses (a) and (b) shall be substituted as follows and be deemed to have always been so:

"(a) as soon as may be after complying with the provisions of section 207 commit the case to the Court of Session:

(b) subject to the provisions of this Code relating to bail, remand the accused to the custody until commitment of the case under clause (a) and thereafter during, and until conclusion of the trial."

[s 209.2] Committal for trial.—

The Magistrate has to commit a case for trial to the Sessions Court only after arriving at a conclusion on the question whether the offence is exclusively triable by the Court of Session. He has to examine for this purpose the police report and other documents mentioned in section 207.[64.] In cases where it appears that the offence is one triable exclusively by the Court of Session, the Magistrate need not, before committing the accused, make any elaborate preliminary inquiry except those, in case of private complaint, as prescribed under section 202, but he shall commit the accused to that Court, send records of the case along with documents and articles which are to be produced in evidence and notify the Public Prosecutor. He may grant bail or remand the accused to custody, as is prescribed under the Code. Subject to bail provisions, a Magistrate is duty bound to remand the accused until commitment, and similarly after commitment to the Court of Sessions, an accused is to be remanded to custody during and until the conclusion of (Sessions) trial. Once the Magistrate remands the accused during and until the end of trial, it is not necessary for the Sessions Judge to pass further orders of remand under section 309(2) CrPC. Section 209 CrPC being a specific provision, for cases exclusively triable by Court of Sessions, excludes the general provision under section 309 CrPC.[65.]

The Magistrate is not required to balance and weigh the evidence as a Trial Court would do. If materials and facts are available on record or the diary remains unrebutted, the accused must be committed to Sessions Court.[66.]

When an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused. The Committal court cannot look into the matter to satisfy itself whether a *prima facie* case is made out. His concern is only to see whether offence triable by Court of Session is mentioned in the police report. If it is so mentioned, he must commit the case to Court of Session and do nothing else.[67.]

Section 209(a) clearly stipulates that providing of documents as per section 207 or section 208 is the only condition precedent for commitment of a case. It is noteworthy that after the words, namely, "it appears to the Magistrate", the words that follow are "that the offence is triable exclusively by the court of session". The limited jurisdiction conferred on the Magistrate is only to verify the nature of the offence. Thereafter, a mandate is cast that he "shall commit". Thus, there is a sea of difference in the proceedings for commitment under the old Code and the present Code.[68.]

Absence of the accused at the time of passing commitment order does not cause any prejudice, and it was not a material irregularity.[69.] The committing Magistrate is empowered to summon a person not charge-sheeted by the police, if it is *prima facie* of the opinion that he is also involved in commission of crime, arraign him as additional accused and commit him also to the Court of Sessions to stand his trial.[70.]

Where exclusively triable cases by the Session Court were not committed by the Magistrates even long after the submission of police charge-sheets, the Bombay High Court ordered to issue directions to the Magistrates to ensure committal of such cases to the session within two months of the receipt of the police report. It was further laid down that the committal orders must be precise, clear and must exhibit the application of mind to the facts—(i) that offences are exclusively triable by the Session Court, (ii) proper order remanding the accused involved, (iii) compliance of sections 207 and 208 CrPC and (iv) compliance of the Rules and Manuals framed by the High Courts in this regard.[71.]

[s 209.3] Irregularity and Remand [*Section 209(b)*].—

Where it was alleged that at the time of arrest the grounds of arrest were not communicated to the accused violating section 50(1) CrPC and Article 22(1) of the Constitution, it was held that any illegality at the time of arrest cannot render subsequent remand orders passed by competent Courts as invalid. It was also held that the Magistrate rightly remanded the accused to jail custody during and until the conclusion of trial under section 209(b) CrPC while committing him to the Court of Sessions. It is not correct to say that once section 309(2) CrPC begins to apply on adjournment or postponement of trial, then fresh remand is required if the accused is in custody.[72.] Non-observance of the provisions of the section in the conduct of committal proceedings has been held to be only an irregularity covered under section 465(1). Remedial measures are possible when an objection is taken on the earliest occasion.[73.]

[s 209.4] Offences under Arms Act.—

Offences under sections 25(1)(AA) and 26(2) and (3) of the Arms Act, 1959 are not triable by Magistrate or even by Chief Judicial Magistrate. These offences will fall under the First Schedule of the CrPC, and committal of such cases to Sessions Court was proper.[74.]

[s 209.5] Offence under Terrorist and Disruptive Activities (Prevention) Act, 1987.—

For the transfer of a case under section 18 of this Act, the words "after taking cognizance" would not be confined to any stage of the trial including the stage when judgment is to be delivered.[75.]

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63. Subs. by Act No. 45 of 1978, section 19, for clause (a) (w.e.f. 18-12-1978).
64. *Bajrang Lal v State of Rajasthan*, 2003 Cr LJ 1127 (Raj).
65. *Radhey Shyam v State of UP*, 1995 Cr LJ 556 (All). *KM Ganesha v State of Karnataka,* 2003 Cr LJ 3250 (Kant), where one case was exclusively triable by the sessions judge, but not the other, proper course was to commit both of them.
66. *Saleha Khatoon v State of Bihar*, 1989 Cr LJ 202 (Pat). *Biru Teli v State of Jharkhand*, 2002 Cr LJ 4538 (Jhar), at the stage of committing the case, the Magistrate is not required to apply his mind to the merits of the case and to determine whether any accused need be added or subtracted to face the trial before the Sessions Court.
67. *Ajay Kumar Parmar v State of Rajasthan,* AIR 2013 SC 633 : (2012) 12 SCC 406 .
68. *Rattiram v State of MP,* AIR 2012 SC 1485 : (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481 .
69. *Bhim Singh v State of Haryana*, 1992 Cr LJ 3135 (P&H).
70. *J Jacob (Dr) v State*, 1994 Cr LJ 3330 (Del).

71. *Bholenath J Dhamankar v State of Maharashtra*, 1995 Cr LJ 1029 (Bom).
72. *Vimal Kumar Sharma v State of UP*, 1995 Cr LJ 2335 (All).
73. *State of MP v Bhooraji,* (2001) 7 SCC 2001 : 2001 SCC (Cri) 1373 .
74. *Faujdari Mistry v State of Bihar*, 2002 Cr LJ 4821 (Pat).
75. *Prakash Kumar v State of Gujarat*, AIR 2005 SC 1075 : (2005) 2 SCC 409 : 2005 Cr LJ 929 .

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CHAPTER XVI COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

[s 210] Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.—

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.

Where a private complaint is filed and the Magistrate receives information that the Police is also investigating the same case, he shall stay the proceedings before him (whether it is at the stage of inquiry or trial) and call for report of the police officer. He may then deal with the private complaint and the case which arises out of the police report together. The new section is intended to guard against obtaining snap judgments and collusion.[76.]

Where a private complaint was referred to the police for investigation and on receiving a report from the police, the Court examined the complainant and asked him to produce his witness, it was held that no procedural infirmity was committed.[77.] Trial of a complaint could not be said to be in contravention of section 210 merely because a report was made at a police outpost.[78.] Where cognizance of an offence was taken on a police report, but subsequently on the basis of a private complaint, the Court added names of accused persons, which were not mentioned in the police report, it was held that the procedure was not wrong.[79.] Where in a complaint offence under section 307 of IPC was disclosed, the Magistrate must commit the case to the Sessions Court.[80.]

Since the maintenance proceedings do not relate to any offence as defined in section 2(n) of the Code, the provisions of section 210 of the Code would not apply to such a proceeding.[81.] Where pending a police case, a complaint of the same offence under section 138 of the NI Act, 1881 against the same accused was filed, the Magistrate stayed the proceedings and called for the police report, and after police report was

submitted, he fixed a date for plea of the accused, while quashing the order, the Calcutta High Court held that it was not a reasoned order. It was further directed that if the Magistrate had taken cognizance on police report, then he shall hear both the police case and the complaint case together, and if he had not taken cognizance on the complaint, then he should proceed with the enquiry or trial.[82.]

[s 210.1] Private and Public complaint.—

A private complaint was filed in respect of two incidents. The complaining woman was not aware of the fact whether the police had registered a case in respect of one of the incidents. But in respect of the other incident, there was no police action. The Court held that it could not be said that an investigation was in progress in respect of the complaint. There was thus no question of calling the police report under the section.[83.]

Under the Narcotic Drugs and Psychotropic Substances Act, there is the concurrent jurisdiction of different authorities for investigation. A prosecution was launched by one authority. Another authority undertook investigation on a private complaint. The subsequent authority sought a stay on the earlier authority. But the Court found that offences alleged in the private complaint were different. The stay was accordingly not granted.[84.]

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76. *Jagannath Das v State of Orissa*, 1992 Cr LJ 2204 (Ori).
77. *Jagdish Ram v State of Rajasthan*, 1989 Cr LJ 745 (Raj).
78. *Bhabendra Dwibedi v Pravakar Mishra*, 1989 Cr LJ 1841 (Ori).
79. *Geerarghese v Phillipose*, 1987 Cr LJ 1605 (Ker).
80. *Ajni Khan v Sirajuddin*, 1987 Cr LJ 1304 (MP); *Kadiresan v Kasim*, 1987 Cr LJ 1225 (Mad).
81. *Anil Kumar Jha v State of Bihar*, 1992 Cr LJ 2510 (Pat).
82. *SK Abdul Rahim v Amal Kumar Banerjee*, 1996 Cr LJ 555 (Cal).
83. *Valavaluru Balaramaiah v State of AP,* 2003 Cr LJ 3192 (AP). *State of MP v Mishrilal,* 2003 Cr LJ 2312 (SC) : (2003) 9 SCC 426 , official proceeding and private complaint in respect of the same incident, both ordered to be decided together.
84. *State of Kerala v Intelligence Officer,* 2003 Cr LJ 3210 (Kant). *Bhauja Paramanik v State of Orissa,* 2003 Cr LJ 982 (Ori), offences were different, accused persons were different, no joining. *Parmanand Sisodia v Madhukar,* 2002 Cr LJ 3640 (MP), complaint case and police report on the basis of the same complainant's FIR were merged and charges framed, set aside in revision, even private complaint did not survive such discharge.

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CHAPTER XVII THE CHARGE

A.—Form of charges

[s 211] Contents of charge.—

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name; the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) The charge shall be written in the language of the Court.

(7) If the accused, having been previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.

Illustrations

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code (45 of 1860), that it did not fall within any of the general exceptions of the said Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it.

(b) A is charged under section 326 of the Indian Penal Code (45 of 1860), with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the said Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definition of those crimes contained in the Indian Penal Code (45 of 1860); but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(d) A is charged under section 184 of the Indian Penal Code (45 of 1860), with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

The provisions relating to "charges" are intended to provide that "the charge" shall give the accused full notice of the offence charged against him.

The purpose of a charge is to tell an accused person as precisely and concisely as possible of the matter with which he is charged and must convey to him with sufficient clearness and certainty what the prosecution intends to prove against him and of which he will have to clear himself.[1.] Sections 211 to 214 give clear and explicit directions as to how a charge should be drawn up. It has been repeatedly held that the framing of a proper charge is vital to a criminal trial and that this is a matter on which the Judge should bestow the most careful attention.[2.] Material on record not showing *prima facie* case, it was held that there was no application of mind on part of the Magistrate. Hence, order framing the charge was set aside.[3.]

In summons cases, no formal charge need be framed (section 251, *infra*); but in warrant cases, if the Magistrate is of the opinion that a *prima facie* case has been made out, a charge must be framed (section 240, *infra*). Mere mention of a section under which a person is accused without mentioning the substance of the charge amounts to a serious breach of procedure.[4.] Where the accused was charged of an offence under section 292(1) of the Indian Penal Code, 1860 (IPC) and the charge-sheet contained the word "obscene" but did not contain other words in the section, it was held that since the law used a specific name for the offence and that name had been used, the charge-sheet was not defective.[5.] Defect in the charge vitiates the conviction.[6.] No hard and fast rule can be laid down as to the effect of an omission in the charge-sheet on the conviction of the accused. It will depend upon the merits of each case.[7.] In a criminal trial, charge is the foundation of the accusation and every care must be taken to see that it is not only properly framed but that the evidence is available in respect of the matters put in the charge.[8.] It is a basic principle of law that before summoning a person to face a charge and more particularly when a charge-sheet is actually framed, the Court concerned must be equipped with at least *prima facie* material to show that the person who is sought to be charged is guilty of an offence alleged against him.[9.] If *prima facie* case cannot be established, then framing of the charge amounts to illegal exercise of jurisdiction. Where the two accused were separately charged of committing murder in furtherance of a common intention, but in the charge framed against one accused, the name of the other was not mentioned, but the charges were read over to each of the accused in the presence of the other accused, it was held that this defect in the framing of the charge was a mere irregularity.[10.]

[s 211.1] Charge to state offence [*Sub-section (1)*].—

The term "charge" is defined in section 2(b), *supra*. The charge should be clear and specific. Where three stolen cycles were recovered from the possession of the accused, and there was no evidence to show that they came into his possession at

different points of time, it was held that three different charges should have been clubbed together and disposed of as one offence. It was further ordered that the sentences awarded to the accused in all the three cases should run concurrently and not separately.[11.]

At the time of framing of charges, the Court should not undertake detailed analysis and evaluation of material. The Court has only to find out at that stage whether the material adduced by the prosecution was sufficient to proceed further. In the case of an offence under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988, it is not necessary that the charge can be framed only on failure of the public servant to explain the excess of assets.[12.]

[s 211.2] Error in framing charge.—

Where the accused persons were charged to be the members of an unlawful assembly but the common object of the assembly was not mentioned and they were also charged under section 302 simpliciter and yet convicted with the aid of section 149, it was held by the Supreme Court that the point having not been raised in the Courts below and, in their examination under section 313, they having specifically told the Court that they had committed the offences of the type of which they were convicted, no prejudice was caused to them and, therefore, their trial was not vitiated.[13.]

It was held by the Supreme Court that framing of charge and examination of accused under section 313 are two very important stages in a criminal trial, but these acts are done by trial courts in the most unmindful and mechanical manner. The Supreme Court asked the High Court to take note of it and take appropriate corrective steps.[14.]

[s 211.3] Enhanced punishment of previous convict [*Sub-section (7)*].—

This sub-section says how previous conviction is to be set out. Where it is intended to prove a previous conviction for the purpose of enhancing the punishment, it should be entered in the charge and the accused should be called on to plead thereto; his mere admission that he had been in jail once is insufficient to show that he pleaded guilty to a previous conviction.[15.]

Section 298, *infra*, says how previous conviction may be proved. See also sections 43 and 54 of the Indian Evidence Act.

Section 236, *infra*, lays down the procedure to be followed in the Court of Session in a trial in which the accused is charged with an offence committed after a previous conviction of any offence.

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1. *Mannalal Khatic v State*, AIR 1967 Cal 478 .
2. *Balakrishnan v State*, (1958) Ker 283 . *Pratap Singh v State of Rajasthan*, 1996 Cr LJ 4214 (Raj), enough evidence and extra-judicial confession of cheating, charge framed, justified.

3. *State of WB v Ajit Kumar Saha*, 1988 Cr LJ NOC 2 (Cal).
4. *Court in its own motion v Shankroo*, 1983 Cr LJ 63 .
5. *State v Basheer*, 1979 Cr LJ 1183 (Kant).
6. *Dal Chand v State*, 1982 Cr LJ 1477 .
7. *Bhim Sen v State of Punjab*, AIR 1976 SC 281 : 1976 Cr LJ 293 : (1976) 1 SCC 141 .
8. *Ramkrishna v State of Maharashtra*, 1980 Cr LJ 254 (Bom-DB).
9. *Nohar Chand v State of Punjab*, 1984 Cr LJ 886 .
10. *State of Karnataka v Eshwaraiah*, 1987 Cr LJ 1658 (Kant).
11. *Anasuri Simhadri v Superintendent*, *Central Prison*, *Rajahmundry*, 1993 Cr LJ 1289 (AP).
12. *State v S Bangarappa*, AIR 2001 SC 222 : 2001 Cr LJ 111 : (2001) 1 SCC 369 .
13. *State of AP v Thakkidiram Reddy*, AIR 1998 SC 2702 : (1998) 6 SCC 554 : 1998 Cr LJ 4035 .
14. *Sajjan Sharma v State of Bihar,* AIR 2011 SC 632 : (2011) 2 SCC 206 : (2011) 1 SCC (Cri) 660

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15. *Govind*, (1902) 4 Bom LR 177 .

The Code of Criminal Procedure, 1973

CHAPTER XVII THE CHARGE

A.—Form of charges

[s 212] Particulars as to time, place and person.—

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

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other movable property, it shall be sufficient to specify the gross sum or, as the case may be, describe the movable property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 219:

***Provided* that the time included between the first and last of such dates shall not exceed one year.**

An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him. Unless he has knowledge of the charges against him, he would be seriously prejudiced in his defence.[16.] However, where it is not possible for the prosecution to mention particulars precisely having regard to the nature of the information available to the prosecution, failure to mention such particulars may not invalidate the charge.[17.] Sub-section (2) is an exception to meet certain contingencies and is an exception to the normal rule set out in section 218.[18.]

[s 212.1] "Sufficient to specify the gross sum...in respect of which the offence is alleged to have been committed" [*Sub-section (2)*].—

This section clearly admits of the trial of any number of acts of breach of trust committed within a year as amounting only to one offence. It does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. Section 212(2) does not require that all items of misappropriation including the gross sum or exact date of each of such acts be mentioned. Such items can be grouped together into one lump sum that can be shown as a sum misappropriated. This sub-section is enabling and not obligatory for the prosecution.

[s 212.2] "Without specifying particular items or exact dates".—

When the accused is charged with criminal breach of trust or dishonest misappropriation of money, the particular items or exact dates on which the offence

was committed need not be stated. It is not necessary to specify the separate sums which have been embezzled.[19.] It is sufficient that some of the money mentioned in the charges has been misappropriated, even though it may be uncertain what is the exact amount so misappropriated.[20.] The mere fact that the items composing the amount embezzled are specified and may be more than three in number will not render the charge obnoxious.[21.] Where falsification of accounts is resorted to for the purpose of either facilitating or concealing, the commission of offence of criminal breach of trust or dishonest misappropriation of property section 220(2) will apply.

Sub-section (2) of this section does not permit thefts of different items of ornaments from a safe deposit vault committed at different times to be lumped up into a charge. Such a consolidated charge of theft with an alternative charge of criminal misappropriation cannot be tried at the same trial with two other different offences of theft of money with alternative charges of criminal misappropriation. This is not permissible under the general rule contained in the first part of section 218 of the Code, nor does it come under any of the exceptions contained in sections 219, 220, 221 and 222. The illegality cannot be cured under section 464.[22.]

[s 212.3] "Time...shall not exceed one year".—

Any number of acts of breach of trust committed within one year amounts only to one offence. But where a series of acts extends over more than a year, the joinder of charges is illegal.[23.] A charge for criminal breach of trust framed in contravention of the proviso to sub-section (2) of this section is merely an irregularity which can be cured both under section 215 and section 464 of the Code and will not vitiate the trial when the accused is not prejudiced.[24.]

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16. *Chittaranjan Das v State of West Bengal*, AIR 1963 SC 1696 : (1963) 2 Cr LJ 534 .
17. *Ranchhod Lal v State of Madhya Pradesh*, AIR 1965 SC 1248 : (1965) 2 Cr LJ 253 .
18. *Behari Mahton v Queen-Empress*, (1884) ILR 11 Cal 106, 108.
19. *Raman Behari Das v Emperor*, (1914) ILR 41 Cal 722; *Ibrahim Khan v Emperor*, (1910) 33 All 36 .
20. *Emperor v Byramji Chaewalla*, (1928) 30 Bom LR 325 : ILR 1928 52 Bom 280 : AIR 1928 Bom 148 ; *Emperor v Vinayak Bhatkhande*, (1928) 30 Bom LR 1530 : 53 Bom 119.
21. *Emperor v Gulzari Lal*, (1902) 24 All 254 ; *Emperor v Ishtiaq Ahmad*, (1904) 27 All 69 ; *Shiam Sundar*, (1930) 6 Luck 435 .
22. *Becha Ram Mukherji v Emperor*, (1944) 1 Cal 398 .
23. *Dhanjibhoy v Karim Khan*, (1904) PR No. 14 of 1905.
24. *Kadiri Kunhahammad v State of Madras*, AIR 1960 SC 661 : 1960 Cr LJ 1013 .

The Code of Criminal Procedure, 1973

CHAPTER XVII THE CHARGE

A.—Form of charges

[s 213] When manner of committing offence must be stated.—

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

Illustrations

(a) A is accused of the theft of a certain Article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

When the particulars mentioned in sections 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the Magistrate must give in the charge such particulars of the manner in which the alleged offence was committed, as will be sufficient for that purpose.

The Code of Criminal Procedure, 1973

CHAPTER XVII THE CHARGE

A.—Form of charges

[s 214] Words in charge taken in sense of law under which offence is punishable.—

In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

As provided by section 214 of CrPC, in every charge, words used in describing an offence shall be deemed to have been used in the sense attached to them by law under which such offence is punishable.[25.]

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25. *Radha Sasidharan v State of Kerala*, 2006 Cr LJ 4702 (4708) (Ker).

The Code of Criminal Procedure, 1973

CHAPTER XVII THE CHARGE

A.—Form of charges

[s 215] Effect of errors.—

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

Illustrations

(a) A is charged under section 242 of the Indian Penal Code (45 of 1860), with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit", the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January, 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January, 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haider Baksh on the 20th January, 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haider Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

This section is intended to prevent any failure of justice for noncompliance with the matters required to be stated in the charge.[26.] Unless the irregularity in the charge has misled the accused and occasioned a failure of justice, a conviction cannot be set

aside. It was held by the Supreme Court that the omission to mention section 34 of the Penal Code in the charge had only an academic significance and had not in any way misled the accused and further that on the evidence in the case the charge of murder had been brought home against both the appellants.[27.] Where the requisite sections were not set out under heads (1) and (2) but were given at the end of charge (3), the Bombay High Court held that a mere defect in the language or in the narration or in the sequence, or in the form of the charge would not necessarily vitiate the trial, unless the accused have been prejudiced thereby or have been handicapped on that account.[28.] The charge showed that the accused killed the deceased in the night of 26 March 1992, but that the foul smell from the deceased's house was felt by a witness at about 8 p.m. the same day, and subsequently other witnesses saw the dead body there. Medical opinion was that death must have occurred more than 65 hours back (post-mortem was conducted at 5.30 p.m. on 28 March 1992). It was held that as the charge contained all other material particulars like place of offence, name of accused and manner of commission of crime, *etc.*, the mere mistake about the date of occurrence could not prejudice the accused and prosecution case could not be thrown away on this count.[29.]

Sections 464 and 465 also deal with the same question. Section 464(2) provides for a re-trial of the accused where the charge contains a material error which has occasioned failure of justice. In judging the question of prejudice, the Courts must act with a broad vision and look to the substance and not to the technicalities. The main concern should be to see whether the accused had a fair trial and whether he knew what he was being tried for. Where the main facts sought to be established against him were explained to him and he had been given full and fair chance to defend himself, merely because there had been an omission in the charge of some material facts relating to the offence for which the charge was framed, it could not be said that failure of justice had been caused.[30.] Section 215 must be read with section 465. The combined reading of these provisions requires that when any error, omission or irregularity has occurred in the framing of a charge, the only question to consider is whether it has occasioned a failure of justice by prejudicing the accused in his defence.[31.] Where the prosecution tried to make a case different from that stated in the charge, it clearly causes prejudice to the accused.[32.] Alteration of charge under section 165A of IPC to one under section 161 and 109 of the IPC in respect of abetment is not an illegality.[33.]

The Supreme Court held that non-framing of charge or some defect in drafting of charge, *per se*, will not vitiate the trial itself. The same will have to be examined in the facts and circumstances of a given case. Thus, in a case where charge was framed for the offence of dacoity with murder under section 396 of IPC, it was held that the accused can be convicted under section 302 of IPC without being specifically charged. It was observed that the offence of murder will have to be read into the provisions of section 396 of IPC, *qua* doctrine of "legislation by incorporation".[34.]

It was held in a case before the Supreme Court that the accused could still be convicted for the offence actually committed and proved on the basis of evidence on record, so long as he had not been misled by any error or omission in framing the charge and no failure of justice had been occasioned. The accused was charged under section 304B of IPC (dowry death) and alternatively under section 498A IPC. Statement of charges unambiguously stated that deceased had been subjected to such cruelty and harassment "as did drive her to commit suicide". The trial Court convicted him under section 498A of IPC only. It was held that the presumption under section 113A of Evidence Act, 1872, could be raised and the accused could be convicted under section 306 of IPC as the case had all ingredients necessary for framing charge under that section. There was no need to remit the matter for retrial. The accused had had enough

opportunity for defence. The High Court ought to have allowed appeal of appellant parents of deceased.[35.]

[s 215.1] Failure to frame charge.—

The wife died of poisoning within seven years of marriage. There was no evidence showing that she was subjected to cruelty or harassment by the appellant husband or any of his relatives for any dowry demand. There was omission to frame charge under section 306 of IPC. The plea that the accused could still be convicted under section 306 could not be raised for the first time before the Court unless there was material on record which would establish the charge under the section.[36.]

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26. *Emperor v Yeshwant*, (1926) 28 Bom LR 497 .
27. *Rawalpenta Venkalu v State of Hyderabad*, AIR 1956 SC 171 : 1956 Cr LJ 338 ; *Hemant Kumar Mohapatra v Binod Bihari Mohapatra*, 1992 Cr LJ 2183 (Ori).
28. *CP Kumbhar v State of Maharashtra*, 1995 Cr LJ 290 (Bom).
29. *Pochammala Yellappa v State of AP*, 1995 Cr LJ 3187 (AP).
30. **See** 1977 Cr LJ NOC 234 ; **See** *also, Kailash Gir v K Khare*, *Food Inspector*, 1981 Cr LJ 1555 .
31. 1977 Cr LJ 292 (DB-Raj); *K Damodaran v State of Travancore Cochin*, AIR 1953 SC 462 : 1953 Cr LJ 1928 ; *Moti Das v State of Bihar*, AIR 1954 SC 657 : 1954 Cr LJ 1708 .
32. *Bhupesh Deb v Tripura*, AIR 1978 SC 1672 : 1978 Cr LJ 1738 : (1979) 1 SCC 87 .
33. *Om Prakash v State of UP*, AIR 1960 SC 409 : 1960 Cr LJ 544 .
34. *Rafiq Ahmad v State of Uttar Pradesh*, AIR 2011 SC 3114 : 2011 Cr LJ 4399 : JT 2011 (9) SC 279 : 2011 (8) Scale 272 : (2011) 8 SCC 300 .
35. *AK Prema S Rao v Vadla Srinivasa Rao*, (2003) 1 SCC 217 : AIR 2003 SC 11 : 2003 Cr LJ 69 : JT 2002 (8) SC 502 : 2002 (8) Scale 153 .

Toseswar Chutia v State of Assam, 2002 Cr LJ 1465 (Gau), the appellants, including T, were charged with unlawful assembly and murder, the later was fully aware that the charge against him was that of murder. He was not prejudiced.

36. *Harjit Singh v State of Punjab*, AIR 2006 SC 680 : (2006) 1 SCC 463 : 2006 Cr LJ 554 .

The Code of Criminal Procedure, 1973

CHAPTER XVII THE CHARGE

A.—Form of charges

[s 216] Court may alter charge—

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

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

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

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

This section applies to all Courts. The Supreme Court has said:

> *"...the Criminal Procedure Code gives ample power to the Courts to alter or amend a charge... provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving him a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him."* [37.]

To quote Lord Porter from the Privy Council decision in *Thakur Shah v Emperor,*[38.] the alteration or addition is

> *"always, of course, subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred".*

[s 216.1] "Court may alter or add to any charge".—

Meaning of adding to any charge is addition of a new charge and meaning of alteration of a charge is changing or variation of an existing charge. Addition to or alteration of a

charge or charges implies one or more existing charge or charges.[39.] A charge once framed cannot be deleted but it can be altered.[40.]

For adding a new charge, there must be material before the Court either in the complaint or in the evidence to justify such action.[41.] The Court has power to add to a charge. The word "alter" includes withdrawal by a Sessions Judge of a charge added by him to the charge on which the commitment has been made.[42.] The Court may alter or add to any charge upon its own motion or on application by the prosecution which should be made immediately after the charge is explained by the Magistrate.[43.] When an application was moved by the private counsel engaged by the complainant and forwarded by the Public Prosecutor, it was held that the alteration of charges was allowed and it was not an illegality.[44.]

Where the alteration of the charge was not read and explained to the accused, it was held by the Supreme Court that the requirement of section 216 (2) was not fulfilled.[45.]

The alteration of charge and framing of proper charge can be best decided by the trial Court at an appropriate stage of the trial. In a hit and run case, the accused was originally charge-sheeted for offence under section 304A of IPC, which is triable by a Magistrate. Subsequent alteration of the charge to section 304, Part II, which is triable by Sessions Court, was held to cause no prejudice to the accused. Alteration of charge depends upon the evidence before the Court. But so far as the quashing of the charge under section 482 by the High Court was concerned, it was held that it was premature for the High Court to record a finding that there was no material to frame a charge for the offence punishable under section 304, Pt II. The trial was directed to proceed on the basis of charges framed by the Magistrate's Court. The Supreme Court further clarified that if the Magistrate came to the conclusion that there was sufficient material to charge the serious offence under section 304, Pt II, he could proceed to do so, without, in any manner, being hindered or influenced by the observations or findings of the High Court or Session Court.[46.]

In *Anant Prakash Sinha v State of Haryana,*[47.] it was held that the court can change or alter the charge if there is defect or something is left out. The test is that it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice is to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of section 216 of CrPC.

In the Bhopal Gas Tragedy case, the CBI sought review of the judgment and order dated 13 September 1996 passed by the Supreme Court. In that judgment, it had been held that no charge under section 304, Pt II or under sections 324, 326 and 429 with or without the aid of section 35 of IPC could be framed against the accused on the material led by prosecution. It was further directed that on the material led, charge under section 304A IPC could be made out against the accused. The review/curative petition was sought on the ground that such decision thwarted the powers of trial court under section 216of CrPC to enhance charges. It was held by the Supreme Court that the grounds raised are based on wrong assumption as no decision by any court could nullify the express provisions of an Act or code. Moreover, the review sought after 14 years without any explanation was liable to be dismissed.[48.]

[s 216.2] "At any time before judgment is pronounced".—

The Court may alter or add to the charge at any time before judgment is pronounced. It may be done even at the appellate stage before the pronouncement of the judgment of appeal.[49.] But it must exercise a sound and wise discretion in so doing.[50.] If it wishes to strike out any of the charges, it should do so before concluding the trial and should give the accused an opportunity of making such defence as he thinks fit; otherwise, the trial is vitiated.[51.] The application of section 216(1) cannot be limited to altering or amending a charge in respect of an offence disclosed by the evidence during trial. Even if there is an omission to frame a proper charge at the commencement of the trial, if that omission is discovered subsequently, it can be remedied by framing appropriate charge at any time before the judgment is pronounced.[52.] It has been held that if an accused was charged of an offence, a Court can convict him of another offence provided the latter is a lesser offence.[53.]

The Court should proceed with the trial if alteration or addition made to the charge is not likely to prejudice the accused in his defence or the prosecution in the conduct of the case. The Court should treat the added or altered charge as the original charge. The addition or alteration of a charge does not open up the trial from the beginning, and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused.[54.]

In *Rajbir v State of Haryana*,[55.] the Supreme Court had directed all trial Courts to ordinarily add section 302 to the charge under 304B. A trial judge, acting on the direction of Supreme Court given in the above case, framed additional charge under section 302 in a dowry death case, without adverting to the evidence adduced in the case. In *Jasvinder Saini v State (Govt of NCT of Delhi),* it was held by Supreme Court that such framing of additional charge was unjustified and remitted the matter to trial Court to reconsider whether the charge under section 302 should be framed in the light of the evidence in the case.[56.]

Sub-section (5) declares that when previous sanction is necessary for the new or altered or added charge, such sanction should be obtained; but it will not be necessary to do so if sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Under section 216, addition to the alteration of a charge(s) implies one or more existing charge or charges. When the accused were discharged of all the charges and no charge existed against them, an application under section 216 was not maintainable.[57.]

For addition/alteration/amendment of charge, the expressions "*at any time*" and "*judgment is pronounced*" in section 216 indicate that wide powers have been conferred on the Court which can be exercised in appropriate cases. Thus, where the designated Court under TADA Act, 1993 (now repealed) inadvertently did not mention charges given in the original charge-sheet, the application for addition of charges was allowed. Therefore, in the Bombay Blast case where the respondent was declared a proclaimed offender and was absconding for 15 years, in his confessional statement under section 15 of the TADA Act, he admitted his role in the criminal conspiracy. Hence, the original charge of criminal conspiracy under section 3(2) of TADA Act read with section 120B and other offences were allowed to be added.[58.]

37. *Kantilal Chandulal Mehta v The State of Maharashtra*, AIR 1970 SC 359 , 362-363 : (1970) 3 SCC 166 1970 Cr LJ 510 . *Hasanbhai Valibhai Qureshi v State of Gujarat*, AIR 2004 SC 2078 : (2004) 5 SCC 347 , alternation of charge by trial Court permissible if exigencies of the case warrant or necessitate.
38. *Thakur Shah v Emperor,* AIR 1943 PC 192 .
39. *TJ Edward v CA Victor Immanuel*, 2002 Cr LJ 1670 (Ker).
40. *Vibhuti Narayan Choubey v State of UP*, 2003 Cr LJ 196 (All).
41. *TJ Edward v CA Victor Immanuel*, 2002 Cr LJ 1670 (Ker).
42. *Dwarka Lal v Mahadeo Rai*, (1890) ILR 12 All 551.
43. *Re Abdur Rahman*, (1900) ILR 27 Cal 839 (FB).
44. *Radhey Shyam v State of UP*, 1992 Cr LJ 202 (All).
45. *Sabbi Mallesu v State of AP*, AIR 2006 SC 2747 : (2006) 10 SCC 543 : 2006 Cr LJ 4038 .
46. *State of Maharashtra v Salman Salim Khan*, AIR 2004 SC 1189 : (2004) 1 SCC 525 : 2004 Cr LJ 920 .
47. *Anant Prakash Sinha v State of Haryana,* (2016) 6 SCC 105 : AIR 2016 SC 1197 : 2016 Cr LJ 1836 : 2016 (3) Scale 107 .
48. *CBI v Keshub Mahindra,* AIR 2011 SC 2037 : (2011) 6 sec 216 : (2011) 2 sec (Cri) 863 : (2011) 6 SCC 216 .
49. (1979) Mad LJ (Cr) 431. *Surinder Kumar v State of HP*, 2003 Cr LJ 2900 (HP), addition allowed at the appellate stage. Material facts constituting the offence under section 409 were set out in charges framed earlier for offences under sections 420, 468 and 472 read with section 120B of IPC. Addition of the charge under section 420 as a penal provision was allowed because it must have been left out by mistake.
50. *King-Emperor v Mathura Thakur*, (1901) 6 Cal WN 72.
51. *Chetto Kalwar v Emperor*, (1922) 49 Cal 555 : AIR 1922 Cal 401 .
52. *Enumula Subba Rao v State of AP*, 1979 Cr LJ 258 .
53. *Annappa Bandu Kavaiage v State of Maharashtra*, ILR (1977) Bom 2425 (DB).
54. *Shamlal Kalwar v Emperor*, (1921) 1 Pat 54 : AIR 1922 Pat 393 .
55. *Rajbir v State of Haryana,* AIR 2011 SC 568 : 2010 (12) Scale 319 : (2010) 15 SCC 116 .
56. *Jasvinder Saini v State (Govt of NCT of Delhi)*, AIR 2014 SC 841 : (2013) 7 SCC 256 .
57. *Sohan Lal v State of Rajasthan*, 1990 Cr LJ 2302 : AIR 1990 SC 2158 : (1990) 4 SCC 580 .
58. *CBI v Karimullah Osan Khan,* AIR 2014 SC 2234 : (2014) 11 SCC 538 : 2014 Cr LJ 1870 (SC).

The Code of Criminal Procedure, 1973

CHAPTER XVII THE CHARGE

A.—Form of charges

[s 217] Recall of witnesses when charge altered.—

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

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material.

The accused has a right to recall prosecution witnesses after the alteration of the charge.[59.] The Court may, however, deny such right if it is of opinion that the purpose is only delay or vexation or defeating the ends of justice. Similar right with the same safeguard is also conferred on the prosecution. No duty is laid on the Court to ask the accused, after the charge has been altered, to state whether he wishes to have any of the witnesses recalled or re-examined and whether he wishes to call any further witnesses.[60.]

The Supreme Court[61.] has where the charge was altered from under sections 306 to 302 of IPC and the 3 appellants were convicted under it by the trial court and affirmed by the High Court, held that whenever a charge is altered or added by the Court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re-summon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the Court is to even allow any further witness which the Court thinks to be material in regard to the altered or additional charge. As it was not followed, the Supreme Court restricted the sentence to the period undergone.

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59. *Re Ramalinga Odayar*, (1929) ILR 52 Mad 346 : AIR 1929 Mad 200 .

60. *Koumal*, (1929) 52 All 455 ; *Moosa Abdul Rahiman v State of Kerala*, 1982 Cr LJ 1384 (Ker).

61. *R Rachaiah v Home Secretary, Bangalore*, AIR 2016 SC 2447 : 2016 Cr LJ 2943 : 2016 (5) Scale 692 .

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CHAPTER XVII THE CHARGE

B.—Joinder of charges

[s 218] Separate charges for distinct offences.—

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

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

(2) Nothing in sub-section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223.

Illustration

"A" is accused of a theft on one occasion, and of causing grievous hurt on another occasion. "A" must be separately charged and separately tried for the theft and causing grievous hurt.

This section provides, first, that there should be a separate charge for each distinct offence; and, secondly, that there should be a separate trial for every such charge, except in the four cases mentioned in sub-section (2), *viz*. sections 219, 220, 221 and 223. Unless, therefore, a case falls within any of these four sections, it would be a breach of this section to join a number of charges in the same trial. Such a trial is illegal as the illegality goes to the root of the trial.

Sections 218 to 222 provide for joinder of charges in one trial of the same accused person. Section 223 deals with joinder of charges against two or more accused in the same trial.

[s 218.1] Object.—

The object of this section is to see that the accused is not bewildered in his defence by having to meet several charges in no way connected with one another.[62.] The mind of the Court might be prejudiced against the accused if he were tried in one trial upon different charges resting on different evidence.[63.]

[s 218.2] Scope.—

This section applies to summons cases also, although it is not necessary to embody a charge in writing in a summons case.[64.] Non-compliance with the provisions of this section is an illegality which vitiates the whole trial, and it cannot be cured by applying

sections 464 and 465 of the Code.[65.] However, if the accused person so desires by an application in writing and the Magistrate is also of opinion that thereby no prejudice will be caused to the accused, then the Magistrate *may* try all or any number of charges against him together. The conditions are cumulative and not alternative in nature.

[s 218.3] "For every distinct offence of which any person is accused".—

The expression "every distinct offence" must have a different context from the expression "every offence" or "each offence". A separate charge is required for every distinct offence and not necessarily for each separate offence. "Distinct" means "not identical". It stresses characteristics that distinguish, while the word "separate" would stress the "two things not being the same". Two offences would be distinct if they are not in any way interrelated.[66.]

The inclusion in one charge of several distinct offences is an illegality, and the conviction on such a charge must be set aside.[67.] Thefts of different items of ornaments from the safe deposit vault committed at different times cannot be lumped up into one charge.[68.] Where the Sessions Judge had framed a single charge against the accused for causing death of two persons by two separate shots, it was held that two separate charges ought to have been framed as provided for under section 218of CrPC However, non-framing of separate charges was held as mere irregularity curable under section 464 of CrPC, as it did not occasion a failure of justice or cause any prejudice to the accused.[69.]

Where the accused was charged with conspiracy to commit murder, but no charge was framed under section 300 IPC, yet, he could be convicted under section 120B read with section 300 if found to have actually committed the offence with other accused with whom he conspired.[70.]

[s 218.4] "There shall be a separate charge."—

This section is mandatory, and for every distinct offence, there should be a separate charge which should, except in certain cases specified in sections 219, 220, 221 and 223 of the Code, be tried separately.[71.] Where two dacoities are committed in two different houses on the same night, a single rolled-up charge embracing both dacoities should not be framed.[72.] The accused were convicted of rioting, which was the only charge before the Magistrate. On appeal, the Sessions Judge acquitted them of rioting, but convicted them under sections 448 and 323 of the Penal Code of house-trespass and hurt. It was held that the conviction was illegal as the offences were distinct and separate offences, which should have formed the subject of separate charges.[73.] Where the accused was charged with the commission of 5 offences of rape, committed on three girls, at different places between September 1986 and February 1991, it was held that the offences were not committed in the same transaction, and clubbing all the 5 offences of rape in one was nothing but illegality, which would highly prejudice the trial.[74.]

[s 218.5] Alternative charge.—

The accused should never be called on to plead in the alternative but separately to each of the heads of a charge. An alternative charge is forbidden by this section.[75.] But

at the same trial, the accused can be charged with murder, and in the alternative with the offence of causing evidence to disappear with the intention of screening the offender.[76.]

[s 218.6] "Every such charge shall be tried separately".—

Each offence should form a separate head of charge, with reference to which there should be a distinct finding and a distinct sentence. The principle of *res judicata* is not applicable to criminal cases. The evidence led in one case cannot be taken note of or considered in the other case. Even in the cross cases, they have to be independently decided on the evidence led independently.[77.] The trial of each of the charges should be separate. Separate offences should not be lumped together in one single charge.[78.] In a case, the employer-company did not deposit the employer's contribution towards the employee's Provident Fund, committing 33 offences punishable under sections 14 and 14A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. Eleven complaints for thirty-three distinct offences, spread over to thirty-three months, were filed. The accused company moved for consolidation of all the cases. The Rajasthan High Court held that a joint trial in these cases would not be justified under section 218(1)of CrPC and therefore, eleven cases for thirty-three charges could not be consolidated.[79.]

It has been held that the contravention of the mandate of section 218 that there shall be a separate charge and trial for every distinct offence is not incurable.[80.]

[s 218.7] Applicability of proviso.—

It has been held that the provision applies only in such a case where the distinct offences for which the accused is charged are being tried before the same Magistrate. Where the offences were being tried before different Magistrates, the proviso to section 218 could not give any single Magistrate the power to order transfer of cases to him from different Magistrates or Courts.[81.]

Where there was a joint trail for offences of kidnapping and murder under IPC along with an offence under section 25 of the Arms Act, 1959, and section 5 of TADA (now Repealed by Act 26 of 2004) for illegal possession of a country-made pistol and cartridge, but there was no charge that the accused used the pistol for committing the offence of murder or kidnapping, it was held that the joint trial was illegal and caused prejudice to the accused.[82.]

Where the accused outraged the modesty of a woman (complainant) and after the incident was over, two other persons (also accused) approached her to tell her that they would pacify the incident, but on her refusal, they abused her caste and tried to rape her, it was held that the second incident was in pursuance of the first incident. They together formed one transaction. The Court refused to quash the proceedings under which the accused persons were charged for the two offences in a single complaint.[83.]

62. *Queen Empress v Fakirapa*, (1890) 15 Bom 491.
63. *Queen-Empress v Juala Prasad*, (1884) ILR 7 All 174, 177 (FB).
64. *San Dun*, (1905) 3 LBR 52 (FB); *Upendra Nath Biswas v Emperor*, (1914) ILR 41 Cal 694; *Indramani v Chanda Bewa*, (1956) Cut 251 : AIR 1956 Ori 191 : 1956 Cr LJ 1218 .
65. *SB Saxena*, (1955) 34 Pat 781.
66. *Banwarilal Jhunjhunwala v UOI*, AIR 1963 SC 1620 : (1963) 2 Cr LJ 529 ; *Ram Subheg Singh v Emperor*, (1914) 19 Cal WN 972.
67. *Asgar Ali Biswas v Emperor*, (1913) ILR 40 Cal 846.
68. *Becha Ram Mukherji v Emperor*, (1944) 1 Cal 398 .
69. *Mohd Islam v State of UP*, 1993 Cr LJ 1736 (All).
70. *Jitender Kumar v State of Haryana,* AIR 2012 SC 2488 : (2012) 6 SCC (Cri) 67 .
71. *Sita Ahir v Emperor*, (1912) ILR 40 Cal 168.
72. *Chandrama Prasad Chamar v The State*, (1951) ILR 1 Cal 539; *Sanatan Mandal v State of WB*, 1988 Cr LJ 238 (Cal).
73. *Yakub Ali v Lethu Thakur*, (1902) ILR 30 Cal 288.
74. *Priya Sharan Mahraj v State of Maharashtra*, 1995 Cr LJ 3683 (Bom).
75. *Ramaji Sajabrao*, (1885) 10 Bom 124; *Queen Empress v Fakiraap*, (1890) 15 Bom 491; *Emperor v Bankatram*, ILR (1904) 28 Bom 533 : 6 Bom LR 379; *Palani Palagan*, (1902) 26 Mad 55.
76. *Emperor v Hanmappa*, (1923) 25 Bom LR 231 : AIR 1923 Bom 262 .
77. *MP Srivastava v Sqn. Ldr. KV Vashist*, 1991 Cr LJ 12 : 1990 Rajdhani LR 293 (Del).
78. *Sheochurun*, (1871) 3 NWP HCR 314; *Becha Ram Mukherji v Emperor*, (1944) 1 Cal 398 .
79. *Jodhpur Woollen Mills Ltd v State of Rajasthan v State of Rajasthan*, 1995 Cr LJ 769 (Raj).
80. *Kamalnatha v State of TN*, AIR 2005 SC 2132 : (2005) 5 SCC 194 .
81. *State of Punjab v Rajesh Syal*, (2002) 8 SCC 158 : 2003 Cr LJ 60 .
82. *SS Vijender v State of Delhi*, (1997) 6 SCC 171 : (1997) 3 JT 131 , conviction under the Arms Act and TADA was set aside. Sanction for prosecution was also not there.
83. *Vidavaluru Balaramaiah v State of AP*, 2003 Cr LJ 3192 . There was refusal to quash proceedings under section 482 also under reference to Scheduled castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

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CHAPTER XVII THE CHARGE

B.—Joinder of charges

[s 219] Three offences of same kind within year may be charged together.—

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860), or of any special or local law:

***Provided* that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45 of 1860), shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.**

This section modifies section 218 by allowing three charges of three offences of the same kind committed within one year to be tried together. It limits the number of charges of the same kind which may be tried in a single trial. The accused may be tried separately for other offences. The Privy Council has ruled that it is illegal under this section to charge a person at one trial with more than three acts, these acts extending over a period of more than a year. In this case, the accused was tried on charges of extortion in which forty-one criminal acts extending over a period of two years were brought against him. It was held that the trial so conducted was plainly prohibited and was illegal and could not be cured by section 464.[84.]

Three offences of the same kind under this section cannot be jointly tried with other offences which may form part of the same transaction as each of those three offences of the same kind, unless all the offences taken together, can be said to form part of one transaction.[85.]

[s 219.1] "When a person is accused of more offences than one of the same kind".—

This section by its terms refers to the case of a single accused, and is not applicable where several persons are tried jointly.[86.] This section does not deal with acts, it deals with offences, and the condition laid down in this section is that the accused must be charged with not more than three offences of the same kind. This section does not provide that the accused may be charged with having committed three acts or three series of acts of the same kind. The compliance that is required of this section is not a substantial compliance but an actual compliance. It is not enough that the acts must

be similar or that the offences must be similar, but in order to bring a case within this section, the offences must be "of the same kind" as defined by clause (2) of this section.[87.]

The expression "offences of the same kind" is explained in sub-section (2). Embezzlement and abetment thereof are not offences of the same kind.[88.]

[s 219.2] "Committed within the space of twelve months".—

Offences of the same kind committed in the course of one year only can be tried at one trial.[89.] Where the accused was charged with having altered and mutilated certain accounts between the years 1907 and 1909, it was held that the charge was bad, in as much as he could have been tried at one trial only for three separate offences committed within the space of twelve months from first to last.[90.] Two cheques were issued within the space of 12 months. The Court said that it was not necessary to start two separate complaints against their dishonour. A single complaint was maintainable.[91.]

[s 219.3] "Whether in respect of the same person or not".—

An accused person may be charged at one trial with three offences of the same kind, though committed against different persons.

Where a postmaster was accused of having, on three different occasions within a year, dishonestly misappropriated moneys paid to him by different persons for money orders, it was held that he could be charged with, and tried at one trial for, all three offences.[92.] The Supreme Court has held that a single act of firing a shot at two different persons is one offence and not two offences.[93.]

[s 219.4] "May be charged with, and tried at one trial for, any number of them not exceeding three".—

This section simply places a statutory limit on the member of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged with and tried on the same day for any number of distinct offences of the same kind committed within a year.[94.]

[s 219.5] Attempt to commit such offence same as actual offence [*Proviso*].—

Sections 379 and 380, IPC, refer to theft and theft in a building and are deemed to be offences of the same kind. Similarly, it is provided specifically that an attempt to commit an offence, where such an attempt is penalised by any law, is of the same kind as the actual offence. What is the effect of a trial in which an accused is charged of more than three offences committed during a year in violation of section 219? Formally, the view was that such a trial is null and void as being without jurisdiction. But this view is no longer correct.[95.] It was held that when an accused was charged and tried for four dacoities committed within a space of more than twelve months and he did not raise

any objection to it at the trial stage or even at the appellate stage, subsequent objection could not be sustained as no prejudice had been caused to him.[96.]

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84. *Subramania Iyer v King-Emperor*, (1901) 28 Moo Ind App 257 : 3 Bom LR 540 : 25 Mad 61.
85. *Mangal Chandra Dan v The State*, (1954) Cut 599.
86. *Mudhai Sheikh*, (1905) 33 Cal 292 ; *Abdul Majid v Emperor*, (1906) ILR 33 Cal 1256; *Tulsi*, (1916) PR No. 17 of 1917.
87. *Chandra v The State*, (1951) 53 Bom LR 928 (FB) : AIR 1952 Bom 177 .
88. *Janeshar Das v Emperor*, (1929) ILR 51 All 544 : AIR 1929 All 202 .
89. *Reg v Hanmanta*, ILR (1877) 1 Bom 610 ; *Raman Lal v Emperor*, (1926) ILR 49 All 312 : AIR 1927 All 223 .
90. *Salim-ullah-Khan*, (1909) 32 All 57 .
91. *Madan Mohan Sahu v Central Agencies*, AIR 2010 NOC 1076 Ori.
92. *Queen-Empress v Juala Prasad*, (1884) ILR 7 All 174 (FB).
93. *Bhagat Singh v The State Gurdev Singh*, 1952 SCR 371 : AIR 1952 SC 45 : 1952 Cr LJ 323 .
94. *Ram Manikya Chakrobutty v Dononjay Baraj*, (1878) ILR 3 Cal 540.
95. *W Staney v State of MP*, AIR 1956 SC 116 : 1956 Cr LJ 291 ; *Chandi Prasad v State of UP*, (1955) 2 SCR 1035 : AIR 1956 SC 149 : 1956 Cr LJ 322 .
96. *Rahmat v State of UP*, 1980 Cr LJ 581 (All).

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CHAPTER XVII THE CHARGE

B.—Joinder of charges

[s 220] Trial for more than one offence.—

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

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

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

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860).

Illustrations to sub-section (1)

(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and convicted of, offences under sections 225 and 333 of the Indian Penal Code (45 of 1860).

(b) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code (45 of 1860).

(c) A entices B, the wife of C, away from C, with intent to commit adultery, with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code (45 of 1860).

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several

forgeries punishable under section 466 of the Indian Penal Code (45 of 1860). A may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code (45 of 1860).

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charge. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code (45 of 1860).

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code (45 of 1860).

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code (45 of 1860).

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code (45 of 1860).

The separate charges referred to in *Illustrations* (a) to (h), respectively, may be tried at the same time.

Illustrations to sub-section (3)

(i) A wrongfully strikes B with a cane. A may be separately charged with and convicted of, offences under sections 352 and 323 of the Indian Penal Code (45 of 1860).

(j) Several stolen sacks of corn are made over to A and B, who knew they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code (45 of 1860).

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with and convicted of, offences under sections 317 and 304 of the Indian Penal Code (45 of 1860).

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code (45 of 1860). A may be separately charged with, and convicted of, offences under sections 471 (read with section 466) and 196 of that Code (45 of 1860).

Illustrations to sub-section (4)

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code (45 of 1860).

This section relates to the joinder of charges of offences committed by the same person. It applies to a case in which the different offences are parts of one transaction. The combined effect of this section and section 71 of the Penal Code is given in the author's commentary on the IPC.

Sections 220 and 223, which deal with the joinder of charges of different offences and the joint trial of a number of accused persons, are not controlled by the latter part of section 218(1) or by section 219. If offences are committed in the course of the same transaction, they may be tried together, although they are more than three in number and extending over a period of more than a year. There is nothing in this section or section 223 to suggest that they are not governed by section 212 or the first part of section 218. The illustrations to this section make it clear that when different offences are tried together, they must be separately charged.[97.] Misjoinder of charges is a defect in the procedure followed at the trial and it does not mean that the trial Court acted without jurisdiction.[98.]

[s 220.1] Scope.—

This section allows a number of offences, even when exceeding three and extending over a period of more than twelve months, being tried at one trial if they are committed in one series of acts so connected together as to form the same transaction.[99.] Where charges relating to perjury, conspiracy and evasion of Income-tax were clubbed together against all the three accused along with two more persons as if all the offences were committed in the course of the same transaction, the Supreme Court held that there was clear misjoinder of charges, which includes misjoinder of parties also. Misjoinder of charges cannot be said to be a mere irregularity but a failure of justice. The conviction was set aside.[100.]

[s 220.2] "One series of acts so connected together as to form the same transaction".—

The word "transaction" means a group of facts so connected together as to involve certain ideas, *viz.*, unity, continuity and connection. In order to determine whether a group of facts constitutes one transaction, it is necessary to ascertain whether they are so connected together as to constitute a whole which can properly be described as a transaction.[101.] The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts as to constitute one continuous action. The fact that offences are committed at different times does not necessarily show that they may not be so connected as to fall within this section. Proximity of time, unity or proximity of place, continuity of action, and community of purpose or design are elements for consideration, whether the alleged facts form the same transaction.[102.] But in all such cases, it should be considered whether the alleged acts were, as a matter of fact, so connected in one series as to form essentially and strictly the same transaction.[103.] "Transaction" means "carrying through" and suggests not necessarily proximity in time —so much as continuity of action and purpose.[104.] The Privy Council has held that

identity of time is not an essential element in determining whether certain events form the same transaction within the meaning of this section. It is the continuity of action and the sameness of purpose that determine whether the events constitute the same transaction.[105.]

The word "transaction" has a synonym in the word "affair".[106.] SIR JAMES STEPHEN defines it as "a group of facts, so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue." If a man is found in concealed possession of a diamond necklace of which each individual diamond has been the subject of a separate theft and he knows that the diamonds have been stolen, his dishonest possession of the necklace is one "transaction" in the sense that that word is used in this section. Similarly, the simultaneous possession of a number of bullocks at a fair and the offer of them for sale is one "transaction", and any number of separately stolen bullocks may be the subject of a single trial.[107.] If a quantity of stolen property is found in the possession of an individual in circumstances which lead to the conclusion that he was retaining the whole of such property knowing it to have been stolen, there cannot be separate trials in respect of separate portions of the stolen property. If, however, the articles were proved to have been received on different dates, it would justify separate charge limited to three in respect of each act of reception. It does not follow from the mere fact that the several articles were stolen on different dates and that there is no evidence of separate acts of reception, that the retention of each article on a given date is not a part of a single "transaction."[108.] Where the bribe was offered only to enable the accused to get themselves released so that they may pursue the main part of the conspiracy, the act of offering the bribe was held connected with the other alleged activity so as to form the same transaction.[109.] Where the accused committed three murders in one house and fourth a little after in different house on account of being dissatisfied with family partition, the Karnataka High Court held that he could be charged with and tried at one trial as all the four acts are so connected together so as to form the same transaction and the successive murders did not constitute distinct offences.[110.]

Where some heroin was recovered from the *attachi* being taken by the accused on the road and subsequently 2 kg more heroin was recovered from his house on his disclosure statement, it was held that both the recoveries formed one single transaction and both the charges be clubbed together and single composite trial be held.[111.]

[s 220.3] Enabling provisions.—

The provision is of enabling nature. The Court may or may not try all the offences together in one trial.[112.]

[s 220.4] "More offences than one are committed by the same person".—

The offences may be of the same kind as in ills. (d), (e) and (h) or of different kinds as in (a), (b), (c), (f) and (g). But they must be distinct offences. See section 71 of the IPC.

Expression "by the same person" clearly indicates that where there are more accused than one, this section is inapplicable. Section 223 will then apply.

[s 220.5] "He may be charged with, and tried at one trial for, every such offence".—

The provisions of this section are not imperative but enabling.[113.] The accused may be charged with and tried for every distinct offence, but the Court may not impose a sentence for every conviction. It may sentence the accused for the graver offence proved.

Giving both the sections 219(1) and 220(1) their full significance, the obvious conclusion is that where several offences are committed in the course of the same transaction, they may all be tried jointly whether those offences are of the same kind or not and whether their number exceeds three or not and irrespective of whether they are committed within a period of one year. On the other hand, where the sameness of the transaction is wanting, only three offences of the same kind alleged to have been committed during the period of one year can be tried jointly.[114.]

An accused went to the house of a prostitute in a brothel for the purpose of committing theft. In the course of committing theft, he also committed rape upon the prostitute. It was contended that the joinder of the two offences of theft and rape in the same trial constituted misjoinder under this section. It was held that continuity of action and proximity of time were essential elements in connecting a series of acts together so as to form part of the same single and entire transaction.[115.] A man may be prosecuted under section 7 of the Essential Commodities Act, 1955 for being in possession of rice above the prescribed limit and also of dacoity in respect of the same bags of rice.[116.]

[s 220.6] Facilitating or concealing criminal breach of trust, *etc.* [*Sub-section (2)*].—

When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property is also accused of one or more offences of falsification of accounts for the purpose of facilitating or concealing that or those offences, then he may be charged with and tried in one trial for every such offence. Even under the old section 235 of the Code of 1898 where this sub-section was not in existence, the Calcutta and the Patna High Courts had held that a charge of criminal breach of trust with regard to a gross sum consisting of seven items can legally be joined at the same trial with two charges of falsification of accounts committed within one and the same year, if the falsification was carried out as one of the series of acts constituting the transactions by which the misappropriation was effected[117.]; the Madras and the Bombay High Courts, however, took the contrary view.[118.]

Criminal breach of trust or dishonest misappropriation may, in many cases, be accompanied with falsification of accounts committed either for the purpose of facilitating or concealing that offence. It is possible now to club these offences together.

[s 220.7] Offences falling in one or more definitions [*Sub-section (3)*].—

The offences referred to in this sub-section are distinct and separate offences not necessarily connected with one another. See illustrations (i), (j) and (k). The sub-section refers to a totality of acts some of which bring the case under one definition of an offence and some under another.[119.] Clause (2) of section 71 of the IPC should be read with this section. Where the same facts constitute different offences, the accused

may be charged with, and tried at one trial for, each of such offences. But only one offence is committed, and the punishment must be for the graver offence. The accused cannot be punished for each of the distinct offences.

The act of the accused in the same transaction constituted more than one offence. Accused appellant fired at deceased and also at the prosecution witness, causing death of the former and injuries to the latter. Act or firing at the prosecution witness constituted an offence under section 307 of IPC, while the act of firing at the deceased constituted an offence under section 302 of IPC as well as under section 27(3) of Arms Act, 1959. It was held that in view of specific provisions of section 220(3), the accused could be tried simultaneously for the offences under section 302 of IPC as well as section 27(3) of Arms Act, 1959.[120.]

Where in a trial for more than one offence, several numbers of persons were involved, the issue of process for joint trial was held to be not improper. The Court said that whether the accused persons were to be charged for one offence or series of offences could be considered at the stage of framing of charge and not at the stage of taking cognizance and issue of process.[121.]

[s 220.8] Acts constituting different offences when combined [*Sub-section (4)*].—

Several acts, each constituting an offence and in combination constituting a different or a graver offence, may be separately charged. But it is not necessary to do so, *vide* section 222. The punishment in such cases will be that for the compound or the graver offence. See section 71 of IPC.

Where in one series of acts which were so connected together as to constitute the same transaction, more than one offence were committed, the Court said that there could be a joint trial.[122.]

[s 220.9] Unpaid deposits of different persons, separate offences.—

A finance company had accepted deposits from a large number of persons. The offences arising out of non-payment of such deposits were held to be separate offences and not a single offence. Criminal cases were filed by the depositors at different places in different states. The parties were different, and the amount of deposit and its period were all different. The Court accordingly held that each individual deposit constituted an independent transaction.[123.]

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97. *Emperor v Karamalli Gulamalli*, (1938) 40 Bom LR 1092 : (1939) Bom 42 : AIR 1938 Bom 481 .
98. *Kanardhan Reddy v State of Hyderabad*, AIR 1951 SC 217 : 52 Cr LJ 736.
99. *Choragudi Venkatadri v Emperor*, (1910) ILR 33 Mad 502.

100. *KTMS Mohd v UOI*, AIR 1992 SC 1831 : 1992 Cr LJ 2781 : (1992) 3 SCC 178 .

101. *Kashiram Jhunjhunwalla v (Firm) Hurdut Rai Gopal Rai*, (1935) 62 Cal 808 : AIR 1935 Cal 312 .

102. *Vajiram*, (1892) 16 Bom 414, 424; *Amrita Lal Hazra v Emperor*, (1915) ILR 42 Cal 957; *Kamala Kanta Ray Chaudhuri*, (1938) 1 Cal 98 ; *Nana*, (1939) Nag 686; *Nabijan v Emperor*, (1946) 25 Pat 503; *Mannalal Khatic v The State*, AIR 1967 Cal 478 .

103. *Queen Empress v Fakirapa*, (1890) 15 Bom 491.

104. *Datto Hanmant*, (1905) 30 Bom 49 : 7 Bom LR 633; *Mallayya*, (1924) 49 Mad 74; *Emperor v Shapurji Sorabji*, (1935) 38 Bom LR 106 : 60 Bom 148 : AIR 1936 Bom 154 ; *Ajablal Rai v Emperor*, (1935) 15 Pat 138 : AIR 1936 Pat 20 ; *Astell v Eng Take*, (1941) Ran 539 : AIR 1941 Rangoon 337 , differing from *Shapurji Sorabji* on the point that the trial should be set aside because injustice might have occurred.

105. *Babulal : Sailendra Nath v The King-Emperor*, (1938) 40 Bom LR 787 : 65 IA 158 : (1938) 2 Cal 295 ; *Hirday v Emperor*, (1945) 24 Pat 501 : AIR 1946 Pat 40 .

106. *Ramnath Rai v Emperor*, (1933) 13 Pat 161 : AIR 1934 Pat 483 .

107. *Ibid*, p 164.

108. *Ramnath Rai v Emperor*, (1933) 13 Pat 161, at pp 163, 164 : AIR 1934 Pat 483 .

109. *State of Bihar v Simranjit Singh*, 1987 Cr LJ 999 (Pat); *EK Thankappan v UOI*, 1989 Cr LJ 2374 (Ker).

110. *MS Sherappa v State*, 1994 Cr LJ 3372 (Kant).

111. *Naresh Kakkar v State*, 1995 Cr LJ 3062 (Del).

112. *Mohinder Singh v State of Punjab*, AIR 1999 SC 211 : (1998) 7 SCC 390 .

113. *Ugra*, (1988) *Unrep* CRC 307; *Ameruddin v Farid Sarkar*, (1882) ILR 8 Cal 481; *Shamshudeen v State of Kerala*, 1989 Cr LJ 2068 (Ker).

114. *Gurucharan Samal v The State*, (1953) Cut 96 : AIR 1953 Ori 258 .

115. *Faiz Md*, (1945) Kar 100 .

116. *Ramayan Bhagat v The State*, 1970 Cr LJ 118 .

117. *Kashiram Jhunjhunwalla v The State*, (1935) 62 Cal 808 : AIR 1935 Cal 312 ; *Ramkishoonprasad*, (1933) 13 Pat 170, dissenting from *Raman Behari Das v Emperor*, (1914) 41 Cal 722 .

118. *Kasi Viswanathan*, (1907) 30 Mad 328; *Emperor v Manant K Mehta*, (1925) 27 Bom LR 1343 : ILR 1925 49 Bom 892 : AIR 1926 Bom 110 .

119. *Emperor v Dagdi Dagdya*, (1928) 30 Bom LR 342 : AIR 1928 Bom 177 .

120. *Surendra Singh Rautela v State of Bihar*, AIR 2002 SC 260 : 2002 Cr LJ 555 : (2002) 1 SCC 266 .

121. *Bijaya Das v State of Orissa*, 2003 Cr LJ 1621 (Ori).

122. *State of Punjab v Rajesh Syal*, (2002) 8 SCC 158 : 2003 Cr LJ 60 .

123. *Narinderjit Singh Sahni v UOI*, (2002) 2 SCC 210 : AIR 2001 SC 3810 : JT 2001 (8) SC 477 : 2001 (7) Scale 189 .

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CHAPTER XVII THE CHARGE

B.—Joinder of charges

[s 221] Where it is doubtful what offence has been committed.—

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

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

Illustrations

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) In the case mentioned, A is only charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence.

(c) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

The preceding section referred to the commission of a series of acts, each of which taken separately constitutes a distinct offence. This section provides for cases where it is doubtful what offence has been committed. It applies to cases in which the facts are not doubtful, but the application of the law to the facts is doubtful.[124.] All possible offences which can be made out on the basis of allegation made by the prosecution in the complaint, or in the charges submitted by the investigating agency or by the allegations made by various prosecution witnesses examined prior to the framing of the charges, should be charged.[125.] A Court trying a criminal case may convict of a crime not the subject of the charge provided (a) that the crime of which the accused is found guilty is established by the evidence and (b) that having regard to the information

available to the prosecuting authorities, it is doubtful which of one or more offences would be established by the evidence at the trial. If there is any chance of injustice being done or of the accused having been prevented from giving or of his having failed to give evidence material to his defence by reason of the amendment of the charge, the Court should at least make him the offer of a new trial on the charge as amended. It is not always necessary to make such an offer.[126.] The essential question is whether the accused are prejudiced by the charge. If it was not at all necessary to frame the alternative charge and no prejudice is caused to him because of the framing thereof, the accused cannot succeed by showing that that alternative charge was defective.[127.] The illustrations fully explain the meaning of the section.

[s 221.1] Condition for applicability.—

The primary condition for application of section 221 of the Code is that the Court should have felt doubt, at the time of framing the charge, as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. In such a case, the section permits to convict the accused of the offence which he is shown to have committed, though he was not charged with it. But in the nature of the acts alleged by the prosecution in this case, there was absolutely no scope for any doubt regarding the offence under section 302 of IPC at least at the time of framing the charge.[128.]

Framing of charge under section 304B of IPC and alternatively under section 302 of IPC in view of doubt as to which of the two offences would have been made out was held to be permissible under section 221.[129.]

[s 221.2] "Single act or series of acts is of such a nature that it is doubtful which of several offences the facts...will constitute".—

The section applies when it is doubtful of which of the offences charged the accused is guilty. It will apply to a case where on the same facts it is doubtful whether the accused committed one offence only or both that offence and another.[130.] The "several offences" referred to are not offences of the same kind, but offences of different kinds arising out of a "single act or set of acts" and committed at one and the same time.[131.] Where the facts of the prosecution case against the accused were of such a nature that it was doubtful whether he had committed the substantive offence of kidnapping itself or abetment thereof and, in fact, he was charged only with the substantive offence, it was held that the provisions of this and the following section were attracted and he could be convicted of the offence of abetment, provided that the accused is not thereby prejudiced in any manner.[132.]

[s 221.3] "The accused may be charged with having committed all or any of such offences".—

This section authorises the Court to frame cumulative charges or charges in the alternative. Where the several acts amount to distinct offences, separate charges should be framed. A person can be charged with murder and in the alternative with the offence of causing evidence to disappear with the intention of screening the offender.[133.] Where the accused husband grabbed his wife's *stridhan* (women's estate) and also by other acts of cruelty drove her to suicide and he was convicted under section 498A IPC, the Supreme Court held that on the same evidence, he could be

convicted for abetment of suicide under section 306 of IPC with the aid of section 221 of CrPC.[134.]

An abetment is a distinct offence. Where the accused was charged under sections 300 and 149, it was held that he could not be convicted under section 300 with the aid of section 109. That would cause great prejudice to the accused in his defence.[135.]

[s 221.4] "He may be charged in the alternative with having committed some one of the said offences".—

This section only authorises a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute, and not when there is a doubt as to the facts which constitute one of the elements of the offence.

A charge in the alternative of two different offences under different sections of the Indian Penal Code is bad in law.[136.] A person charged with rape on a married woman cannot be alternatively charged with adultery with the same woman and on the same facts, as a complaint for adultery should be actually instituted by the husband.[137.] This section cannot be utilised to declare the charge in the alternative of embezzlement and abetment thereof to be one charge; it involves two separate charges.[138.]

[s 221.5] Contradictory statements.—

Illustration (c) settles the law which was uncertain in consequence of conflicting case law. Contradictory statements by a witness which are irreconcilable constitute the offence of intentionally giving false evidence, though it cannot be proved which of the two statements is false.[139.] A person may be charged with and convicted of giving false evidence on two statements to two Courts which are contradictory and irreconcilable, although it may not be proved which of those statements is false. Each of those statements should be separately charged and an attempt should be made to prove that one of them is false. A charge in the alternative may be framed to provide against a failure to prove that either of them is false. Prosecution or conviction in the alternative in regard to contradictory statements is justifiable only when the prosecution is unable to prove which of the contradictory statements is false.

The provisions of the two sub-sections are clear enough to enable a Court to convict an accused person even of an offence with which he has not been charged if the Court is of opinion that the provisions do apply[140.] so that for want of a specific charge, there should not be a failure of justice. The essential question, however, is whether there was any reasonable likelihood of the accused being prejudiced in view of such charge framed against him.[141.]

[s 221.6] "Offence for which he might have been charged under the provisions of sub-section (1)".—

A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. In a case falling under sub-sections (1) and (2),[142.] it is permissible for a criminal Court to alter the conviction from an offence which is of lesser gravity to an offence of greater gravity, provided that prejudice is not caused to the accused thereby.[143.] Five persons

were charged under section 302, Indian Penal Code, with murder, and two of them were convicted. The evidence established that the other three had assisted to remove the body, knowing that a murder had been committed. Without any further charge being made, they were convicted under section 201 of causing the disappearance of evidence. It was held that the conviction without a further charge being made was warranted by this section.[144.] If the accused could not have been charged for the offence which he is shown to have committed under the provisions of sub-section (1), then sub-section (2) cannot apply. The two sub-sections must be read together.[145.] Offences charged and offences shown to have been committed must be cognate offences, eg, criminal breach of trust and attempt to cheat.[146.] Where the facts were such that the accused could be charged with abetment of the offence of kidnapping or kidnapping itself, but he was charged only with the substantive offence of kidnapping, it was held by the Bombay High Court that he could be convicted of the offence of abetment.[147.]

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124. *Abdul Hamid*, (1935) 14 Ran 24; *Eusof Shaikh v King-Emperor*, (1945) 2 Cal 470 : AIR 1949 Cal 36 : AIR 1949 Cal 532 : 1949 Cr LJ 895 ; *Jatin Kumar v Delhi Admn*, 1992 Cr LJ 1482 (Del).
125. *Sunil Kumar Paul v State of West Bengal*, AIR 1965 SC 706 : (1965) 1 Cr LJ 630 .
126. *Thakur Shah v The King-Emperor*, (1943) 23 Pat 88 : 46 Bom LR 513 : 70 IA 196.
127. *Kishan Singh v State of Haryana*, AIR 1971 SC 983 : 1971 Cr LJ 806 : (1971) 3 SCC 226 .
128. *Shamnsaheb M Multtani v State of Karnataka*, AIR 2001 SC 921 at p 924 : 2001 Cr LJ 1075 : (2001) 2 SCC 577 .
129. *Mohd Azeem v State of UP*, 2002 Cr LJ 1526 (All).
130. *Ganapathi Bhatta v Mani Anantha Bhatta*, (1911) 36 Mad 308.
131. *Manu Miya v The Empress*, (1882) 9 Cal 371 .
132. *Shamrao*, (1972) 75 Bom LR 274 .
133. *Emperor v Hannappa Rudrappa*, (1923) 25 Bom LR 231 : AIR 1923 Bom 262 ; *Teprinessa v Emperor*, (1918) ILR 46 Cal 427.
134. *K Prema S Rao v Yadla Ranga Rao*, AIR 2003 SC 11 : (2003) 1 SCC 217 .
135. *Wakil Yadav v State of Bihar*, 1999 Cr LJ 5000 (SC) : (2000) 10 SCC 500 .
136. *Ramji Sajabarao*, (1885) 10 Bom 124.
137. *Empress of India v Kallu*, (1882) ILR 5 All 233.
138. *Janeshar Das v Emperor*, (1929) ILR 51 All 544 : AIR 1929 All 202 .
139. *GI*, 1907, Pt V, p 367; *Sadashiva*, (1956) Cut 87.
140. *GD Sharma and RN Tyagi v The State of Uttar Pradesh*, AIR 1960 SC 400 : 1960 Cr LJ 541 .
141. *Madan Raj Bhandari v State of Rajasthan*, AIR 1970 SC 436 : 1970 Cr LJ 519 : (1969) 2 SCC 385 .
142. *Nani Gopal Biswas v Municipality of Howrah*, AIR 1958 SC 141 : 1958 Cr LJ 271 .
143. *Chainsukhlal Punamchand Meher v The State of Maharashtra*, (1969) 71 Bom LR 390 .
144. *Begu v Emperor*, (1925) 52 IA 191 : 6 Lah 226 : 27 Bom LR 707 : AIR 1925 PC 130 . The Calcutta High Court doubted the correctness of this decision in *Ishtahar Khondkar v Emperor*, (1935) 62 Cal 956 : AIR 1936 Cal 796 .
145. *Harun Rashid v Emperor*, (1926) 53 Cal 466 : AIR 1926 Cal 581 .

146. *Ramajirav Jivbajirav*, (1875) 12 BHCR 1.

147. *SS Akhade v State of Maharashtra*, 1974 Cr LJ 86 ; *See also Samsuddin Isabhai v State of Gujarat*, 1970 Cr LJ 1348 : AIR 1970 Guj 178 .

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CHAPTER XVII THE CHARGE

B.—Joinder of charges

[s 222] When offence proved included in offence charged.—

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

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

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

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.

Illustrations

(a) A is charged, under section 407 of the Indian Penal Code (45 of 1860), with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under section 406 of that Code in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under the said section 406.

(b) A is charged, under section 325 of the Indian Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of that Code.

This section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such cases gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case, where the circumstances, embodied in the major charge, do not necessarily, and according to the definition of the offence, imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter. The section is not intended to apply to a collateral offence.[148.] The major and the minor offences must be cognate offences.[149.] But where the accused is charged with an offence under section 307 of the Penal Code, he cannot be convicted of an offence under section 326, as the offence

under the latter section cannot be said to be a minor offence in relation to an offence under section 307.[150.]

The Supreme Court has held that with the development of criminal jurisprudence, the law has recognised the concept of cognate charges besides alternative charges. The differentiation between offences from the same family in contradistinction to the offences falling in different categories has persuaded the courts to apply the principal of "cognate offences" and punish the offender of a less grave offence because the offences of greater gravity have not been proved beyond reasonable doubt. This principal is to be applied keeping in view the facts and circumstances of a given case, notwithstanding the fact that no charge for such less grave offence has been framed against the offender.[151.]

[s 222.1] "A combination of some only of which constitutes a complete minor offence".—

Some of the acts which are a component part of the original charge must constitute a minor offence. The Court can then convict the accused of the minor offence even though he is not charged with it. But the Court must see that the accused is not prejudiced thereby. In determining the question of prejudice, the nature of the case made at the trial, the evidence given and the line of defence of the accused are matters to be taken into consideration.[152.]

[s 222.2] "Minor offence" [*Sub-section (2)*].—

The words "minor offence" have not been defined by law: they are to be taken, not in any technical sense, but in their ordinary sense.[153.] The test is not gravity of punishment, when a person is charged with an offence, consisting of several particulars, and if all the particulars are proved, then it will constitute the main offence, while if only some of those particulars are proved and their combination constitutes a minor offence, the accused can be convicted of the minor offence though not so charged. The minor offence should be composed of some of the ingredients of the main offence, i.e., it should be essentially a cognate offence of the major offence and not entirely distinct and different offence, constituted by altogether different ingredients.

Accordingly, it was held that a person charged with murder and causing disappearance of evidence under sections 302 and 201 IPC cannot be convicted of abetment of suicide under section 306 IPC, without framing a charge, which is not a minor offence in respect of the offence of murder and causing disappearance of evidence.[154.] Under this section, the Court can convict a person of a minor offence, although he was charged with a major offence: but it does not enable a Court to convict him of a major offence, when he is charged with a minor offence.[155.] Where the accused was acquitted of the offence of higher degree, it was held by the Supreme Court that he could still be convicted for the lesser offence depending upon the evidence on record.[156.] Where the main ingredients of two cognate offences are common, the one punishable with lesser sentence can be said to be a minor offence. The ingredients of section 304B of IPC being different from those of section 302 of IPC, the former cannot be regarded as a minor offence.[157.] Similarly, the offence under section 306 was held to be not a minor offence in relation to the offence under section 302. Conviction under section 306 when the charge was under section 302 was held to be not proper.[158.]

Where the evidence showed that though the alleged rape was not actually committed, the accused did attempt to commit it, it was held by the Supreme Court that the

accused could be convicted under section 376 read with section 511, though he was not separately charged with attempt to commit rape.[159.]

It is not open to a judge in appeal to change the conviction from one offence to another offence which is not a minor offence. The offence under section 304 of IPC, is not a minor offence as compared to the offence under section 325 of the Code.[160.]

An offence under section 365, Indian Penal Code (abducting a woman for wrongful confinement), is a minor offence as compared with offences under sections 366 (abducting a woman for illicit intercourse) and 376 (rape).[161.] An offence under section 456 (lurking house-trespass) is a minor offence as compared with an offence under section 457 (lurking house-trespass to commit theft).[162.] A person charged with an offence under section 304 (culpable homicide) or with one under section 325 (grievous hurt) may be convicted of an offence under section 323 (hurt).[163.]

Where the case of rape was not made out on medical evidence but the accused who was charged with it said nothing against the statement of the prosecutrix that he had undone her clothes, the Court said that he could be convicted for attempt, though he was not charged with it.[164.]

The accused was charged under section 121 of IPC for the offence of evading or attempting or abetting to wage war against the State. The offence of concealment of such a fact is a minor offence, the accused could be convicted for the minor offence under section 123 of IPC even without any such charge. The accused could have raised his defence at the trial. The writs filed after dismissal of review and curative petition were held to be not tenable.[165.]

Where an accused is charged with a major offence, but all the ingredients constituting the offence are not proved but the ingredients of a minor offence are proved, then by virtue of this section, the accused may be convicted of the minor offence even though no charge for the minor offence was framed. Thus, where the accused was charged under sections 376 and 511 of IPC only, but the said offence was not made out, it was held by the Supreme Court that the accused could be convicted under sections 366 and 354 of the IPC, although no charge was framed for those offences.[166.]

[s 222.3] Punishment for attempt though not charged [*Sub-section (3)*].—

A person charged with an offence may be convicted of an attempt to commit that offence, although the attempt is not separately charged.

Where the accused was charged under section 376 of IPC, he could safely be convicted for attempt to commit rape if rape was not proved, although he was not separately charged for attempt.[167.]

[s 222.4] Conviction for minor offence only where requirements complied [*Sub-section (4)*].—

A person charged with an offence cannot be convicted of a minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence are not satisfied, e.g., where sanction is lacking. Nor can the Court in such a case charge the person with an offence which does not apply to the facts of the case and then convict him of an offence for which sanction is necessary on the ground that the

latter is a "minor offence." This will amount to evading the provision by resorting to devices or camouflages.[168.]

148. Per WEST J, in *Chand Nur*, (1874) 11 BHCR 240.

149. *Makkhan v Emperor*, (1945) All 558 : AIR 1945 All 81 .

150. *Ramchandra Bhaira Shingate v The State of Maharashtra*, (1971) 73 Bom LR 811 : 1972 Cr LJ 938 .

151. *Rafiq Ahmed v State of Uttar Pradesh*, AIR 2011 SC 3114 : (2011) 8 SCC 300 .

152. *Karali Prasad Guru v Emperor*, (1916) ILR 44 Cal 358.

153. *Queen-Empress v Sitanath Mandal*, (1895) ILR 22 Cal 1006.

154. *Anil Kumar v State of Rajasthan*, 1992 Cr LJ 3637 (Raj).

155. *Durgya*, (1899) 1 Bom LR 513 .

156. *K Prema S Rao v Vadla Srinivasa Rao*, (2003) 1 SCC 217 : AIR 2003 SC 11 : 2003 Cr LJ 69 : JT 2002 (8) SC 502 : 2002 (8) Scale 153 ; charged with offence of theft, but convicted of receiving stolen property with knowledge; *State of HP v Tara Dutt*, AIR 2000 SC 297 : (2000) 1 SCC 230 : 2000 Cr LJ 458 .

157. *Shaminsaheb M Multiani v State of Karnataka*, AIR 2001 SC 921 : 2001 Cr LJ 1075 a : JT 2001 (2) SC 92 : 2001 (1) Scale 365 : (2001) 2 SCC 577 .

158. *Sangaraboina Sreenu v State of AP*, AIR 1997 SC 3233 : (1997) 5 SCC 348 : 1997 Cr LJ 3955 ; **Overruled** in *Dalbir Singh v State of UP*, AIR 2004 SC 1990 : (2004) 5 SCC 334 , with this slight difference in facts that no injustice was caused because the accused in the course of investigation and trial came to know that he could be convicted under section 306.

159. *State of Maharashtra v Rajendra Jawanmal Gandhi*, AIR 1997 SC 3986 : (1997) 7 SCC 518 : 1998 Cr LJ 54 . *State of TN v Srinivasan*, (1997) 1 SCC 682 : (1996) 10 JT 141 , the accused could be convicted and punished for a lesser offence under section 5 of the Explosive Substances Act, 1908, if the ingredients of that offence were satisfied.

160. *Naranbhai*, (1960) 2 GLR 142 .

161. *Queen-Empress v Sitanath Mandal*, (1895) ILR 22 Cal 1006.

162. *Karali Prasad Guru v Emperor*, (1916) ILR 44 Cal 358.

163. *Dasarath Mandal*, (1907) 34 Cal 325 .

164. *Pandharinath v State of Maharashtra*, AIR 2010 SC 1453 : (2009) 14 SCC 537 .

165. *Shaukat Hussain Guru v State (NCT) of Delhi*, AIR 2008 SC 2419 : (2009) 14 SCC 537 .

166. *Tarkeshwar Sahu v State of Bihar (Now Jharkhand)*, (2006) 8 SCC 560 : (2006) 3 SCC (Cri) 556 .

167. *Kishor v State of Maharashtra*, 1995 Cr LJ 1765 (Bom).

168. *Basir-ul-Huq v The State of West Bengal*, AIR 1953 SC 293 : (1953) SCR 836 : 1953 Cr LJ 1232 .

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CHAPTER XVII THE CHARGE

B.—Joinder of charges

[s 223] What persons may be charged jointly.—

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

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860), or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860), relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided **that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the [169].[Magistrate or Court of Session] may, if such persons by an application in writing, so desire, and [170].[if he or it is satisfied] that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.**

[s 223.1] CrPC (Amendment) Act, 2005 [*Clause (21)*].—

The proviso to section 223 provides that the Magistrate on an application of the accused persons may direct their joint trial even if they do not fall in the categories specified, if he is satisfied that such persons would not be prejudicially affected thereby. In the interest of prompt disposal of cases, scope of this proviso is being widened to enable the Court of Session also to hold such trials (*Notes on Clauses*).

COMMENT

The foregoing sections 219 to 222 have provided for joinder of charges against the same person in the same trial. This section provides for joinder of charges against more than one accused person in the same trial. The provision of joint trial is an enabling one and, therefore, the Court is not obliged to try the cases jointly even if the offences committed by one or the other accused persons are part of the same transaction. It is discretionary for the Court.[171.]

This section is the last exception to section 218 which lays down the general principle that every offence must be charged and tried separately. This is the only section which authorises a joint trial of several persons under circumstances specified in the section. Except in cases falling under this section, a joint trial of several accused persons renders the trial invalid.

Clauses (a) to (g) provide for cases in which accused may be charged and tried jointly. "On a plain construction of the provisions, it is open to the Court to avail itself cumulatively of the provisions of the different clauses for the purpose of framing charges and charges so framed will not be in violation of the law."[172.]

It is true that on the general principles of construction of statutes, sections 219, 220, 221, 222 and 223 should be construed as supplementing one another and dealing with those exceptions to the general rule of separate trial for every distinct offence as provided in section 218. But where neither section 219 nor section 220 would apply, the trial must be held to be clearly vitiated by misjoinder, and it will not be proper to rely on section 218 for some of the charges and on section 222 for the rest.[173.]

The Allahabad High Court has held that each of the four sections 219, 220, 221 and 223 can individually be relied upon as justifying a joinder of charges in respect of any trial, but use cannot be made of two or more of these four sections together to justify a joinder. In other words, the exceptions provided in the said sections are mutually exclusive, and in this view of the law, the joinder of three charges of criminal breach of trust with three charges of falsification of accounts, not forming part of the same transaction, cannot be upheld.[174.] See also sub-section (2) of section 220.

The purpose of the Legislature in laying down various restrictions with regard to charges against a number of persons, or of different charges against the same person, was to avoid embarrassing the accused by a multiplicity of charges or by bringing together evidence relating to a number of accused persons; and so in cases where mandatory provisions as to the joining of charges are disregarded, it is reasonable to presume that the accused has been prejudiced because his trial has been complicated and his defence, therefore, rendered more difficult. Where there is a misjoinder of accused persons, there is always a possibility that the Court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately. A misjoinder does not always vitiate a trial, but a Court should ordinarily presume prejudice until it is quite certain that there could have been none.[175.]

However, it is open to the accused, even in cases which do not fall under section 223, to apply for being tried together provided in the opinion of the Magistrate such persons will not thereby be prejudicially affected. It was held by the Supreme Court that the accused could not assert any right to a joint trial with the co-accused. It is the right of the prosecution to decide whom to prosecute.[176.]

Even where section 220 and this section justify a joinder, it should not be resorted to if there is a risk of embarrassment to the defence, e.g., charges of murder of several persons and of arson must embarrass and bewilder the accused in their defence.[177.]

[s 223.2] Amalgamation of cases.—

Amalgamation is a concept unknown to the Code. There is no provision in the CrPC for amalgamating cases; the relevant sections regarding joinder of charges and joinder of persons now here permit a Magistrate to amalgamate two cases started separately; such trial will be illegal. Where two trials involve different conspiracies and different accused, only some of whom are common, joint trial in such cases will be illegal even though a particular accused may petition for joint trial. The balance of convenience accruing to such accused cannot be allowed to prejudice the other accused.[178.]

[s 223.3] Jurisdiction.—

Though it is not stated in express terms either in section 220 or 223 that their provisions would justify the joint trial of offences or of persons mentioned there in in a Court irrespective of the fact whether the offences to be tried were committed within the jurisdiction of that particular Court or not, such should be the interpretation of the provisions in these two sections.[179.]

[s 223.4] "May be charged and tried together".—

This section is only an enabling section and does not trammel the discretion of the Court. The Court has a discretion to proceed jointly or separately against the accused persons. The Court must see that the accused are not prejudiced by the joint trial.

[s 223.5] "Accused of the same offence" [*Clause (a)*].—

Persons accused of the same offence committed in the course of the same transaction can be tried under this clause. If different offences are committed in the course of the same transaction, then clause (d) will apply. The words "the same offence" indicate the same physical act of crime. The test is whether the two persons are engaged in one transaction, and to determine that it is necessary to regard the facts from the point of view of those two persons.[180.] In a murder case, the accused was below 18 years of age. He could not be tried jointly with adults. Juvenile Court alone had the jurisdiction to try him.[181.] If they are animated by a common purpose, and there is continuity in their action, then surely there is one transaction so far as they are concerned. It may even be that community of purpose is not necessary.[182.] The words "the same offence" mean an offence arising out of the same act or series of acts.[183.]

The words "the same transaction" occurring in this section comprise all the acts of all the persons concerned, done in the course of carrying through the affair in question, and the *prima facie* test, as the words "in the course of" indicate, is community and continuity of purpose. If several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy, those acts are committed in course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy serve to unify the acts done in pursuance of it. There may or may not be proximity of time, unity or proximity of place, or continuity of action in all cases, but if there is both community and continuity of purpose or design, all the acts of the persons concerned done in the course of carrying through the conspiracy or any other offence will be considered acts done in the course of one and the same transaction.[184.]

There are various tests to judge whether different acts are part of the same transaction, such as (1) proximity of time, (2) unity of place, (3) unity or community of purpose or design and (4) continuity of action. The last one of these is generally taken to be the main test.[185.]

[s 223.6] Offender and abettor and attempt [*Clause (b)*].—

Where a railway ticket collector handed over two used tickets to another person, instructing him to apply for a refund of the fares covered by the same as unused tickets at the place of issue, and the latter made an application but was discovered in the act, it was held that the joint trial of the ticket collector on charges under sections 408, 420 and 109 and the other under sections 420 and 511 of the Penal Code was legal.[186.]

[s 223.7] Offences of same kind committed jointly within 12 months [*Clause (c)*].—

Section 219 provides for the case of a person who is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences. This clause provides for the case where several persons commit several offences of the same kind within a period of twelve months. It is not necessary that all the offences must have been committed in the course of the same transaction. But it is necessary that they should have been committed jointly. If they are independent of one another, the accused cannot be tried jointly.

[s 223.8] "In the course of the same transaction" [*Clause (d)*].—

Persons accused of different offences committed in the course of the same transaction may be tried jointly.[187.] But if the transaction is not the same, they cannot be so tried. The words "the same transaction" comprise all the acts of all the persons concerned done in the course of carrying through the affair in question, and the *prima facie* test, as the words "in the course of" indicate, is continuity of action and continuity of purpose.[188.] The expression "the same transaction" carries the same meaning as given to it in section 220(1). The words "in the course of the same transaction" only mean during the period when the first act forming the series was committed and the commission of the last act ended. The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or cause

and effect, or as principal and subsidiary acts as to constitute one continuous action.[189.]

The offences charged should be committed "in the course of the same transaction." The point of time at which the section requires that condition to be fulfilled is that of the accusation, and not that of the eventual result. It is on the basis of what appears on the facts of the accusation that the Court may proceed to charge and try, and it is immaterial that, if the opinion of the Magistrate as to the existence of the same transaction proves to be wrong in law, the prosecution will thereby be enabled at the trial to join separate offences contrary to the terms of sections 219 and 220. This clause is expressly an exception to section 218 and enables a plurality of offences to be dealt within the same trial. But it does not import either expressly or by implication the limitation set out in section 219, according to which not more than three offences of the same kind committed within the space of twelve months can be tried together, or the limitation contained in section 220(1), under which more offences than one committed by the same person can only be tried together if they are in one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number. Nor is there any limit of number of offences specified in this clause. The one and only limitation there is that the accusation should be of offences "committed in the course of the same transaction." Where several persons conspire to commit offences and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same transaction which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy serve to unify the acts done under it. Identity of time is not an essential element in determining whether certain events form the same transaction within the meaning of this section. It is the continuity of action and the sameness of purpose that determine whether the events constitute the same transaction.[190.] As a result of the conspiracy between the petitioner and the co-accused, trees were felled in large numbers and transported by the petitioner. It was held that this was a consequence of the initial act of conspiracy between the accused. The order of the Court to conduct a joint trial was therefore justified.[191.]

Persons accused of different offences which were committed in course of the same transaction can be tried jointly. Thus, in Mumbai bomb blast cases, where blasts at Ghatkopar, Bombay Central, Vile Parle and Mulund occurred within a short span of three months in thickly populated areas, all the blasts had similar pattern and mode and common people were targeted and thus, a common thread was running through all these incidents. It was held by the Bombay High Court that the case was covered by section 223(d) of CrPC and therefore joint trial of accused arrested in connection with blast at one place with other accused arrested for blasts at other places was proper.[192.]

Circumstances of the case showed that the two accused jointly committed offences and committed them in the course of the same transaction, both accused were charged and tried together.[193.] The offences must be committed in the course of the same transaction. The applicable test is that there must be commonality of purpose or design and continuity of action. For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction". But if in one case the accused is alleged to have killed a person without any junction with the accused in the other case, then it cannot be treated as the same offence or even different offences "committed in the course of the same transaction". If such two diametrically opposite versions are put to joint trial, the confusion which it

can cause in the trial would be incalculable. It would then be a mess and then there would be no scope for a fair trial. Hence, the attempt to bring the two cases under the umbrella of section 233 of the Code has only to be foiled as untenable.[194.]

In *R Dinesh Kumar v State,*[195.] the Supreme Court answered the question as to when a person could appear to have committed an offence be tried together with the accused already facing trial. It was held that where several persons are alleged to have committed several separate offences, which, however, are not wholly unconnected, then there may be a joint trial unless such joint trial is likely to cause either embarrassment or difficulty to the accused in defending themselves.

In case of cross-cases, where both cases related to the same incident and the FIR in both cases were investigated by the same Investigating Officer (IO), it was held by the Supreme Court that the IO ought to have brought to the notice of the trial court about the two FIRs arising out of the same incident to avoid gross injustice to parties concerned.[196.]

In *Essar Teleholdings Ltd v Delhi High Court,*[197.] the Supreme Court held that the Special Court for the 2G matter may allow the application for joint trial made by the petitioners. As the trial court rejected the same holding that it will prolong the trial, cause unnecessary wastage of judicial time and confuse or cause prejudice to the accused who had taken part only in some minor offence. The Supreme Court was again approached by a writ petition against this order by the petitioners and the same was dismissed in *Essar Teleholdings Ltd v CBI.*[198.]

[s 223.9] Theft *etc.* and receiving stolen property [*Clause (e)*].—

When one person is accused of an offence which includes theft extortion, cheating or criminal misappropriation, and another of receiving or retaining or assisting in disposing of or concealment of the stolen property, they may be tried jointly.[199.] The thief and the receiver of the stolen property may be jointly tried.[200.] Dacoity and receiving property stolen in the commission of the dacoity may be tried together.[201.] Under clauses (a) and (c), three persons jointly committing thefts on two different occasions within a period of twelve months can be tried at the same trial. Under this clause, joint trial would also be legal if two of them were charged with theft under section 380 of the IPC and one under section 411 for each of these occurrences.[202.]

[s 223.10] Offences under sections 411 and 414 IPC [*Clause (f)*].—

Persons accused of offences under sections 411 and 414 of the Penal Code in respect of stolen property, the possession of which has been transferred by one offence may be tried together.[203.] The expression "possession of which has been transferred by one offence" refers to the original theft of the stolen property.[204.] Where several articles stolen at one theft are received by different persons, all or any of the receivers are triable jointly for the offence of receiving stolen property.[205.] If more than one offence of theft has been committed in respect of certain property, then the persons accused of receiving such stolen property which has been secured by means of the commission of several offences of theft or robbery, *etc.*, cannot be tried jointly.[206.]

[s 223.11] Counterfeit coins [*Clause (g)*].—

This clause provides for the joint trial of offences under Chapter XII of the Penal Code relating to the same coin and abetment of or attempt to commit any such offence.

[s 223.12] Joint trial in other cases where no prejudice caused [*Proviso*].—

The proviso is a proviso to the whole section and not to clause (g) only. It permits joint trial if a number of accused charged with separate offences which do not fall within clauses (a) to (g) make an application in writing to the Magistrate for joint trial and the Magistrate is satisfied that such trial will not prejudicially affect them. It is not permissible for the Court under section 223 to club and consolidate the case on a police *challan* and the case on a complaint where the prosecution versions in the police *challan* case and the complaint case are materially different, contradictory and mutually exclusive.[207.]

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169. Subs. by Act 25 of 2005, section 21(a), for "Magistrate" (w.e.f. 23-6-2006).
170. Subs. by Act 25 of 2005, section 21(b), for "if he is satisfied" (w.e.f. 23-6-2006).
171. *Lalu Prasad v State*, 2003 Cr LJ 610 (Jhar).
172. *Ganeswara Rao*, AIR 1963 SC 1850 , at p 1861 : (1963) 2 Cr LJ 671 .
173. *Mangal Chandra Dan*, (1954) Cut 599.
174. *Sri Ram Verma*, (1956) 2 All 551 .
175. *Moongan v Roshan Ali Sahib*, (1942) ILR Mad 322.
176. *AR Antulay v RS Nayak*, 1988 Cr LJ 1661 : AIR 1988 SC 1531 .
177. *Alimaddin Naskar v Emperor*, (1924) ILR 52 Cal 253.
178. *KL Srivastava v The State of West Bengal*, 1974 Cr LJ 518 .
179. *Purushottam Dalmia v The State of West Bengal*, AIR 1961 SC 1589 : (1961) 2 Cr LJ 728 .
180. *AR Antulay v RS Nayak*, 1988 Cr LJ 1661 : AIR 1988 SC 1531 .
181. *Bijoy Singh v State of West Bengal*, 1986 Cr LJ 2016 (Cal).
182. Per CRUMP J, in *Sejmal Punamchand v Emperor*, (1926) 29 Bom LR 170 , 171 : 51 Bom 310 : AIR 1927 Bom 177 .
183. *Amar Singh*, (1954) Punj 844.
184. *SB Saxena*, (1955) 34 Pat 781.
185. *Ghumand Singh v The State*, (1954) Patiala 585.
186. *Kalidas Chuckerbutty v Emperor*, (1911) ILR 38 Cal 453.
187. *Deputy Legal Remembrancer v Kailash Chandra Ghose*, (1914) ILR 42 Cal 760.
188. *Nabijan v Emperor*, (1946) 25 Pat 503 : AIR 1947 Pat 212 .
189. *State v Mangtu Ram*, (1962) 12 Raj 64 : AIR 1962 Raj 155 .
190. *Babulal v Sailendra Nath*, (1938) 40 Bom LR 787 : 65 IA 158 : (1938) 2 Cal 295 ; *Chhoteymiyan*, (1937) Nag 165.
191. *Jagdish Singh v State of HP*, 1990 Cr LJ 19 (HP).
192. *Adnan Bilal Mulla v State of Maharashtra*, 2006 Cr LJ 564 (Bom) (DB).

193. *Ayodhya Singh v State of Rajasthan*, AIR 1972 SC 2501 : 1972 Cr LJ 1696 : (1972) 3 SCC 885 .

194. *Balbir v State of Haryana*, AIR 2000 SC 11 : 2000 Cr LJ 169 : (2000) 1 SCC 285 .

195. *R Dineshkumar v State,* (2015) 7 SCC 497 : AIR 2015 SC 1816 : 2015 Cr LJ 2362 : 2015 (3) Scale 598 .

196. *Kuldeep Yadav v State of Bihar,* AIR 2011 SC 1736 : (2011) 5 SCC 324 : (2011) 2 SCC (Cri) 632 .

197. *Essar Teleholdings Ltd v Delhi High Court,* (2013) 8 SCC 1 : AIR 2013 SC 2300 : JT 2013 (9) SC 236 : 2013 (7) Scale 739 .

198. *Essar Teleholdings Ltd v CBI,* (2015) 10 SCC 562 : 2015 (10) Scale 257 .

199. The decisions to the contrary are no longer of any authority.

200. *Emperor v Bhima*, (1916) ILR 38 All 311 : AIR 1916 All 321 ; *Nawab*, (1936) 18 Lah 62.

201. *Durga Prasad*, (1922) 45 All 223 .

202. *Superintendent and Remembrancer of Legal Affairs, Bengal v Raghula Brahmin*, (1935) 62 Cal 946 .

203. *Keshav Krishna*, (1904) 6 Bom LR 361 , the decisions to the contrary are no longer of any authority.

204. *Emperor v Lakha Amra*, (1932) 34 Bom LR 301 : AIR 1932 Bom 201 .

205. *Musammat Guljania v Emperor*, (1927) ILR 6 Pat 583 : AIR 1928 Pat 38 .

206. *Bhaggan v Emperor*, (1935) 11 Luck 70 : AIR 1935 Oudh 327 .

207. *Harijinder Singh v State of Punjab*, AIR 1985 SC 404 : (1985) 1 SCC 422 .

The Code of Criminal Procedure, 1973

CHAPTER XVII THE CHARGE

B.—Joinder of charges

[s 224] Withdrawal of remaining charges on conviction on one of several charges.—

When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges, and such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into, or trial of, the charge or charges so withdrawn.

A charge can be withdrawn under section 224of CrPC only after judgment, and it cannot be deleted.[208.]

Where in charge for offence under sections 304A and 279 of IPC date of accident stated was incorrect, it being clerical was held immaterial.[209.]

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208. *Vibhubi Narayan Chaubey v State of UP*, 2002 All LJ 2542 : 2002 (45) All Cri C 745 : 2003 Cr LJ 196 (197) (All).

209. *Tara Singh v State of Punjab*, 2008 Cr LJ (NOC) 630 (P&H).

The Code of Criminal Procedure, 1973

CHAPTER XVIII TRIAL BEFORE A COURT OF SESSION

Section 209 lays down the procedure which the Magistrate should follow when an offence is exclusively triable by the Court of Session, and sections 207 and 208 provide for the supply of police report and other documents to the accused so that he may meet his case. Sections 225 to 237 are concerned with the procedure of trials held before the Court of Session.

It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 225] Trial to be conducted by Public Prosecutor.—

In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.

Public Prosecutor means any person appointed under section 24 and will include any person acting under his direction. The Public Prosecutor may avail himself of the services of counsel engaged by a private individual.[1].

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1. *Narayan M Pendshe*, (1874) 11 BHCR 102.

The Code of Criminal Procedure, 1973

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 226] Opening case for prosecution.—

When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

It has been seen earlier that no elaborate committal proceeding before the Magistrate is necessary. When it appears to the Magistrate that the case is triable by the Court of Session, he commits the case to that Court, sends records, documents and article to it, remands the accused to custody or grants him bail and notifies the Public Prosecutor. The Public Prosecutor opens his case before the Sessions Court by describing what charge is brought against the accused and stating by what evidence he will prove the guilt of the accused.

[s 226.1] Prosecution not bound to examine all witnesses.—

The Supreme Court has held that the prosecution is not bound to examine all the witnesses. Witnesses excluded from evidence may include those about whom the Public Prosecutor knows that they would not support the prosecution case.[2.]

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2. *Hukam Singh v State of Rajasthan,* (2000) 7 SCC 490 : 2001 Cr LJ 511 .

The Code of Criminal Procedure, 1973

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 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.

If the Judge after going through the record and documents submitted, and after hearing the prosecution and the accused comes to the conclusion that no sufficient ground exists to proceed against the accused, he shall discharge him. The reasons, however, should be recorded in writing. An order of discharge may be passed only where Court is almost certain that there is no prospect of conviction and that time of the Court need not be wasted by holding a trial.[3.] Where there was a long delay in lodging the FIR, no evidence, medical or otherwise to corroborate the only infirm and improbable evidence of prosecutrix existed, and no reasonable circumstances were there to show the commission of the offences of rape, it was held that the accused deserved to be discharged of the charges under section 376 Indian Penal Code (IPC).[4.]

In exercising powers under section 227, the settled position of law is that the Judge while considering the question of framing the charges under the section 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. 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. By and large if two views are equally possible and the Judge is satisfied that the evidence produced before him gave rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under section 227. The Judge cannot act merely as a post office or a mouthpiece of the prosecution. He has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court. But he should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.[5.] It is, thus, clear that while considering the discharge application, the Court is to exercise its judicial mind to determine whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not to hold the mini trial by marshalling the evidence.[6.]

After the stage of framing a charge, there can be only one of the two conclusions to the trial, either the accused is convicted or acquitted. If after framing of charge, no

evidence is led on the basis of which Court could convict the accused, then only an order of acquittal can be passed, and not of discharge.[7.] Before framing a charge, the Court need not undertake an elaborate enquiry. It needs only to consider whether no sufficient grounds exist for proceeding against the accused. If it is so found, the accused will be discharged, otherwise charge shall be framed, and the accused be put to trial.[8.]

"There is no sufficient ground for proceeding" mean that no reasonable person could come to the conclusion that there is ground whatsoever to sustain the charge against the accused.[9.] Case committed to the Sessions Court was made over to the Assistant Sessions Judge for disposal. The Assistant Sessions Judge finding the case not exclusively triable by the Sessions Court transferred it under section 228 to the Additional District Judge designated as Chief Judicial Magistrate. It was held that transfer was valid.[10.] Where the owner of an open field, from which opium was recovered, was implicated solely because he was the owner of the field, the High Court quashed the order framing charge and the owner accused was directed to be discharged.[11.]

It has been held by the Supreme Court that at the stage of consideration of an application for discharge, the Court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the materials to find out whether the facts taken at their face value disclose the existence of the ingredients constituting the offence. At this stage, only the probative value of the materials has to be gone, into and the Court is not expected to go deep into the matter to hold a minitrial.[12.]

It was observed by the Supreme Court that the standard of test and judgment which is to be finally applied before the recording of a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under section 227 or 228 of the Code. At that stage, the Court is not to see whether there is sufficient ground for conviction of the accused. It has to see whether the trial is sure to end in his conviction.[13.] At the time of framing of charge, it is not necessary for the prosecution to establish beyond all reasonable doubts that the accusation is bound to be brought home against him. The purpose of sections 227 and 228 is to ensure that the Court should be satisfied that the accusation is not frivolous and there is some material for proceeding against him.[14.]

On consideration of the authorities about the scope of sections 227 and 228 of the Code, the following principles emerge:[15.]

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. 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 discloses 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.

[s 227.1] Reasons to be recorded for discharging accused but not for framing charge.—

The Court is required to state reasons for discharging the accused but not for framing a charge against him.[16.]

[s 227.2] Discharge and acquittal.—

An order of discharge does not tantamount to acquittal of the accused.[17.]

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3. *Sushil Ansal v State*, 2002 Cr LJ 1369 (Del) : 95 (2002) DLT 623 .
4. *Priya Sharan Maharaj v State of Maharashtra*, 1995 Cr LJ 3683 (Bom).
5. *Dilwar Balu Kurane v State of Maharashtra,* AIR 2002 SC 564 : 2002 Cr LJ 980 : (2002) 1 LLN 671 : (2002) 2 SCC 135 . The Court followed *UOI v Prafulla Kumar Samal,* AIR 1979 SC 366 : 1979 Cr LJ 154 : (1979) 3 SCC 4 .
6. *Vikram Johar v State of Uttar Pradesh,* AIR 2019 SC 2109 : 2019(6) Scale 794 .
7. *State of Maharashtra v BK Subba Rao*, 1993 Cr LJ 2984 (Bom).
8. *Tulsa Bai v State of Madhya Pradesh*, 1993 Cr LJ 368 (MP).
9. *The State of Maharashtra v Century Spinning & Manufacturing Co*, (1970) 72 Bom LR 585 .
10. *Y Siva Prasad v State of AP*, 1988 Cr LJ 381 (AP).
11. *Soorajmal v State of MP*, 1992 Cr LJ 3206 (MP).
12. *State of Tamil Nadu v N Suresh Rajan*, (2014) 11 SCC 709 : 2014 Cr LJ 1444 (SC).

13. *State of Bihar v Ramesh Singh*, AIR 1977 SC 2018 : 1977 Cr LJ 1606 : (1977) 4 SCC 39 .

14. *State Bank of India v Satyanarain Sarangi*, 1992 Cr LJ 2635 (Ori). *KR Saroj v Excise Inspector, Ernakulam*, 2002 Cr LJ 4744 (Ker), the owner of the vehicle deserved to be discharged because there was no provision in the Akbari Act casting criminal liability on the owner of the vehicle.

15. *Sajjan Kumar v CBI*, (2010) 9 SCC 368 : JT 2010 (10) SC 413 : 2010 (10) Scale 22 ; *State v A Arun Kumar*, (2015) 2 SCC 417 .

16. *Om Wati v State,* (2001) 4 SCC 333 : 2001 Cr LJ 1723 ; *State of HP v Kewal Kumar,* 2002 Cr LJ 3807 (HP), discharge of accused under section 498A IPC without considering the nature and effect of the alleged acts of cruelty was held liable to be set aside. *M Saran v CBI,* 2002 Cr LJ 3635 (MP), where the material indicates that the accused had a role to play, he should not be discharged. At the stage of framing of charges, the evidence on record should not be scanned and scrutinized by sifting of evidence. *GP Sharma v State of MP,* 2002 Cr LJ 3104 (MP), at the stage of charge, the Court should not consider the contents of the case diary. It should go by the contents of the charge-sheet filed by the police. *Indian Bank v State,* 2002 Cr LJ 3300 (Jhar), no discharge where the material on record showed that the case for discharge was not made out. *State by CBI v R Suri Babu,* AIR 2001 SC 60 , discharge order withdrawn, trial of corruption case to proceed.

17. *P Viswanathan v AK Burman*, 2002 Cr LJ 949 (Cal).

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CHAPTER XVIII TRIAL BEFORE A COURT OF SESSION

Section 209 lays down the procedure which the Magistrate should follow when an offence is exclusively triable by the Court of Session, and sections 207 and 208 provide for the supply of police report and other documents to the accused so that he may meet his case. Sections 225 to 237 are concerned with the procedure of trials held before the Court of Session.

It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 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, [18][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.

[s 228.1] State Amendments

Chhattisgarh.— *Following amendments were made by Chhattisgarh Act 13 of 2006, section 4 (w.e.f. 13-3-2006).*

In section 228, in sub-section (2), after the words "to the accused", add the following words, namely:—

"present in person or through the medium of electronic video linkage and being represented by his pleader in the Court".

Karnataka.— *Following amendments were made by Karnataka Act No. 22 of 1994, section 2 (w.e.f. 18-5-1994).*

S 228.—In section 228 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), in sub-section (1), in clause (a), for the words "to the Chief Judicial Magistrate and thereupon the Chief Judicial Magistrate", the words "to the Chief Judicial Magistrate or to any Judicial Magistrate competent to try the case and thereupon the Chief Judicial Magistrate or

such other Judicial Magistrate to whom the case may have been transferred" shall be substituted.

West Bengal.— *Following amendment were made by W.B. Act 63 of 1978, section 3 (w.e.f. 1-6-1979).*

Section 228.—In Section 228 of the said Code, in clause (a) of sub-section (1), for the words "to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate", the words "to the Chief Judicial Magistrate or to any Judicial Magistrate competent to try the case, and thereupon the Chief Judicial Magistrate or such other Judicial Magistrate to whom the case may have been transferred" shall be *substituted*.

[s 228.2] CrPC (Amendment) Act, 2005 [*Clause (22)*].—

Under section 228, a Session Judge can transfer a case only to the Chief Judicial Magistrate. The amendment seeks to give discretion to the Sessions Judge to transfer a case either to the Chief Judicial Magistrate or to any other Judicial Magistrate of the First Class and to fix a date for the appearance of the accused before the Chief Judicial Magistrate or the Judicial Magistrate, as the case may be, so that a lot of time, which is wasted in summoning the accused by the Magistrate, may be saved. (*Notes on Clauses*).

COMMENT

Before framing a charge, the Court should properly evaluate the material and documents placed before it and apply its mind to find out whether any fact in the FIR or statements of witnesses disclosed the ingredients of the alleged offence.[19.] A *prima facie* case should be made out. There must be grounds for forming the opinion that the accused had committed the crime.[20.] Where the charge was found mechanically framed and defective, the conviction was set aside.[21.] If the Sessions Judge is of opinion that an offence has been committed but that offence is not exclusively triable by him, he frames a charge against the accused and transfers the case to the Chief Judicial Magistrate. Where he finds that the offence is exclusively triable by his Court, he frames a charge in writing against the accused. While considering the question of framing the charge, the Court can sift and weigh the evidence for the limited purpose of finding out whether a *prima facie* case against the accused has been made out. Where the materials disclose a grave suspicion, which has not been explained, the Court would be justified in framing the charge.[22.]

The accused is entitled to a copy of the statement of the complainant before framing of charge.[23.]

[s 228.3] Scope of inquiry at stage of framing of charge.—

At the stage of framing of the charge, the Court has to consider the material with a view to find out if there is a ground for presuming that the accused has committed the offence or that there is no sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion whether the proceedings are likely to lead to a conviction. The Court has to *prima facie* consider whether there is a sufficient ground for proceeding against the accused. The Court is not required to appreciate evidence to conclude whether the materials produced are sufficient for convicting the accused.

Each case depends upon its particular facts and circumstances and sometimes even a remote link between the activities of an accused and the facts of the case may justify a reasonable inference warranting a judicial finding that there is a ground for presuming that the accused has committed the offence or at least for a presumption that he is directly or indirectly involved in the commission of the offence.[24.] The court is not concerned with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which the final test of guilt is to be applied.[25.]

[s 228.4] Proper hearing and consideration.—

At the time of framing charge, there must be proper "hearing" and "consideration", otherwise "there is every possibility that the charges would be framed in routine and mechanical manner which may ultimately lead to a situation where charges are framed either inadequately or inappropriately defeating the cause of justice".[26.]

[s 228.5] Examination of accused and framing of charge, two distinct stages.—

The Supreme Court deprecated the practice of examination of the accused and framing charge, two important stages in a criminal trial, being done together in an unlawful and mechanical manner in some of our Courts. The High Courts should take note of it.[27.]

[s 228.6] Reading and explaining of charge [*Sub-section (2)*].—

It is mandatory to read out the charge framed to the accused and explain it to him. He shall then be asked whether he pleads guilty to the charge or whether he claims to be tried.

It has been held by the Supreme Court that in a case based on FIR lodged before police, the correct stage for addition or subtraction of sections will have to be determined at the time of framing of charge. At the stage of framing of charge, the prosecution will have the opportunity of placing materials before the Court to substantiate that appropriate sections be added to the charge. At the same time, the accused also will have the liberty to state whether charge under a particular section should be framed or not.[28.]

[s 228.7] "Explained to the accused".—

Mere reading of the charge is not sufficient. It should be explained sufficiently to enable the accused to understand the nature of the charge to which he is called upon to plead.[29.] Non-compliance with the provisions of this section in the absence of proof of any prejudice caused to the accused will not vitiate the trial in view of section 464 of the Code.[30.]

[s 228.8] Discharge after framing charge.—

Where a Sessions Judge framed a charge against the accused but subsequently discharged him, the Calcutta High Court held it illegal and set the discharge aside. The Court observed that once charge is framed under section 228 Cr.PC, the trial has to proceed, and the process cannot be put to back-gear for discharging the accused under section 227 CrPC. If the accused feels aggrieved by reason of the charge, he has to either face the trial or approach the High Court in its revisional jurisdiction.[31.]

At the stage of framing of charge, the only documents which are required to be considered are the documents submitted by the investigating agency along with charge-sheet. Any document which the accused wants to rely upon cannot be read as evidence, because doing so would defeat the object of the code.[32.]

Order framing charge is not a purely interlocutory order and can, in a given situation, be interfered with under section 397(2) or section 482 of the Code or Article 227 of Constitution, but the power of the High Court to interfere with an order framing charge and to grant stay is to be exercised only in an exceptional situation.[33.]

[s 228.9] Framing of alternative charge—Permissibility.—

Effect of framing of alternative charges against the accused varies from case to case. This question came up for consideration before a Bench of the Supreme Court. In the case of death of a married woman, the husband and mother-in-law were charged for offence under section 302 read with section 34. It was urged before the Bench that in a case where the accused is called upon to defend only a charge under section 302 of IPC, the burden of proof remains on the prosecution and it never shifts to the accused. But where the accused has no notice of the offence under section 304B, as he is only defending a charge under section 302 IPC alone, it may lead to grave miscarriage of justice as he will have to contend with the presumption under section 113B of the Evidence Act, 1872. However, in *Balbir Singh v State of Punjab*,[34.] the Supreme Court held that the accused have not shown any prejudice for not framing independent charge under section 304B even in their statement under section 313 of CrPC. The question was not even raised in the Special Leave Petition.

Thus, it was held that the same cannot be allowed to be raised at a belated stage. It was observed that in the particular facts of the case[35.] the appellants having not raised any grievance at any stage in that behalf cannot be allowed to do so at this stage.

[s 228.10] CASES.—Counter Case—Powers of Sessions Court.—

The power of Sessions Court extends to try even cases which are not triable exclusively by it. The provision in section 228(1)(a) for transferring any such case to the Court of the Chief Judicial Magistrate has been held to be not mandatory. On the facts of the case, the Supreme Court held that the transfer of only one of the counter cases was not proper.[36.]

[s 228.11] Error or irregularity in framing charge.—

Where all other requirements of the section were complied with, the Supreme Court held that an error or irregularity in framing the charge was not to upset the trial because no injury or prejudiced to the accused was caused in his defence on merits. His acquittal on this ground was not proper.[37.]

[s 228.12] Diluting or dropping charge.—

The Supreme Court explained the role of the Judge at the stage of framing of charge. The words "if after such consideration" occurring in section 228 provide an inter-connection between sections 227 and 228. While dropping or diluting a charge under a particular section, although the accused is not discharged, the Court is expected to record reasons. The judgment showed non-application of mind to the statement in the charge-sheet and medical record. No reasons were stated as to why the material in the case diary was considered to be insufficient. *Bona fides* in the decision became doubtful.[38.]

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18. Subs. by Act 25 of 2005, section 22, for ", and thereupon the Chief Judicial Magistrate" (w.e.f. 23-6-2006).

19. *Prem Kumar v State of Karnataka*, 1994 Cr LJ 3641 (Knt) : 1994 (2) ALT Cri 155.

20. *State of Maharashtra v Som Nath Thapa*, AIR 1996 SC 1744 : 1996 Cr LJ 2448 , a large number of accused involved, the order indicated reasons for not charging some of them but gave no reasons why others were being charged, order without application of mind, not proper. *Inderjit Kaur v State of Delhi,* 2002 Cr LJ 505 (Delhi) : 94 (2001) DLT 584 , evidence should not be subjected to appreciation at the stage of framing of a charge. Even a grave suspicion should be enough. *M Saran v CBI,* 2002 Cr LJ 3635 (MP), sifting of evidence to find out its reliability, probability and credibility should not be done at the time of framing a charge. *Shyam Sunder Sharma v State,* 2002 Cr LJ 517 (Delhi), framing of charge is an exercise conducted against each accused based on the material before the court. The case of one accused cannot be linked with that of any other for any purpose whatsoever. *Public Prosecutor, AP High Court v Potharlanka Venkateswarlu,* 2002 Cr LJ 3145 (AP) : 2002 (1) Andh LD (Cri) 500, another case of more than one accused persons. *Rajendra Kumar Jain v State of Rajasthan*, 2002 Cr LJ 4243 (Raj), at the time of framing charge, the trial Court need not discuss every material placed before it by the police along with the charge-sheet. It also need not go deep into the probative value of the material on record.

21. *Pati Ram v State of UP*, 1994 Cr LJ 3813 (All).

22. *Dilawar Babu Kurana v State of Maharashtra*, 2002 Cr LJ 980 : AIR 2002 SC 564 : (2002) 2 SCC 135 .

23. *Suresh Kumar Upadhayay v State of UP*, 2002 Cr LJ 1852 (All).

24. *Suresh v State of Maharashtra,* AIR 2001 SC 1375 at pp 1377-1378 : 2001 Cr LJ 1697 : (2001) 3 SCC 703 . *State of MP v Mohanlal Soni,* AIR 2000 SC 2583 : 2000 Cr LJ 3504 : (2000) 6 SCC 338 , the Court has only to see whether there was a *prima facie* case or sufficient ground for proceeding against the accused. For this limited purpose, the Court can evaluate material and document on record, but it is not necessary to subject the evidence to appreciation. To the same effect, *State of MP v SB Johari,* AIR 2000 SC 665 : 2000 Cr LJ 944 : (2000) 2 SCC 57 . *State of Maharashtra v Priya Sharan Maharaj,* AIR 1997 SC 2041 : 1997 Cr LJ 2248 : (1997) 4 SCC 393 , the High Court cannot seek independent corroboration at the stage of framing of charge and quash the charge and discharge the accused. *Sushil Ansal v State,* 2002 Cr LJ 1369 (Delhi), strong suspicion about the criminality of the accused based on the material on record, charge

should be framed without detailed inquiry. *Shyam Sunder Sharma v State*, 2002 Cr LJ 517 (Delhi), it is not necessary to examine whether the material on record should be sufficient to bring home the guilt of the accused. It is sufficient if the material supports a triable case.

25. *State of Rajasthan v Fatehkaran Mehdu,* AIR 2017 SC 796 : (2017)1 SCC(LS) 545.
26. *Public Prosecutor, AP High Court v Patharlauka Venkateswarlu*, 2002 Cr LJ 3145 (AP) : 2002 (1) Andh LD (Cri) 500.
27. *Sajjan Sharma v State of Bihar*, AIR 2011 SC 632 : 2011 Cr LJ 1169 : (2011) 2 SCC 206 .
28. *State of Gujarat v Girish Radha Krishnan Varde*, AIR 2014 SC 620 : (2014) 3 SCC 659 : 2014 Cr LJ 570 (SC).
29. *Queen-Empress v Bhadu*, (1896) ILR 19 All 119; *King Emperor v Trimbaka*, (1901) 3 Bom LR 489 .
30. *Banwari v State of Uttar Pradesh*, AIR 1962 SC 1198 : (1962) 2 Cr LJ 278 ; *Ashok Kumar v State (Delhi Admn)*, 1993 Cr LJ 3629 (Del).
31. *Tapati Bag v Patitpaban Ghosh*, 1993 Cr LJ 3932 (Cal); *Ashok Kumar v State (Delhi Admn)*, 1993 Cr LJ 3629 (Del).
32. *Ajay Kumar Parmar v State of Rajasthan,* AIR 2013 SC 633 : (2012) 12 SCC 406 .
33. *Asian Resurfacing of Road Agency Pvt Ltd v CBI,* AIR 2018 SC 2039 : 2018 SCC OnLine SC 310 : LNIND 2018 SC 132 .
34. *Balbir Singh v State of Punjab*, AIR 2006 SC 3221 : (2006) 12 SCC 283 .
35. *Balbir Singh v State of Punjab*, AIR 2006 SC 3221 : (2006) 12 SCC 283 .
36. *Sudhir v State of MP,* AIR 2001 SC 626 : (2001) 2 SCC 688 : 2001 Cr LJ 1072 .
37. *State of Punjab v Harjagdev Singh*, AIR 2009 SC 2693 : (2009) 16 SCC 91 .
38. *RS Mishra v State of Orissa*, AIR 2011 SC 1103 : (2011) 2 SCC 689 : 2011 Cr LJ 1654 .

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Section 209 lays down the procedure which the Magistrate should follow when an offence is exclusively triable by the Court of Session, and sections 207 and 208 provide for the supply of police report and other documents to the accused so that he may meet his case. Sections 225 to 237 are concerned with the procedure of trials held before the Court of Session.

It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 229] Conviction on plea of guilty.—

If the accused pleads guilty, the Judge shall record the plea and may, in his discretion, convict him thereon.

[s 229.1] "If the accused pleads guilty".—

The plea of guilty only amounts to an admission that the accused committed the acts alleged against him. It is not an admission of guilt under any particular section of the criminal statute.[39.] Therefore, if the facts proved by the prosecution do not amount to an offence, then the plea of guilty cannot preclude an accused person from agitating in the High Court the correctness of his conviction.[40.]

The accused can plead guilty under this section, or he can claim to be tried under section 230, or he can refuse to plead. The plea of "not guilty" is not recognised by the Code[41.] and it amounts to a claim to be tried. Where the plea of guilty was recorded without explaining the offence alleged, it was held that the conviction based on such a plea could not be sustained and must be set aside.[42.]

Where a person, accused of murdering his wife, did not plead guilty at the time of the framing of charge, but subsequently confessed his crime in the open Court, which was recorded by the trial Judge himself and again reiterated his plea of guilt in his statement under section 313 of CrPC, it was held, dismissing his appeal, that applicability of section 229of CrPC could not be restricted to a particular date or occasion, and the plea of guilt might be advanced by an accused at any stage of the trial after framing of the charge.[43.]

It is the practice of the Sessions Courts in the Bombay State never to accept a plea of guilty to a capital charge. There is, however, no reason why, if proper safeguards are taken, such a plea should not be accepted. Such safeguards must include the accused's representation by counsel who must be in a position to answer the questions of the Court, with regard to whether the accused knows what he is doing and the consequences of his plea and also a medical report or medical evidence upon him.[44.] When an accused pleads guilty, conviction on that basis is not barred merely because a serious offence providing grave sentence is involved. The rule of prudence however requires that a man should not be convicted for such an offence without recording the evidence.[45.]

[s 229.2] "May, in his discretion, convict him".—

The Court has a discretion to convict the accused when he pleads guilty or to proceed with the trial. The proper exercise of this discretion is of considerable importance in the case of persons tried jointly, when some plead guilty and the others claim to be tried.[46.] When the accused pleads guilty, he may be convicted, or evidence taken as if the plea had been one of "not guilty," and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted, the trial does not terminate with the plea of guilty. It does not strictly end until the accused has been either convicted or acquitted or discharged. As a matter of practice, Judges prefer not to act on the plea of guilty in murder cases[47.] lest the evidence may disclose that the facts proved do not, in law, constitute an offence of murder, but some lesser offence.[48.]

There was conviction of some of the accused persons who pleaded guilty at the stage of recording their pleas. The trial against the other accused one of whom had made the confessional statement continued. There was no order for separating the trial of the convicted accused from other accused. It was held that all the accused were tried in the same trial.[49.]

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39. *Chaman Lal v State of Punjab*, AIR 2009 SC 2972 : (2009) 11 SCC 721 .
40. *State of Mysore v Bantra Kunjanna*, AIR 1960 Kant 177 : 1960 Cr LJ 965 .
41. *Emperor v Nirmal Kanta Roy*, (1914) 41 Cal 1072 .
42. 1979 Bom LR 41 .
43. *Ram Kishun v State of UP*, 1996 Cr LJ 441 (All).
44. *Emperor v Abdul Kader Allarakhia*, (1947) 49 Bom LR 25 (SB) : AIR 1947 Bom 345 .
45. *Tyron Nazarath v State of Maharashtra,* 1989 Cr LJ 123 (Bom).
46. *Queen-Empress v Khandia*, (1890) 15 Bom 66.
47. *Queen-Empress v Chinna Pavuchi*, (1899) 23 Mad 151; *Emperor v Chinia Bhika*, (1906) 8 Bom LR 240 ; *Laxmya Shiddappa v Emperor,* (1917) 19 Bom LR 356 : AIR 1917 Bom 220 ; *Queen-Empress v Bhadu*, (1896) ILR 19 All 119; *Vishwanath*, (1945) Nag 492; *Mohanlal Devdanbhai Chokshi v JS Wagh,* 1981 Cr LJ 454 .
48. *Re Gavisiddappa*, AIR 1968 Mys 145 .
49. *Jameel Ahmed v State of Rajasthan*, AIR 2004 SC 588 : (2003) 9 SCC 673 .

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 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.

The accused may not plead or refuse to plead, or he may claim to be tried or he may plead, but the Judge in his discretion may not convict him. In all these cases, the Judge fixes a date for the examination of witnesses and if necessary, issues process to compel attendance of witnesses or production of document or other thing.

The pleas that arise in criminal trials are four: (1) *autrefois acquit* (previous acquittal) (see section 300); (2) *autrefois convict* (previous conviction) (see section 300); (3) pardon (see section 306); and (4) not guilty. The first three are special pleas and must be proved by the accused, and the fourth is a general issue and must be disproved by the prosecution.

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 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.

The witnesses should be examined orally. It is not sufficient, even with the consent of the pleader for defence, to put in depositions taken before the Magistrate or the police and allow witnesses to be cross-examined upon them.[50.] Similarly, evidence taken before a Sessions Judge in one criminal trial cannot be treated as evidence in similar criminal cases before the same Judge involving the same accused even with the consent of the advocate.[51.] The only legitimate object of the prosecution is to secure not a conviction but to see that justice be done.

The prosecution should lay before the Court all material evidence available to it for unfolding its case, but it will be unsound to lay down a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised.[52.] Prosecution is not bound to produce all the witnesses. Only the material witnesses considered necessary for unfolding the prosecution story need be produced.[53.]

The Supreme Court stated that there are two categories of witnesses to an occurrence. One of them consists of category closely related to the victim, and the other consists of persons who have no such relation. The Public Prosecutor's duty may require him to examine witnesses from the latter category and also limit their number. He can skip examination of anyone from among that category, if he has reliable information that such witness would not support the prosecution version.[54.]

[s 231.1] Practice directions for recording of evidence.—

In a case before the Supreme Court, it was found that on different occasions the trial Judge had chosen to decide questions of admissibility of documents or other items of evidence as and when objections thereto were raised and then detailed orders were passed either upholding or overruling such objections. After passing such orders, the

trial Court waited for days and weeks for the parties concerned to go before the higher Courts for the purpose of challenging such interlocutory orders. The Supreme Court held:

> "It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. Such practices when realised through the course of long period to be hindrances which impede stead and swift progress of trial proceedings must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.
>
> When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course. If the objection relates to deficiency of stamp duty of a document, the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.
>
> The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. This measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses."[55.]

There cannot be a straitjacket formula providing for the grounds on which judicial discretion under section 231(2) of the CrPC can be exercised. The exercise of discretion has to take place on a casetocase basis. The guiding principle for a Judge under section 231(2) of the CrPC is to ascertain whether prejudice would be caused to the party seeking deferral, if the application is dismissed.[56.] While deciding an Application under section 231(2) of the 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:

- possibility of undue influence on witness(es);
- possibility of threats to witness(es);
- possibility that nondeferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;
- possibility of loss of memory of the witness(es) whose examination-in-chief has been completed;
- occurrence of delay in the trial, and the non-availability of witnesses, if deferral is allowed, in view of section 309(1) of the CrPC14.

These factors are illustrative for guiding the exercise of discretion by a Judge under section 231(2) of the CrPC.[57.]

[s 231.2] Delay in examining witness.—

The delay in the examination of a particular witness has been held to be not sufficient in itself to suspect the prosecution version.[58.]

50. *Subba*, (1885) 9 Mad 83.
51. *Koli Raja Sarwan v The State of Gujarat*, (1966) 7 Guj LR 544 : AIR 1966 Guj 239 : 1966 Cr LJ 1128 .
52. *Masalti v State of UP*, AIR 1965 SC 202 : (1965) 1 Cr LJ 226 ; *Bava Hajee v State of Kerala*, AIR 1974 SC 902 : 1974 Cr LJ 755 : (1974) 4 SCC 479 .
53. *Pirthi v State of Haryana*, 1993 Cr LJ 3517 (P&H).
54. *Banti v State of MP*, AIR 2004 SC 261 : (2004) 1 SCC 414 : 2004 Cr LJ 372 .
55. *Bipin Shantilal Panchal v State of Gujarat,* AIR 2001 SC 1158 at pp 1160-1161 : 2001 Cr LJ 1254 : (2001) 3 SCC 1 .
56. *State of Kerala v Rasheed*, CRIMINAL APPEAL NO. 1321 OF 2018 [Arising out of Special Leave Petition (Crl.) No. 4652 of 2018], decided on 30 October 2018 (SC) : LNIND 2018 SC 582 .
57. Ibid.
58. *Banti v State of MP*, AIR 2004 SC 261 : (2004) 1 SCC 414 : 2004 Cr LJ 372 .

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 232] Acquittal.—

If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.

The Judge records an order of acquittal if after (a) taking the evidence for the prosecution, (b) examining the accused and (c)(i) hearing the prosecution and (ii) defence on the point, he considers that there is no evidence that the accused had committed the offence.

The words "there is no evidence" are not to be read as meaning "no satisfactory, trustworthy or conclusive evidence". If there is evidence, the trial must go on to its close.[59.]

Where a Sessions Judge dropped the proceedings against the accused after framing a charge against him due to non-availability of evidence, it was held that a Court has no power to drop the proceedings after framing a charge and it has either to acquit or convict an accused.[60.]

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59. *Queen-Empress v Vajiram*, (1892) 16 Bom 414; *Queen-Empress v Munna Lal*, (1888) ILR 10 All 414.

60. *Kisan Sewa Sahkari Samiti Ltd v Bachan Singh*, 1993 Cr LJ 2540 (All).

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Section 209 lays down the procedure which the Magistrate should follow when an offence is exclusively triable by the Court of Session, and sections 207 and 208 provide for the supply of police report and other documents to the accused so that he may meet his case. Sections 225 to 237 are concerned with the procedure of trials held before the Court of Session.

It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 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.

If the accused is not acquitted under the previous section, then the Judge calls upon him to enter on his defence. This is not a mere formality but is an essential part of criminal trial. An omission on the part of the Judge to do so occasions failure of justice and is not curable under section 464.[61.] The provision in sub-section (1) is mandatory.[62.] The Kerala High Court set aside the conviction and remanded a murder case back as the accused was not afforded an opportunity to adduce his defence as required by section 233 of CrPC.[63.]

The accused may apply for issue of process to compel attendance of witnesses or production of documents or things and the Judge, unless he considers the application to be vexatious or made for the purpose of delay or defeating the ends of justice, shall issue such process. The Judge should record his reasons for refusal. It may be noted that under section 230 the Judge "*may* issue any process" on the application of the prosecution for compelling attendance of witnesses *etc*. In this section, refusal to issue process on specific grounds is mentioned. It seems the word "may", denotes discretion on the part of the Judge in section 230. Right of the Court to deny an opportunity for defence evidence is limited to cases where it is satisfied, for reasons to be recorded in writing that the application should be refused on the ground that it is made vexatiously or for the purpose of causing delay as defeating the ends of justice.[64.] Where the Sessions Judge did not actually call upon the accused to enter on his defence in terms of section 233 of CrPC, but the accused was questioned as to whether he had any evidence to lead and the accused replied in the negative, it was held that no prejudice

could be said to have caused to the accused and the conviction could not be set aside on the ground of not following strictly the procedure under section 233 CrPC.[65.]

[s 233.1] Compelling attendance of witness [*Sub-section (3)*].—

The accused applied for an order compelling the attendance of a witness. The witness appeared but he was examined as a prosecution witness. The Court said that he could not thereafter by juxtaposed as a defence witness on behalf of the accused. After a long span of time, the prosecution witnesses filed a false affidavit stating that they were coerced and tortured by police. The witnesses were held liable to be punished for perjury.[66.]

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61. *Imam Ali Khan*, (1895) 23 Cal 252 .
62. *PKJ Pillai v State of Kerala*, 1982 Cr LJ 899 (Ker).
63. *Bhadran v State of Kerala*, 1993 Cr LJ 1966 (Ker).
64. *TN Janardhanan Pillai v State of Kerala*, 1992 Cr LJ 436 (Ker).
65. *Majid Khan v State of Karnataka*, 1993 Cr LJ 907 (Knt) : 1993 (1) Kar LJ 176 .
66. *State of MP v Badri Yadav*, AIR 2006 SC 1769 : (2006) 9 SCC 549 : 2006 Cr LJ 2128 .

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 234] Arguments.—

When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply:

Provided **that where any point of law is raised by the accused or his pleader, the prosecution may, with the permission of the Judge, make his submissions with regard to such point of law.**

Every accused person may of right be defended by a pleader (see section 303) of his choice. The word "reply" means "reply generally on the whole case". But where a point of law, not of fact, is raised by the accused or his pleader, the Judge may permit the prosecution to make its submissions with regard to such point of law. Where the accused had taken the plea of his impotency only at the stage of trial for the first time in a case under section 306 IPC for abetting suicide by his wife, the P&H High Court held that even if the accused had not taken specific plea earlier, he was not debarred from taking the plea during the trial unless of course it could be shown that the accused had been taking inconsistent pleas about his innocence at different stages.[67.]

67. *Gopal v State of Haryana*, 1993 Cr LJ 2724 (P&H).

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[s 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 question of sentence, and then pass sentence on him according to law.

Even if the accused is convicted, save in cases of admonition or release on probation of good conduct, the accused can make his submission on point of sentence, e.g., he is the only bread-earner in his family, *etc*.

The provision in clause (2) of this section was newly added and it did not exist in the old Code of 1898. This provision is according to the new trend in penology and envisages that after a Court holds a person guilty, it must consider the question of sentencing in the light of various factors such as the prior criminal record of the offender, his age, employment, educational background, home life, sobriety and social adjustment, emotional and mental condition, and the prospects of his returning to normal path of conformity with the law. It was therefore considered that the accused as well as the prosecution should be given an opportunity to put forward their viewpoints on the question of the sentence. This sub-section requires the Court to give a hearing to the accused on the question of the sentence. It is mandatory.[68.] In case of non-compliance with this provision, the case may be remanded to the Sessions Judge for retrial on the question of the sentence only. When a case is then remitted to the Sessions Court, it is not necessary for the Sessions Judge to hold a *de novo* trial. The trial will be restricted only to the question of sentence.[69.] But when such remand is likely to cause delay, it is open to the appellate Court to remedy the breach by giving a hearing to the accused on the question of sentence.[70.] The plea of not having heard the accused on the question of the sentence was raised for the last time in the Supreme Court, as an additional ground. The trial Court in fact had heard the accused on the same day the question of the sentence. It was held that the plea did not merit any consideration.[71.]

It has been held by the Supreme Court that while hearing the accused under section 235(2) at the time of awarding sentence, in appropriate cases, the Courts can also call for a report from the Probation Officer to examine whether there is likelihood of the

accused indulging in commission of any crime or there is any probability of the accused being reformed and rehabilitated.[72.]

In *General Vaidya's* murder case, the accused had already filed confessional statements and also owned responsibility for murder of the General in their statement under section 313 CrPC, and did not pray for imposition of lesser sentence, no prejudice could have been caused to them, when conviction and death sentence were pronounced the same day.[73.]

Where the trial Judge, after recording convictions, specifically questioned each of the accused regarding the sentences and recorded their answer, considered their answers and referred to all the decisions before awarding death sentence and also considered part played by each accused and mitigating and aggravating circumstances and then awarded death sentence to three accused and life imprisonment to others, it was held that there was sufficient compliance of section 235(2) CrPC.[74.]

[s 235.1] Nature of function of sentencing [*Sub-section (2)*].—

The Supreme Court has observed:

> The function of awarding sentence after conviction is a judicial function to be performed by the Courts of law. The discretion of the Court plays its part except to the extent to which there is a minimum sentence prescribed by law. Considerations of the legality of the sentence and its adequacy in appeal is also a judicial function and this includes the power to suspend the sentence during the pendency of the appeal.[75.] Offences having great impact upon the social order and public interest require exemplary treatment.[76.]

There is no mandate in section 235(2)of CrPC to fix separate date for hearing on sentence. It depends on the facts and circumstances as to whether a separate date is required for hearing on sentence or parties feel convenient to argue on sentence on the same day. Had any party pressed for separate date for hearing on the sentence, or both of them wanted to be heard on some other date, situation could have been different. In the present case, the parties were heard on sentence by both the courts below, and finally by this Court, as is apparent from the judgment under review. As such, merely for the reason that no separate date is given for hearing on the sentence, the Review Petition cannot be allowed.[77.] The convict has a right to be heard before sentence, but there is no mandate in section 235(2) to fix separate date and merely because no separate date given, the entire case cannot be held to be flawed or vitiated.[78.]

The Court should give an opportunity to the accused to place before it, the relevant material having a bearing on the question of sentence. It is not sufficient for the Court to merely hear the State counsel and the counsel for the accused on the question of sentence.[79.]

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68. *Santa Singh v State of Punjab*, AIR 1976 SC 2386 : 1976 Cr LJ 1875 : (1976) 4 SCC 190 ; *Dagdu v State of Maharashtra*, AIR 1977 SC 1579 : 1977 Cr LJ 1206 : (1977) 3 SCC 68 ; *Shiv Mohan Singh v State (Delhi Admn)*, AIR 1977 SC 949 : 1977 Cr LJ 767 : (1977) 2 SCC 238 . *Shobhit Chamar v State of Bihar,* AIR 1998 SC 1693 : 1998 Cr LJ 2259 : (1998) 3 SCC 455 , the accused persons were convicted and sentenced to death in a murder case. The trial Court after

pronouncing the judgment remanded them to judicial custody. Sufficient opportunity was given to them on the question of sentence. Hence, the provisions of the section were complied with.

69. *Narpal Singh v State of Haryana*, AIR 1977 SC 1066 : 1977 Cr LJ 642 : (1977) 2 SCC 131 .

70. *Dagdu v State of Maharashtra, Ibid.; Tarlok Singh v State of Punjab*, AIR 1977 SC 1747 : 1974 Cr LJ 1265 : (1977) 3 SCC 218 .

71. *Jumman Khan v State of UP*, 1991 Cr LJ 439 : AIR 1991 SC 345 : (1991) 1 SCC 752 . *Bishnu v State of Rajasthan*, 1996 Cr LJ 3572 (Del), an order of conviction and sentence passed on the same day, held bad in law.

72. *Birju v State of MP*, 2014 SC 1504 : (2014) 3 SCC 421 : 2014 Cr LJ 1568 (SC).

73. *State of Maharashtra v Sukhdeo Singh*, AIR 1992 SC 2100 : 1992 Cr LJ 3454 : (1992) 3 SCC 700 .

74. *Shankar v State of Tamil Nadu*, (1994) 4 SCC 478 : 1994 Cr LJ 3071 (SC).

75. *Dadu v State of Maharashtra,* (2000) 8 SCC 437 : 2000 Cr LJ 4619 (SC).

76. *Shivaji v State of Maharashtra*, AIR 2009 SC 56 : (2008) 15 SCC 269 , the case involved rape and murder.

77. *BA Umesh v Registrar General Karnataka High Court,* 2016 (9) Scale 600 : 2017 Cr LJ 762 .

78. *Vasanta Sampat Dupare v State of Maharashtra*, AIR 2017 SC 2530 : [2017] 3 MLJ (Crl) 404 : LNIND 2017 SC 248 .

79. *Anil v State of UP*, 2002 Cr LJ 2694 (All).

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 236] Previous conviction.—

In a case where a previous conviction is charged under the provisions of sub-section (7) of section 211, and the accused does not admit that he has been previously convicted as alleged in the charge, the Judge may, after he has convicted the said accused under section 229 or section 235, take evidence in respect of the alleged previous conviction, and shall record a finding thereon:

Provided **that no such charge shall be read out by the Judge nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 229 or section 235.**

This section lays down a special form of procedure as to the issue of liability to enhanced punishment in consequence of previous conviction. The section is applicable to trials before the Court of Session only; in case of trials before a Magistrate, section 248(3) applies.

The object of this section in prohibiting the proof of previous conviction to be put in until the accused is convicted, is to prevent the accused from being prejudiced at the trial.[80.] Furthermore, it is enough for the prosecution to prove that the person concerned has been earlier convicted and it is not necessary that the sentence imposed in an earlier case should be in force.[81.]

Section 75 of the IPC provides for enhanced sentences in case of certain offences of which an accused person is previously convicted.

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80. *Re Kamya*, AIR 1960 AP 490 : 1960 Cr LJ 1302 .

81. *Pratap v State of UP*, AIR 1973 SC 786 : 1973 Cr LJ 565 : (1973) 3 SCC 690 .

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It may be noted that the jury system does not find any place in the Criminal Procedure Code, 1973.

[s 237] Procedure in cases instituted under section 199(2).—

(1) A Court of Session taking cognizance of an offence under sub-section (2) of section 199 shall try the case in accordance with the procedure for the trial of warrant-cases instituted otherwise than on a police report before a Court of Magistrate:

Provided **that the person against whom the offence is alleged to have been committed shall, unless the Court of Session, for reasons to be recorded, otherwise directs, be examined as a witness for the prosecution.**

(2) Every trial under this section shall be held *in camera* if either party thereto so desires or if the Court thinks fit so to do.

(3) If, in any such case, the Court discharges or acquits all or any of the accused and is of opinion that there was no reasonable cause for making the accusation against them or any of them, it may, by its order of discharge or acquittal, direct the person against whom the offence was alleged to have been committed (other than the President, Vice-President or the Governor of a State or the Administrator of a Union territory) to show cause why he should not pay compensation to such accused or to each or any of such accused, when there are more than one.

(4) The Court shall record and consider any cause which may be shown by the person so directed, and if it is satisfied that there was no reasonable cause for making the accusation, it may, for reasons to be recorded, make an order that compensation to such amount not exceeding one thousand rupees, as it may determine, be paid by such person to the accused or to each or any of them.

(5) Compensation awarded under sub-section (4) shall be recovered as if it were a fine imposed by a Magistrate.

(6) No person who has been directed to pay compensation under sub-section (4) shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made under this section:

Provided **that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.**

(7) The person who has been ordered under sub-section (4) to pay compensation may appeal from the order in so far as it relates to the payment of compensation, to the High Court.

(8) When an order for payment of compensation to an accused person is made, the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or if an appeal is presented, before the appeal has been decided.

The cognizance of the offence of defamation against high dignitaries of State and public servants employed in connection with the affairs of the Union or a State while acting in the discharge of their official functions can be taken by the Sessions Judge when the Public Prosecutor makes a complaint to him in writing [section 199(2)]. The trial in such cases should be according to the procedure laid down in sections 244-247 inclusive, but the high dignitary should, unless the Court of Session otherwise directs in writing, be examined as a witness for the prosecution. The trial may be held in *camera* if either party so desires or the Court thinks such a procedure to be fit for the occasion. If the case results in the discharge or acquittal of the accused, a show cause notice for grant of compensation to the accused may be issued to those alleged to have been defamed, provided the Court is of opinion that there was no reasonable cause for making the accusation. After considering the cause shown and recording his reasons, the Court can award a compensation not exceeding Rs1,000 to the accused or each or any of them. There is a right of appeal provided against this order. However, civil or criminal liability of those directed to pay compensation, *de hors* this section, remains. Necessary adjustment with regard to the compensation awarded under the present section should be made by the Civil Court. The provisions regarding award of compensation do not apply to the cases of the President, Vice-President, the Governor of a State or the Administrator of a Union territory.

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CHAPTER XIX TRIAL OF WARRANT-CASES BY MAGISTRATES

This Chapter is concerned with procedure in respect of trial of warrant-cases either instituted on a police report (see sections 238–243) or instituted otherwise than on a police report (see sections 244–247). The last part (sections 248–250) deals with the conclusion of the trial.

A.—Cases instituted on a police report

[s 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.

The underlying purpose in prescribing this procedure is to ensure speedy disposal of warrant-cases instituted on police reports without in any way prejudicing the accused.[1.] This section casts a duty on the Magistrate to *satisfy himself* that he has complied with the provisions of section 207, *viz.* furnishing the accused free of cost copies of the documents referred to in that section without delay.

[s 238.1] "Police report".—

A report made by an Excise Officer is not the same thing as a police report, and a Magistrate cannot proceed under this section in a case instituted on a report made by an Excise Officer,[2.] unless an Act of the State itself contains a specific provision deeming the report of an Excise Officer to be such report.[3.]

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1. *Pulugani Veeraraghaveulu*, (1958) Andhra 143.
2. *Chhitar Singh v State*, (1958) Raj 1206 ; *Brijlal v The State*, AIR 1961 Ori 64 : 1961 Cr LJ 539 . But **see** contra *Laxminarayan Khemchand v State through Police*, AIR 1961 MP 13 .
3. *Ashiq Miyan v The State of MP*, AIR 1966 MP 1 FB : 1966 Cr LJ 29 ; *Mangala Panchuram v State*, (1961) 2 Cr LJ 414 ; **See** *also Ashiq Miyan v State of Madhya Pradesh*, AIR 1969 SC 4 : (1969) 1 SC WR 489 : 1969 Cr LJ 239.

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A.—Cases instituted on a police report

[s 239] When accused shall be discharged.—

If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

Under this section, the trial Court is required to see whether ground for presuming commission of offence exists or whether the charge is groundless; whether a *prima facie* case pertaining to the commission of the offence is made out or not.[4.] This section enjoins upon the Magistrate to record his reasons for holding the charge against the accused to be groundless and discharging him. This is simply because his order of discharge is subject to revision by the higher Courts. There were sufficient documents and evidence indicating that *prima facie* charges were made out against the accused but those documents and evidence were neither referred nor considered and the Magistrate discharged the accused on the ground that nobody represented the state including the official entrusted with the work of supervising the state litigation or any advocate including the District Govt. Counsel. It was held that the order of discharge was liable to be set aside.[5.] At the stage of consideration of an application for discharge, the Court has to proceed with the presumption that material brought on record by the prosecution are true and evaluate such material with a view to find out whether the facts emerging therefrom taken at their face value disclose existence of the ingredients of the offence.[6.]

[s 239.1] Scope.—

The Supreme Court has held that the present section should be read along with section 240 (sub-sections (2) and (3) of section 251A of the old Code. If there is no ground for presuming that the accused has committed an offence, the charge must be considered to be groundless, which is the same thing as saying that there is no ground for framing the charge under the next section. The term "charge" used in section 239 is only in the sense of allegation or accusation. Elaborate examination of statement recorded during police investigation is not warranted.[7.] The Magistrate is entitled and indeed has a duty to consider the entire material referred to in this section prior to his coming to a decision either way.[8.] When sufficient material, in compliance with the provisions of section 173, was before the Magistrate, the accused was discharged on the sole ground of the public prosecutor being absent. The order was held improper.[9.]

Order of discharge based on error of record is not proper and cannot be sustained.[10.]

Opportunity of being heard by the accused included his right to introduce documents at pre-charge stage.[11.]

[s 239.2] "Heard".—

The hearing of the prosecution and the accused under this section does not mean hearing of arguments only; it includes hearing of evidence as well, if needed.[12.]

[s 239.3] "Discharge".—

The word "discharge" must be read as having reference to a discharge in relation to the specific offence for which the accused has been charged. It does not necessarily mean that the accused cannot be proceeded against for some other offence if there was evidence *prima facie* to establish such a charge.[13.] Even if at one stage the Magistrate finds no *prima facie* case against the accused and discharges him, the Magistrate does not become *functus officio* if in proceeding with the case against others he finds that there is *prima facie* case against the accused whom he has discharged.[14.]

Where fresh material was found to proceed against the discharged accused in a fresh trial, the Magistrate was held to be competent to take cognizance. It did not amount to review of discharge order.[15.] Where the trial Court refused the plea of discharge after thoroughly examining the documents, police report and case diary and proceeded to frame the charge against the accused, it was held that there was no illegality in examining the record as the Court had to consider whether evidentiary material on record would reasonably connect the accused with the crime.[16.]

Reasons are required to be stated when the accused is to be discharged. No reasons are required to be stated when charges are to be framed against the accused.[17.] The standard of proof which is required at the stage of decision making for conviction is not requisite for decision as to framing of charge. The accused can also, therefore, produce any reliable material at that stage as would affect the very sustainability of the case.[18.]

At the time of framing of a charge what the Court has to consider is only the police report and documents sent with it under section 173. The accused has the right of being heard and the Court may examine him, if necessary. The Supreme Court said that the High Court was not justified in looking at the documents filed by the accused and to conclude by relying on them that no offence was committed by the accused persons.[19.]

It has been held by the Supreme Court that a Court trying the case can direct discharge of the accused only for reasons to be recorded and only if it considers the charge to be groundless. Therefore, at the time of framing of charge, the Magistrate has, on the basis of material on record, only to see whether there is ground to presume that the accused has committed the offence. Thus, even strong suspicion about the existence of facts constituting the offence is sufficient to refuse discharge. In a case of dowry harassment, the complainant made specific allegations not only against the husband but also against the in-laws. Even conceding that in matrimonial cases that tendency to rope in as many members of the husband's family as possible is on the rise, it was held

that at the intermediate stage, the Court would not speculate whether the allegations are true or false and direct the discharge of the accused.[20.]

[s 239.4] Cognizance taken without considering limitation.—

Where the Magistrate took cognizance of the offence without taking note of the fact that the complaint was time-barred, the Supreme Court held that the accused could be discharged before trial or at the stage of framing of charge.[21.]

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4. *AR Saravenan v State*, 2003 Cr LJ 1140 (Mad); *Ram Kawal Tiwari v State of UP,* 2002 Cr LJ 1860 (All), the accused failing to show at the stage of charges that the charges were groundless, an application under section 482 for quashing of the charge was dismissed.
5. *State of Uttar Pradesh v Jitendra Kumar Singh*, 1987 Cr LJ 1768 (All).
6. *State v S Selvi*, AIR 2018 SC 81 : LNINDORD 2018 KANT 3541 .
7. *State v MK Raghu*, 1989 Cr LJ NOC 205 (Ker).
8. *CS & Mfg Co*, AIR 1972 SC 545 : (1972) 3 SCC 282 .
9. *State of Mizoram v KLalruata*, 1992 Cr LJ 970 (Gau).
10. *Nitaipada Das v Sudarsan Saranji*, 1991 Cr LJ 3012 (Ori).
11. *Vinod Kumar v State of Haryana*, 1987 Cr LJ 1335 (P&H).
12. *Superintendent and Remembrancer of Legal Affairs on behalf of State of West Bengal v Sardar Bahadur*, 1969 Cr LJ 1120 : 73 Cal WN 547 : AIR 1969 Cal 451 .
13. *Pramatha Nath Mukherjee v The State of West Bengal*, (1958) 1 Cal 552 , affirmed in appeal in AIR 1960 SC 810 : 1960 Cr LJ 1165 .
14. *Saraswatiben v Thakorlal*, AIR 1967 Guj 263 : 1967 Cr LJ 1632 .
15. *Vijaya Bai v State of Rajasthan*, 1990 Cr LJ 1754 (Raj).
16. *R Balkrishna Pillai v State of Kerala*, 1996 Cr LJ 757 (Ker).
17. *Kanti Bhadra Shah v State of WB,* AIR 2000 SC 522 : 2000 Cr LJ 746 : (2000) 1 SCC 722 .
18. *Om Prakash Sharma v CBI,* AIR 2000 SC 2335 : 2000 Cr LJ 3478 : (2000) 5 SCC 679 .
19. *State Anti-Corruption Bureau v P Suryaprakasan,* (1999) SCC (Cri) 373 .
20. *Shroj Singh Ahlawat v State of UP,* AIR 2013 SC 52 : (2013) 11 SCC 476 ; *Onkar Nath Mishra v State (NCT of Delhi),* AIR 2008 SC (Supp) 204 : (2008) 2 SCC 561 —Ref.
21. *Arun Vyas v Amita Vyas,* AIR 1999 SC 2071 : 1999 Cr LJ 3479 : (1999) 4 SCC 690 .

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This Chapter is concerned with procedure in respect of trial of warrant-cases either instituted on a police report (see sections 238–243) or instituted otherwise than on a police report (see sections 244–247). The last part (sections 248–250) deals with the conclusion of the trial.

A.—Cases instituted on a police report

[s 240] Framing of charge.—

(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

[s 240.1] State Amendment

Chhattisgarh.—*Following amendments were made by Chhattisgarh Act 13 of 2006, section 5 (w.e.f. 13-3-2006).*

Section 240.–In section 240 of the Code of Criminal Procedure, 1973 (2 of 1974), in sub-section (2), after the words "the accused", add the following words, namely:—

"present either in person or through the medium of electronic video linkage in the presence of his pleader in the Court".

This section corresponds to cls. (3) and (4) of section 251A of the old Code. It should be read along with the previous section. When after considering the entire material referred to in section 239, the Magistrate is of the opinion that the accused has committed an offence, which he is competent to try and adequately punish, then he shall frame in writing a charge. The charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried. The provisions of section 239 and section 240 of the CrPC give the Magistrate the power to go beyond the document filed under section 173 of the CrPC.[22.]

It is not necessary for the trial Court to write a reasoned or lengthy order for the purpose of framing charges.[23.] The manner of examination of material placed by the prosecution before the Court has been thus explained by the Supreme Court:[24.]

> It is well settled that at the stage of framing of charge the trial Court is not to examine and assess in detail the materials placed on record by the prosecution nor is it for the Court to consider the sufficiency of the materials for the purpose of seeing whether the offence alleged against the accused persons is made out. At the stage of charge the Court is to examine the materials only with a view to be satisfied that a *prima facie* case has been

made out against the accused persons. It is also well settled that when the petition is filed by the accused u/s. 482, Cr.P.C. seeking for the quashing of the charge framed against them, the Court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the Court, the charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions.

Where the High Court, under its revisional jurisdiction quashed the charges framed not only against the respondent but also against all accused persons, when no such prayer was made, it was held by the Supreme Court that the order was improper. The High Court could not have gone beyond the scope of prayers made by the respondent and quash even charges framed against all other accused.[25.]

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22. *Alarakh v State of Rajasthan*, 1986 Cr LJ 1794 (Raj).
23. *Munna Devi v State of Rajasthan,* (2001) 9 SCC 631 : AIR 2002 SC 107 : 2002 Cr LJ 225 : JT 2001 (9) SC 438 : 2001 (8) Scale 88 .
24. *State of Delhi v Gyan Devi,* (2000) 8 SCC 239 : AIR 2001 SC 40 : 2001 Cr LJ 124 .
25. *Ashish Chadha v Smt. Asha Kumari,* AIR 2012 SC 431 : (2012) 1 SCC 680 : (2012) 1 SCC (Cri) 744 .

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CHAPTER XIX TRIAL OF WARRANT-CASES BY MAGISTRATES

This Chapter is concerned with procedure in respect of trial of warrant-cases either instituted on a police report (see sections 238–243) or instituted otherwise than on a police report (see sections 244–247). The last part (sections 248–250) deals with the conclusion of the trial.

A.—Cases instituted on a police report

[s 241] Conviction on plea of guilty.—

If the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon.

It is not obligatory on the part of the Magistrate to convict him even if the accused pleads guilty. He may proceed with the trial.

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A.—Cases instituted on a police report

[s 242] Evidence for prosecution.—

(1) If the accused refuses to plead or does not plead, or claims to be tried or the Magistrate does not convict the accused under section 241, the Magistrate shall fix a date for the examination of witnesses:

[26] **[*Provided* that the Magistrate shall supply in advance to the accused, the statement of witnesses recorded during investigation by the police]**

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.

(3) On the date so fixed, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution:

***Provided* that the Magistrate may 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.**

This section corresponds to clauses (6) and (7) of section 251A of the old Code, but sub-section (2) is newly added. The sub-section sets at rest the divergent views expressed by different High Courts with regard to the duty or obligation of the Court to summon any witness, even if asked by the prosecution, in a case instituted on a police report under the old section 251A. The Court, under the present sub-section (2), may, on application by the prosecution, issue summons to compel attendance of prosecution witness or to compel production of any document or anything. This power may be exercised by the Court *suo motu*. It seems, the Court may, where the prosecution is negligent or guilty of laches, refuse to exercise this power.[27]

On the date fixed for hearing, the Magistrate shall take evidence which may be produced by the prosecution. The prosecution, however, is not bound to produce all the witnesses mentioned in the First Information Report. Only material witnesses considered necessary by the prosecution for unfolding the prosecution story need be produced without unnecessary and redundant multiplicity of witnesses.[28]

[s 242.1] "Shall proceed to take all such evidence *etc*."—

This provision is mandatory. The Magistrate cannot, therefore, refuse to examine other witnesses after examining some of them on the ground that their evidence cannot improve matters and order acquittal.[29.]

In taking the evidence for the prosecution, the cross-examination of a witness can be deferred until all the material witnesses have been examined by the prosecution. Common trial and clubbing of cases registered against the accused is not permissible.[30.]

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26. Ins. by Act 5 of 2009, section 19 (w.e.f. 31-12-2009).
27. *State v Mangilal*, 1974 Cr LJ 221 .
28. *Raghubir Singh v State of UP*, AIR 1971 SC 2156 : 1971 Cr LJ 1468 : (1972) 3 SCC 79 .
29. *State of UP v Ramsevak*, 1969 Cr LJ 1452 : AIR 1969 All 512 ; *K Sadasivan v VA Rajagopalan*, 1971 Cr LJ 159 .
30. *State of Karnataka v Annegowda*, AIR 2006 SC 2641 : (2006) 5 SCC 716 : 2006 Cr LJ 3630 .

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A.—Cases instituted on a police report

[s 243] Evidence for defence.—

(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers 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 and such ground shall be recorded by him in writing:

***Provided* that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.**

(3) The Magistrate may, before summoning any witness on an application under sub-section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court.

This section lays down that after the prosecution evidence is over as laid down in the preceding section, the accused shall be called upon to enter upon his defence. If the accused applies to the Magistrate to issue process for calling any witness for examination or cross-examination or for the production of any document or thing, the Magistrate shall issue[31.] process unless—(1) he considers that such application is made for the purpose of vexation or delay or defeating the ends of justice; or (2) the accused had, prior to entering upon his defence, either cross-examined or had the opportunity of cross-examining any witness. In the former case, the Magistrate is required to record his reasons in writing for refusal to issue process,[32.] and, in the latter, the Magistrate may, if satisfied that it is necessary for the ends of justice to compel such attendance, issue process. The Magistrate may require the accused to deposit reasonable expenses which may be incurred by the witness.

However, where the accused does not have the capacity or means to pay the necessary expenses, the Court may exempt him from depositing the amount for such expenses.[33.]

A Magistrate cannot issue summons to the complainant for being examined as a witness to the accused.[34.]

While a prosecution witness can be resummoned under section 243 of the instance of the accused, the complainant cannot be resummoned.[35.]

[s 243.1] Demand for examination of prosecution document.—

The prosecution in the course of its evidence produced a document. The Court did not allow the defence to get at that stage itself the document to be tested by a handwriting expert. The Court said that the defence would have to wait till their turn for evidence.[36.]

[s 243.2] Number of defence witnesses to be examined.—

The object of the requirement of demanding list of witnesses before the Special Judge under the Prevention of Corruption Act, 1988, is to ensure speedy trial of cases. The accused has no right to examine any number of witnesses. The Court has the power to peruse the list and if it considers that some unnecessary persons have been included in the list, it is the duty of the Court to shortlist such persons. If the Court considers that the list is intended to delay the proceedings, it can reject even the entire list. The accused-appellant submitted a list of 267 persons for the defence. The trial Court shortlisted the same on the ground of delay and the High Court only marginally increased the number. It was held that the Supreme Court's interference was not called for. After examining the witnesses as permitted by orders of the Courts, accused can seek trial Court's permission to examine some more witnesses in the interest of justice, if he considers such a course necessary. The trial Court can either grant such permission or can exercise powers under section 311 of CrPC in respect of such witnesses.[37.]

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31. *Emperor v Purshottam Kara*, (1902) 26 Bom 418 : 4 Bom LR 38.
32. *Sat Narain Singh*, (1881) ILR 3 All 392; *Manmohan Dastidar v Bankim Behari Chowdhury*, (1924) 51 Cal 1044 : AIR 1925 Cal 411 .
33. *Venkateswara Rao v State of Andhra Pradesh*, 1979 Cr LJ 255 (AP).
34. *Thomas Thomaskutty v Vijayakumari,* 2002 Cr LJ 3108 (Ker).
35. *CK Kamarudheen v P Shoukkathali,* 2002 Cr LJ 1289 (Ker).
36. *Pradip Kumar Sengupta v State of WB,* 2003 Cr LJ 2345 (Cal).
37. *Arivazhagan v State,* AIR 2000 SC 1198 : 2000 Cr LJ 1714 : (2000) 3 SCC 328 .

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B.—Cases instituted otherwise than on police report

[s 244] Evidence for prosecution.—

(1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.

Sections 238 to 243 dealt with the procedure regarding trial in warrant-cases instituted on police report whereas sections 244 to 247 deal with warrant-cases instituted otherwise than on a police report. When the accused is brought before a Magistrate, he should proceed to hear the prosecution and take all such evidence as may be produced. The Magistrate should also summon such persons whom the prosecution wishes to give evidence to support its case.[38.] Such evidence must be taken in the manner laid down in section 138 of the Indian Evidence Act, 1872 and if the accused so desires, he cannot be refused an opportunity to cross-examine the witnesses produced in support of the prosecution. The opportunity allowed by the Legislature to the accused in section 246(4) of cross-examining the witnesses for the prosecution after the charge has been framed cannot be substituted for the opportunity to which he is entitled when the witnesses are examined and before the charge is framed.[39.]

> The object of section 244 is to enable the Magistrate to collect materials to find out whether a case has been made out against the accused. The prosecution witnesses are examined u/s.under section 244 at the enquiry stage. The trial in a warrant case instituted otherwise than on a police report does not start till the evidence is taken under section 244.[40.]

An application under section 245(2) was rejected. The Supreme Court said that the trial Court could not straight-away proceed to frame a charge under section 246(1) even without any evidence having been taken under section 244.[41.]

[s 244.1] "As may be produced".—

The fact that the prosecution does not keep all its witnesses present when the accused appears before the Magistrate does not necessarily mean that the prosecution does not want to examine all of them. The Magistrate should, before closing evidence and framing the charge, ask the prosecution whether it wants more of its witnesses to be examined in support of the complaint. Failure to do so results in non-compliance with

sub-section (1).[42.] Unlike under section 252(2) of the old Code of 1898, under the new section 244(2), the Magistrate is not under an obligation to summon any witness on his own. It is now the responsibility of the prosecution to move the Magistrate by an application to issue a summons to any of its witnesses directing him to attend or produce any document or other things.[43.]

[s 244.2] Examination of witnesse—

Court can permit examination of witness not mentioned in the list of witnesses. It is not necessary that all witnesses named in the list should have been examined before granting such a permission.[44.]

[s 244.3] Summoning witnesses [*Sub-section (2)*].—

In a complaint case under the Income Tax Act for an offence triable as a warrant-case, an order of discharge merely because the witnesses did not turn up in response to the summons was held illegal. The Gauhati High Court held that where the complainant made successive prayers for issuing summons to witnesses, it was bounden duty of the Magistrate to exhaust all his powers for securing the attendance of the witnesses before dismissing the case.[45.] The High Court set aside the rejection of an application for examining witnesses given in a supplementary list holding that the complainant has a right to examine all witnesses.[46.]

Where a Magistrate refused to summon some witnesses other than those named in the list of witnesses appended to the complaint and rejected the application due to mention of a wrong provision of law, the AP High Court set aside the order holding that the complainant has a right to examine some more witnesses and the Court is bound to summon them.[47.]

[s 244.4] Additional witnesses.—

Complainant's petition for examining additional witnesses should not be accepted by Court at the stage when the evidence of all his witnesses had already been completely taken and the case was fixed for examination of the accused under section 313.[48.]

[s 244.5] Cross-examination of prosecution witnesses.—

Though the accused has no independent right to cross-examine the prosecution witnesses under section 244, the Magistrate may in his discretion permit cross-examination at the inquiry stage. But refusal to allow cross-examination is neither illegal nor irregular.[49.]

38. *Jethalal v Khimji*, (1973) 76 Bom LR 270 .
39. *Syed Mohammad Husain Afqar v Mirza Fakhrullah Beg*, (1932) 8 Luck 135 ; *Medu Sekh v The State of Assam*, 1972 Cr LJ 367 .
40. *Gopalkrishnan v State of Kerala*, 2002 Cr LJ 2490 (Ker).
41. *Ajoy Kumar Ghose v State of Jharkhand*, AIR 2009 SC 2282 : (2009) 14 SCC 115 : 2009 Cr LJ 2824 .
42. *Yeshodabai Keshav v Bhaskar*, (1972) 74 Bom LR 717 : 1973 Cr LJ 1007 .
43. *Parveen Dalpatrai Desai v Gangavishindas Rijharam Bajaj*, 1979 Cr LJ 279 (Bom).
44. *Nawal Kishore Shukla v State of Uttar Pradesh*, 1992 Cr LJ 1554 (All).
45. *PN Bhattacharji v Kamal Bhattacharji*, 1994 Cr LJ 2924 (Gau).
46. *Jamuna Rani v S Krishna Kumar*, 1993 Cr LJ 32 (AP).
47. *Jamuna Rani v S Krishna Kumar*, 1993 Cr LJ 1405 (AP).
48. *Saktipada Dolui v Madhabi Dolui*, 2003 Cr LJ 328 (Cal).
49. *Gopalkrishnan v State of Kerala*, 2002 Cr LJ 2480 (Ker).

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B.—Cases instituted otherwise than on police report

[s 245] When accused shall be discharged.—

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

[s 245.1] **State Amendment**

West Bengal.— *The following amendments were made by West Bengal Act No. 24 of 1988, section 5.*

Section 245.—In section 245 of the principal Act, after sub-section (2), the following sub-section shall be inserted:—

(3) If all the evidence referred to in section 244 are not produced in support of the prosecution within four years from the date of appearance of the accused, the Magistrate shall discharge the accused unless the prosecution satisfies the Magistrate that upon the evidence already produced and for special reasons there is ground for presuming that it shall not be in the interest of justice to discharge the accused.

In a warrant-case instituted otherwise than on a police report, discharge and acquittal are two different concepts. The word "discharge" is used in sections 239 and 245. Normally, a person cannot be discharged unless the prosecution evidence has been taken and the Magistrate considers for reasons to be recorded that no case is made out against the accused. Sub-section (2) of section 245 is an exception to this rule in so far as it empowers the Magistrate to discharge the accused at any previous stage if he considers that the charge is groundless.[50.] Sub-section (1) enables the Magistrate to discharge an accused after taking all the evidence produced by the prosecution. Since his order is subject to revision, he is required to record his reasons in writing. The Magistrate cannot pass an order of discharge until he has examined all the witnesses of the prosecution and such an order passed only after examining the complainant, and not all the witnesses, will be illegal.[51.] The order of discharge passed exclusively on the basis of material in cross-examination and without considering other vital pieces of

evidence and documentary evidence on record held sufficient to make out a *prima facie* case. The order was set aside.[52.]

While considering scope of section 245, trial Court shall not go into meticulous consideration of material produced. It has to see whether a *prima facie* case has been made out or grounds exist to connect the accused to the alleged offence.[53.]

[s 245.2] Power of Magistrate where charge groundless [*Sub-section (2)*].—

This sub-section enables a Magistrate to discharge the accused at any previous state of the case if he considers the charge to be groundless. "Groundless" means that the evidence is such that no conviction can be rested on it, and not that the evidence does not disclose any offence whatsoever. A Magistrate is not bound to examine all the witnesses that may be tendered or available before taking action under this sub-section.[54.] But, this sub-section does not clothe the Magistrate with an arbitrary power of discharge. There must be ground or material on record to come to the conclusion that no offence is made out.[55.] The reasons must be recorded. Non-appearance of the complainant himself is a valid ground for discharging the accused.[56.]

The Magistrate cannot discharge an accused under section 245(2) if he has himself issued the process under section 204, unless he has examined some additional evidence which could persuade him to change his mind.[57.] If on the face of the complaint or the evidence recorded under sections 200 and 202 of CrPC, there is technical defect which makes the complaint not maintainable by the complainant, the Magistrate can discharge the accused under section 245(2) without taking any additional evidence.[58.]

Under section 245, the Magistrate is required to consider the evidence with a view to forming *prima facie* case for conviction. He cannot go into the pros and cons of the evidence which is yet to be produced.[59.] If an offence is exclusively triable by the Court of Sessions, the Magistrate has no power to record the prosecution evidence much less to discharge the accused.[60.]

[s 245.3] "At any previous stage of the case".—

The phrase has a bearing upon the duty of the Magistrate to take all evidence and it is in juxtaposition to that duty that sub-section (2) empowers the Magistrate to discharge an accused at any previous stage of the case.[61.]

[s 245.4] Expiry of limitation period.—

The mere expiry of the period of limitation does not entitle an accused person to be discharged as the complainant has the right to seek extension of time under section 473 by explaining the cause of delay. The delay was held to be properly explained on the facts of the case. The Supreme Court said:

> The mere fact that the complaint was filed 25 days after the expiry of the period of limitation did not entitle the accused to seek discharge under section 245, Cr.P.C. because the complainant has, under law, a right to seek for extension of time under section 473 Cr.P.C.[62.]

[s 245.5] Fresh proceeding after discharge.—

An order of discharge under this section does not amount to an acquittal and does not bar further proceedings against the accused (section 300, explanation). It is not a "judgment". When an accused has been discharged for absence of complainant on the day of the hearing, it is competent to the Magistrate to entertain a second complaint on the same facts from the same complainant.[63.] But the accused should not be discharged under this sub-section if on allegations made against them a *prima facie* case is made out.[64.]

The starting point for calculation of four years for the purpose of discharge of the accused under section 245(3) of CrPC as introduced by Criminal Procedure (West Bengal Amendment) Act, 1988 (Act 24 of 1988) will be the date on which the accused appears after the complaint is filed and the Magistrate has taken cognizance thereon.[65.]

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50. *Kaliappan v Munisamy*, 1977 Cr LJ 2038 (Mad).
51. *Yeshodabai v Bhaskar*, (1972) 74 Bom LR 717 : 1973 Cr LJ 1007 .
52. *Mani Kant Sohal v PK Banthia*, 1991 Cr LJ 1247 (Bom).
53. *S Bangarappa v GN Hegade*, 1992 Cr LJ 3788 (Knt); *Shailendra Singh v Som distilleries & Breweries Ltd,* 2003 Cr LJ NOC 182 (MP) : (2003) 1 MPLJ 97 , allegation of cheating in a complaint, the accused failed to appear inspite of repeated bailable warrants, an application was made by the accused for dispensing with personal attendance and discharge, the accused was not allowed to make a further application under section 402 for quashing of complaint. *Anil Kumar Agarwal v KC Babu,* 2003 Cr LJ 2197 (AP), evidence was still to be recorded in a charge for violation of FERA (now FEMA), the accused was not entitled to be discharged under this section.
54. *Kashinatha Pillai v Shanmugam Pillai*, (1929) 52 Mad 987; *Muhammad Ibrahim Haji Moula Baksh v TCH Naughton*, (1941) Kar 345 : AIR 1941 Sindh 198 .
55. *Muhammedu v Balkrishna*, (1964) 2 Cr LJ 92 ; *Gopala Panicker v Kesavan*, AIR 1966 Ker 243 1966 Cr LJ 1138.
56. *Nabaghan v Brundaban*, 1989 Cr LJ 381 (Ori); *State of Madhya Pradesh v Punamchand*, 1987 Cr LJ 1232 (MP).
57. *Luis de Piedade Lobo v Mahadev*, 1984 Cr LJ 513 (Bom).
58. *Vishva Nath v 1st Munsif, Lower Criminal Court, (Bahraih)*, 1989 Cr LJ 2082 (All).
59. *Hukamichand v Ratanlal*, 1977 Cr LJ 1370 (Knt).
60. *Malleshappa v Neelankatappa*, 1979 Cr LJ NOC 9 (Kant).
61. *Jethalal v Khimji*, (1973) 76 Bom LR 270 .
62. *Rakesh Kumar Jain v State,* AIR 2000 SC 2754 : 2000 Cr LJ 3973 : (2000) 7 SCC 656 . The trial was under section 13(3) of the Official Secrets Act and the complaint regarding offences under sections 5(4), 5(2) and (3) was barred by limitation.
63. *Emperor v Amanat Kadar*, (1928) 31 Bom LR 146 : AIR 1929 Bom 134 .
64. *Abhey Dass v Gurdial Singh*, AIR 1971 SC 834 : 1971 Cr LJ 691 : (1972) 4 SCC 44 .

65. *Bijan Haldar v State of West Bengal*, 1993 Cr LJ 3082 (Cal).

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B.—Cases instituted otherwise than on police report

[s 246] Procedure where accused is not discharged.—

(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.

(3) If the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon.

(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub-section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any), they shall also be discharged.

The section enables a Magistrate to frame a charge (1) after the evidence for the prosecution under section 244 is over or (2) at any previous stage, if the Magistrate forms the opinion that a *prima facie* case has been made out against the accused.[66.] The charge so framed must be read and explained to the accused so that he understands the nature of it thoroughly.[67.] Where the charge was not properly explained to the accused, the High Court set aside the conviction and ordered a new trial.[68.]

After a charge has been drawn up, the accused is entitled to have the witnesses for the prosecution recalled for purposes of cross-examination. This section gives the Magistrate no discretion in the matter. It is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine, and if so, which of the witnesses for the prosecution whose evidence has been taken.[69.] But it is open to the accused to say that he wants all the witnesses for further cross-examination, in which case he need not give the names.[70.] The fact that there has already been some cross-examination before the charge has been drawn up does not affect this privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.[71.]

This section does not prohibit the accused from cross-examination the witnesses for the prosecution before the charge is framed.[72.] As a matter of practice or discretion, Magistrates should permit some cross-examination before framing a charge.[73.]

Sub-section (6) enables the prosecution to examine witnesses, who have not been examined, or whose names have not been disclosed, before the charge is framed. If the accused desires time to enable him to cross-examine witnesses whose names have not been disclosed, it is open to the Magistrate to give time, just as it is open to him to give the prosecution time to ascertain the antecedents of the witnesses produced by the accused at the trial without the assistance of the Court.[74.] Section 246(6) gives to the accused the right to cross-examine the additional witnesses. This right is similar to the right envisaged under clause (5). Clause (6) requires the Magistrate not to discharge the additional witnesses unless and until they are cross-examined and re-examined. When the Magistrate rejected the petition for recalling the additional witnesses for the purposes of cross-examination, it amounted to denial of the right given by clause (6) to the accused to cross-examine the additional witnesses and such resulted in miscarriage of justice.[75.]

[s 246.1] "An offence".—

The words "an offence" read with the other parts of the Code can only mean an offence mentioned in the summons or warrant against the accused or some offence allied to it. The section does not empower the Court to call upon the accused in course of the trial to meet a charge in respect of an offence different from the one stated in the petition to complaint although alleged by the complainant in the course of his examination. Consequently, where an accused was called upon to meet a charge of criminal breach of trust and was held entitled to a discharge in respect thereof, he could not be charged and tried in respect of an offence of cheating in the course of the same trial on the statement of the complainant in the course of his examination.[76.]

[s 246.2] "Competent to try and which, in his opinion, could be adequately punished".—

A Magistrate may be competent to try a case but if he is of the opinion that he could not adequately punish the accused, he must commit the case to the proper Court.[77.] Unless the Magistrate holds the view that his powers of punishment are insufficient, he is bound to try those cases which are within his own jurisdiction, instead of sending them to other Court to be tried.[78.]

[s 246.3] "Charge".—

As to the language and form of charge, see sections 211–224, *supra*. The charge is to be framed by the Magistrate. The fact of charging indicates that a *prima facie* case exists. The charge should contain all that is necessary to constitute the offence charged, and all that is requisite in order that the accused may have notice of the matter with which he is to be charged.[79.]

[s 246.4] "Magistrate shall record the plea".—

If the accused pleads "guilty", the Magistrate is bound to record the plea. If the plea is not recorded, the conviction will be set aside.[80.] The plea must be recorded in the accused's own words unless there are reasons for dispensing with that safeguard.[81.] Where there is a subsequent plea of guilty after some evidence is recorded, the accused cannot be convicted on such plea only.[82.] A pleader cannot plead "guilty" or "not guilty" on behalf of his client.[83.]

[s 246.5] "May, in his discretion, convict him thereon".—

The Magistrate is given the discretion to convict an accused on his plea of guilt, but he is not bound to do so.[84.]

[s 246.6] "At the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith".—

These words indicate that sufficient time should be given to the accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes.[85.] The accused can be asked about it forthwith on the day the charge is framed, provided the Magistrate records in writing his reasons for the course adopted.[86.]

[s 246.7] "The evidence of any remaining witnesses for the prosecution shall next be taken".—

These words refer to cases where before the stage contemplated by the section, the names of the witnesses have been ascertained and only some of those witnesses have been examined.[87.] It is open to the prosecution to examine witnesses cited but not examined by it even after the charge is framed and the accused has entered on his defence. This principle does not apply when the prosecution seeks to examine new witnesses who were not mentioned in the first instance in the list of prosecution witnesses.[88.]

[s 246.8] "Any remaining witnesses for prosecution".—

The words are wide enough to include any witness, who according to the prosecution is able to support its case, though he has not been summoned and named before the framing of the charge, provided that he is not sprung upon the defence all of a sudden

and sufficient opportunity is given to the accused to prepare for the cross-examination of the witness. The Magistrate is, therefore, competent to summon and examine, under section 246(6), a prosecution witness not mentioned in the *challan*.[89.]

The expression "evidence of any remaining witnesses" should be given wide interpretation. Thus, the Magistrate has discretion to entertain supplementary list of witnesses. But this discretion has to be exercised judiciously for advancement of justice. It is not to be used for *mala fide* purposes to harass the accused.[90.]

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66. *The State v Pulish Ghosh*, 1973 Cr LJ 510 ; *Ratilal Mithani v State of Maharashtra*, AIR 1979 SC 94 : 1979 Cr LJ 41 : (1979) 2 SCC 179 .
67. *The Empress v Vaimbilee*, (1880) ILR 5 Cal 826.
68. *Aiyavu v Queen-Empress*, (1885) 9 Mad 61.
69. *Varisai Rowther v King-Emperor*, (1922) 46 Mad 449, 462 (FB); *Mohd Qasim v Gokul Tewari*, 1963 Cr LJ 346 .
70. *Ramji Jadav*, (1963) 2 Cr LJ 560 .
71. *Zamunia v Ram Tahal*, (1900) ILR 27 Cal 370; *Nasarvanji*, (1900) 2 Bom LR 542 .
72. *Queen–Empress v Sagal*, (1893) ILR 21 Cal 642.
73. *Lachhmi Narain v Mansa Ram Murlidhar*, (1931) 54 All 212 : AIR 1933 All 82 .
74. *Emperor v Nagindas Narottamdas*, (1942) 44 Bom LR 452 : (1942) Bom 540.
75. *Taddi Rama Rao v Kandi Asseervadam*, 1977 Cr LJ NOC 259 (AP).
76. *Doman Chaudhuri v Bejoy Krishna Mukherji*, (1949) 1 Cal 478 .
77. *Queen-Emperess v Kayemullah Mandal*, (1897) ILR 24 Cal 429; *Emperor v Bindeshri Goshain*, (1919) ILR 41 All 454 : AIR 1919 All 266 .
78. *Basdeo v Emperor*, (1945) All 422 , 423.
79. *Sant Singh*, (1888) PR No. 26 of 1889.
80. *Emperor v Gopal Dhanuk*, (1881) 7 Cal 96 .
81. *Brij Kishore v The State*, AIR 1965 All 482 : 1965 Cr LJ 451 a; *Gurdeep Singh v State (Delhi Admn)*, 1999 Cr LJ 4573 : AIR 1999 SC 3646 : (2000) 1 SCC 498 , the Supreme Court explains at p 4582 the reasons for which the accused persons should be encouraged to plead guilty even if the incentive offered may be lesser punishment.
82. *Jayant Luxman v State of Gujarat*, (1964) 2 Cr LJ 86 ; *Re Kothandapani*, AIR 1968 Mad 59 .
83. *Sursing*, (1904) 6 Bom LR 861 .
84. *Kunwar Sen*, (1932) 8 Luck 286 .
85. *Ramchandra Modak v Emperor*, (1926) ILR 5 Pat 110 : AIR 1926 Pat 214 .
86. *Emperor v Lakshman*, (1929) 31 Bom LR 593 : 53 Bom 578 : AIR 1929 Bom 309 .
87. *Queen v Amir*, (1946) Lah 295.
88. *Abdul Razak v Haji Hussain Server*, (1945) Nag 995.
89. *Rewa Chand v KC Kapoor*, (1954) Raj 700 ; *Gangamma v Siddaiah*, AIR 1962 AP 11 ; *Laltu v Ram Lal*, 1969 Cr LJ 1464 : AIR 1969 All 583 . **But See** *Haripada v Hem Kanta*, 1969 Cr LJ 1117 : AIR 1969 Cal 421 .

90. *Sayeeeda Farhana Shamim v State of Bihar*, AIR 2008 SC 2373 : (2008) 8 SCC 218 : 2008 Cr LJ 3057 .

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This Chapter is concerned with procedure in respect of trial of warrant-cases either instituted on a police report (see sections 238–243) or instituted otherwise than on a police report (see sections 244–247). The last part (sections 248–250) deals with the conclusion of the trial.

B.—Cases instituted otherwise than on police report

[s 247] Evidence for defence.—

The accused shall then be called upon to enter upon his defence and produce his evidence; and the provisions of section 243 shall apply to the case.

See comment on section 243.

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C.—Conclusion of trial

[s 248] Acquittal or conviction.—

(1) If, in any case under this Chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal.

(2) Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 325 or section 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.

(3) Where, in any case under this Chapter, a previous conviction is charged under the provisions of sub-section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused, take evidence in respect of the alleged previous conviction, and shall record a finding thereon:

***Provided* that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or any evidence adduced by it, unless and until the accused has been convicted under sub-section (2).**

Under section 245, a Magistrate is empowered to discharge the accused if the case for the prosecution is not proved. But after the framing of a charge, the accused must either be acquitted or convicted. He cannot then be discharged. Even if he discharges the accused, the discharge will amount to an acquittal.[91.] If, however, the Magistrate finds the accused guilty then, in case, he does not proceed in accordance with the provisions of either section 325 (cases where the Magistrate cannot pass sentence sufficiently severe) or section 360 (cases where he releases the accused on probation or after admonition), he passes sentence on the accused after giving him a hearing regarding the sentence. Section 248 would apply when some evidence has been let in and when such evidence is not satisfactory. Acquittal under this section is at the conclusion of a real trial. But when no evidence is forthcoming from the prosecution, if the prosecution finds itself in the predicament of not being able to produce any evidence in support of its case, but still does not formally withdraw from prosecution, the only course open to the Court is to record clearly the circumstances, draw the conclusion that the course of action of the prosecution tantamounts to a withdrawal from prosecution and acquit the accused under section 321(b) of CrPC.[92.]

Sub-section (3) deals with the procedure when a previous conviction is charged and the accused does not admit such previous conviction.

Unless the prosecution is vitiated by a fundamental defect such as lack of necessary sanction, an order of acquittal must be based on a finding of not guilty which can be arrived at after appreciation of evidence. If after framing the charge, the Magistrate without allowing the prosecution to examine all the witnesses suddenly discharges the accused, such discharge is really an acquittal and is illegal.[93.] Where a complaint is dismissed for want of evidence before the framing of charge, it is not acquittal but discharge and a fresh complaint is not barred.[94.]

Sub-section (2) enjoins that the Magistrate must hear the accused on the question of sentence. Hearing does not mean mere oral submission but also includes production of material bearing on the sentence.[95.]

Where the Court after recording order of conviction on the same day simply heard the accused on the question of sentence without giving any opportunity of placing evidence/material having a bearing on that question, it was held that non-compliance with section 248(2) prejudiced the accused in the matter of hearing on the question of sentence.[96.]

[s 248.1] Penology and sentencing system.—

Law should adopt corrective machinery or deterrence based on factual matrix. Undue sympathy to impose inadequate sentence is likely to do more harm than good to the justice system.[97.]

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91. *T Sriramula v K Veerasalingam*, (1914) ILR 38 Mad 585. *Swarnalata Sarkar v State of WB*, AIR 1996 SC 2158 : 1996 Cr LJ 2885 : (1996) 4 SCC 733 , discharge not allowed on the ground of delay when the delay was due to the accused's conduct in raising matters and disputes at interlocutory stage.
92. *Valliappan v Valliappan*, 1989 Cr LJ NOC 64 (Mad).
93. *Ratilal Bhanji Mithani v State of Maharashtra*, AIR 1979 SC 94 : 1979 Cr LJ 41 : (1979) 2 SCC 179 .
94. *Sudershan Prasad Jain v Nem Chandra Jain*, 1984 Cr LJ 673 (All).
95. *Baburao Chandavar v State of Delhi (Admn),* 1977 Cr LJ 1980 (Del). *Bhirug v State of UP,* 2002 Cr LJ 271 (All).
96. *Rakesh Kumar Saini v State of UP*, 2002 Cr LJ 1215 (All).
97. *Siriya v State of MP*, AIR 2008 SC 2314 : (2008) 8 SCC 72 .

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C.—Conclusion of trial

[s 249] Absence of complainant.—

When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Where a Magistrate discharges an accused person, under this section, on account of the absence of the complainant, he does not apply his mind to the evidence in the case. The order is passed not on a consideration of the merits of the case, but merely because the complainant was absent at the time fixed for the hearing of the case. Such an order of discharge is not a judgment[98.] within the meaning of section 362 of the Code and consequently the Magistrate is not debarred from reviewing such an order. The Magistrate should keep in view the gravity of the matter, nature of the offence and ensure presence of the complainant and should not discharge the accused on the complainant's non-appearance or non-filing of an application explaining his non-appearance.[99.]

The word "judgment", as used in the Code, is "the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments".

It is open to the complainant in such a case to file a fresh complaint.[100.] A fresh complaint can lie on the same facts when the previous complaint has been dismissed under section 203 or when the accused person has been discharged under section 245 or this section of the Code.

Once a Magistrate dismisses the complaint and acquits the accused on the ground of non-appearance of the complainant, he has no jurisdiction to restore and revive the dismissed complaint on a subsequent application of the complainant. The Code does not permit a Magistrate to exercise inherent jurisdiction which he otherwise does not have. Filing of a second complaint is, however, possible.[101.]

A distinction must be drawn between cases in which the order of discharge is passed after appreciation of the evidence with a view to determine the guilt or innocence of the accused and those in which the proceedings are terminated merely for some technical reason, such as the absence of the complainant. When a Magistrate has applied his mind to the facts of the case and discharged the accused, because in his opinion the evidence does not *prima facie* establish the guilt of the accused, the order amounts to a

judgment within the meaning of section 362 of the Code, and it is not open to a Magistrate to review it. In other cases, such as those falling under this section, the order of discharge is not a decision given on merits and is not a judgment under section 362, and consequently, the Magistrate is not debarred from reviewing it, setting it aside and reviving the old complaint.[102.]

If the complainant is absent on the day fixed for the hearing of the case, the Magistrate may, in his discretion, discharge the accused if the offence is (1) compoundable (see section 320) or (2) non-cognizable. Otherwise he should proceed with the trial.[103.] It cannot be contended that both the conditions namely that the offence should be compoundable and it should be cognizable should be satisfied before the provisions of section 249 could be invoked. If either of the two conditions is satisfied, the provisions of section 249 would apply.[104.] Under section 256, the accused is generally entitled to acquittal if the complainant is absent but under this section, the Magistrate has a discretion and may proceed with the case.[105.] Similarly, if a charge is framed and the complainant dies subsequently, the Magistrate must proceed with the case.[106.] In a private complaint after the framing of the charge, the Magistrate cannot discharge the accused due to default of appearance by the complainant.[107.]

In a warrant-case in respect of a non-compoundable offence, it is not competent to the Magistrate on a private complainant's offering to withdraw from the prosecution, to enter an order of acquittal.[108.]

An order of discharge under this section is not an acquittal nor has it the effect of an acquittal under section 300.

As to the effect of non-appearance of the complainant in a summons-case, see section 256.

[s 249.1] "Is absent".—

These words govern cases where there is some sort of wilful act on the part of the complainant or, at least, a culpable negligence keeping himself away from the Court.[109.] An order dismissing the complaint and discharging the accused for non-appearance of the complainant was passed. The complainant appeared only a few minutes after the passing of the order. It was held that the Magistrate had discretion to dismiss the complaint and discharge the accused.[110.]

[s 249.2] Fresh Complaint.—

Where a complaint has been dismissed in default, a second complaint on the same facts may be entertained.[111.]

Where the first complaint under sections 420/406 of IPC was dismissed for default under section 149 of CrPC, it was held that second complaint is not barred. It was further held that where the complaint discloses *prima facie* commission of an offence, although on same facts there may be civil liability, it cannot be quashed.[112.]

[s 249.3] Death of complainant in trial for defamation.—

Where in the course of a trial for defamation the complainant dies, the Magistrate need not discharge the accused but can continue with the trial.[113.] Such a course would

ordinarily be desirable where the defamation alleged is against the complainant in his public capacity.[114.]

[s 249.4] Death of complainant in appeal.—

Where the accused were found guilty in a case initiated by the complainant and at the time of appeal in the case the complainant died, the Orissa High Court held that the State should step into the shoes of the complainant and shoulder the responsibility of prosecuting the accused since there was no specific provision relating to the situation where the complainant dies in appeal filed by the convict.[115.]

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98. *Singh v Singh*, AIR 1961 Manipur 34 .
99. *State of MP v Mohd Jabbar Khan*, 2002 Cr LJ 4812 (MP).
100. *SA Irani v Yarriah*, (1956) Hyd 763; *Hafisulla Mia v Ugam Thakur*, AIR 1962 Pat 12 .
101. *AS Gauraya v SN Thakur*, (1986) 2 SCC 709 : 1986 Cr LJ 1074 : AIR 1986 SC 1440 .
102. *Re Wasudeo Narayan*, (1949) 51 Bom LR 578 : AIR 1950 Bom 10 ; *Rayappa v Shivamma*, AIR 1964 Kant 1 : 1964 Cr LJ 49 ; *Smt Ranamoyee v Sudhir Kumar*, AIR 1965 Tripura 29 .
103. **See** *Nanaji*, (1890) Unrep CRC 524, Cr R. No. 54 of 1890; *Govinda Das v Dulall Dass*, (1883) ILR 10 Cal 67; *Hafisulla Mia v Ugam Thakur*, AIR 1962 Pat 12 .
104. *Ganesh Narayan Dangre v Eknath Hari Thampi*, 1978 Cr LJ 1009 (Bom).
105. *U Tin Maung v The King*, (1941) Ran 224 : AIR 1941 Rangoon 202 ; *Narayana Naiek*, (1931) ILR 54 Mad 768 : AIR 1931 Mad 772 ; *Laipal Singh v Manipur Administration*, (1962) 1 Cr LJ 175 .
106. *Govt of Manipur v Hornapla*, (1966) Manipur 1; *Ashwini Kumar v Dwijen*, AIR 1966 Tripura 20 .
107. *Emperor v Ranchhod Bawla*, ILR (1913) 37 Bom 369 : 15 Bom LR 61.
108. *Chinnathambi Mudali v Salla Gurusamy*, (1904) 28 Mad 310; *Emperor v Nazo*, (1943) Kar 103 : AIR 1943 Sindh 148 ; *Hafisulla Mia v Ugam Thakur,* AIR 1962 Pat 12 , *supra*.
109. *Ali Dar v Md Sharif*, AIR 1966 J&K 60 : 1966 Cr LJ 412 .
110. *Chunilal v Bikash*, 1988 Cr LJ 791 (Gau).
111. *Santokh Singh v Geetanjali Woolen Pvt Ltd*, 1993 Cr LJ 3744 ; *Harish Chand Mittal v Laxmi Devi*, 1996 Cr LJ 4258 (All).
112. *Ajai Kumar Tomar v Raj Narain*, 1993 Cr LJ 2547 (All).
113. *Balbir Kaur v Dalip Singh*, 1987 Cr LJ 1555 (Punj).
114. *U Tin Maung v The King*, (1941) Ran 224 : AIR 1941 Rangoon 202 ; *Abdul Hakim v State*, 1973 Cr LJ 492 .
115. *Kamalakanta Rana v Radibandhu Rana (dead)*, 1996 Cr LJ 1904 (Ori).

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This Chapter is concerned with procedure in respect of trial of warrant-cases either instituted on a police report (see sections 238–243) or instituted otherwise than on a police report (see sections 244–247). The last part (sections 248–250) deals with the conclusion of the trial.

C.—Conclusion of trial

[s 250] Compensation for accusation without reasonable cause.—

(1) **If, in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that there was no reasonable ground for making the accusation against them or any of them, the Magistrate may, by his order of discharge of acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one; or if such person is not present, direct the issue of a summons to him to appear and show cause as aforesaid.**

(2) **The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that there was no reasonable ground for making the accusation, may, for reasons to be recorded, make an order that compensation to such amount, not exceeding the amount of fine he is empowered to impose, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.**

(3) **The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such compensation shall undergo simple imprisonment for a period not exceeding thirty days.**

(4) **When any person is imprisoned under sub-section (3), the provisions of sections 68 and 69 of the Indian Penal Code (45 of 1860), shall, so far as may be, apply.**

(5) **No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him:**

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(6) **A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second class to pay compensation exceeding one hundred**

rupees, may appeal from the order, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(7) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (6), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided; and where such order is made in a case which is not so subject to appeal the compensation shall not be paid before the expiration of one month from the date of the order.

(8) The provisions of this section apply to summons-cases as well as to warrant-cases.

[s 250.1] Object.—

The object of the section is not to punish the complainant, but, by a summary order, to award some compensation to the person against whom, without any reasonable ground, the accusation is made—leaving it to him to obtain further redress against the complainant, if he seeks for it, by a regular civil suit or criminal prosecution.[116.] When two accused are guilty of the same offence, no compensation can be given by one accused to the other accused.[117.]

[s 250.2] Scope.—

This section may be applied in summons-cases, whether tried summarily or not.[118.] Where a complaint alleges an offence which is exclusively triable by the Court of Session as well as an offence which is triable by a Magistrate, and after inquiry, the Magistrate finds that the complaint was not justified, he has power to award compensation under this section in respect of that part of the complaint which he has full power to deal with.[119.]

In *State of Rajasthan v Jainudeen Sheikh,*[120.] the Supreme Court was seized of a matter wherein the question involved was that whether the learned Special Judge was justified in granting compensation of an amount of Rs 1,50,000 to each of the respondents who had been arraigned as accused for the offences punishable under the NDPS Act on the foundation that there was delay in obtaining the report from FSL and further the test showed that the seized items did not contain any contraband article and, therefore, they had suffered illegal custody, and whether the High Court has correctly appreciated the fact situation to affirm the view expressed by the learned trial Judge by opining that the grant of compensation is not erroneous. Holding it illegal in law, the Court held that on a close scrutiny of the judgment of the learned trial Judge, it was evident that he has been guided basically by three factors, namely, that the State Government has not established Forensic Science Laboratories despite the orders passed by this Court; that there has been delay in getting the seized articles tested; and that the seizing officer had not himself verified by using his experience and expertise that the contraband article was opium. As far as the first aspect is concerned, it is a different matter altogether. As far as the delay is concerned that is the fulcrum of the reasoning for acquittal. It is apt to note that the police while patrolling had noticed the accused persons and their behaviour at that time was suspicious. There is nothing on record to suggest that there was any lapse on the part of the seizing officer. Nothing has been

brought by way of evidence to show that the prosecution had falsely implicated them. There is nothing to remotely suggest that there was any malice. The High Court, as is noticed, has not applied its mind to the concept of grant of compensation to the accused persons in a case of present nature. There is no material whatsoever to show that the prosecution has deliberately roped in the accused persons. There is no *malafide* or malice like the fact situation which are projected in the case of *Hardeep Singh* (supra). Thus, the view expressed by the learned trial Judge is absolutely indefensible and the affirmance thereof by the High Court is wholly unsustainable.

[s 250.3] "In any case instituted upon complaint or upon information given to a police-officer or to a Magistrate" [*Sub-section (1)*].—

The operation of this section is restricted to cases instituted by "complaint" as defined in the Code, or upon information given to a police officer or a Magistrate; and consequently, it has no application to a case instituted on a police report or on information given by a police officer.[121.]

A case instituted by the police, on a complaint to them, is not instituted "upon complaint", in the sense of this section, and therefore in such a case, an order awarding compensation made under it is illegal.[122.] But, where a police officer appears before a Magistrate and makes a formal complaint of a non-cognizable offence, which is found to be false, the Magistrate can order him to pay compensation to the accused.[123.]

[s 250.4] "One or more persons".—

Where there are more accused than one the Magistrate may award compensation to one or more of them.[124.]

[s 250.5] "Accused before a Magistrate of any offence triable by a Magistrate".—

The offence may be under the Penal Code or any special or local law. A person must be accused before a Magistrate of an offence triable by a Magistrate. The institution of proceedings under section 107 is not an accusation of an offence triable by a Magistrate.[125.] An order for payment of compensation cannot, therefore, be made against a man who has petitioned a Magistrate to take action under section 107 of the Code.[126.]

A Magistrate has no jurisdiction to award compensation in cases where the offence charged is not triable by him but by a Court of Session.[127.]

The section reserves the power to award compensation to the Magistrate who has heard the case. On setting aside the conviction and sentence against the accused person, an appellate Court or a Court acting in revision has no power under this section to make an order awarding compensation to the accused as against the complainant.[128.]

[s 250.6] "The Magistrate by whom the case is heard discharges or acquits, *etc*.".—

There must be a regular hearing of the case. If a Magistrate without issuing process for the attendance of a person complained against dismisses the complaint under section 203, he cannot pass an order for compensation because there is neither an order discharging nor an order acquitting the accused.[129.] There must be a complete discharge or acquittal.

Where an offence is compounded, it is not competent to a Magistrate to award compensation as there is neither a discharge nor an acquittal but only a composition.[130.] The Magistrate who heard the case and acquitted, alone can make an order awarding compensation for accusation without reasonable ground. A successor in office is not competent to make the order.[131.]

[s 250.7] "No reasonable ground for making the accusation".—

These words have been inserted in place of the words "accusation was false and either frivolous or vexatious", of the old Code and the reason appears to be to lay down an objective test, namely, *the total absence of any reasonable ground for the accusation* as observed by the Law Commission while suggesting the amendments.

[s 250.8] "By his order of discharge or acquittal".—

When a Magistrate thinks it right to award compensation to the accused, he must do so by his order of discharge or acquittal.

[s 250.9] "If the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation".—

If the complainant is present in Court, the Magistrate must forthwith call upon him to show cause why he should not pay compensation.

[s 250.10] Who is liable as complainant.—

A person includes a juristic person. Where a municipal peon charged the accused under the District Municipal Act and the Magistrate acquitted the accused and ordered the peon to pay compensation to the accused, it was held that though the peon acted under the orders of the executive body of the Municipality, he was liable to pay the compensation. An executive body cannot authorise a servant to prefer a wrongful complaint and so screen the complainant from the legal authority.[132.] But where the complaint was instituted under the authority of a Judge acting judicially, it was held that the Judge should be regarded as the complainant and he having acted judicially was not liable to any penalty.[133.]

[s 250.11] Who is entitled to compensation.—

Compensation is awarded to the person who has suffered from the accusation and not to his relative.[134.]

[s 250.12] Compensation to accused against false accusation [*Sub-section (2)*].—

This subsection empowers a Magistrate to award compensation not exceeding the fine he is empowered to impose. The Magistrate may, in a case where there are more accused than one, award compensation to each of them. The pecuniary jurisdiction of a Magistrate to award is equivalent to his jurisdiction to impose fine on an accused. The Magistrate of the first class can impose fine to the extent of Rs 2,000 only and a Magistrate of lesser denomination can impose lesser fines as enjoined under the law. The scope of inquiry under section 250 of CrPC was only an effort to award to the accused a bare sum of Rs 2,000 if at all, after hearing the complainant. The inquiry being so small and narrow, the legislature perhaps thought that it should be in the nature of an addendum to the main inquiry or trial. The same Magistrate alone could initiate action and pass final orders. The succeeding Magistrate could not continue with the proceeding initiated by his predecessor.[135.]

[s 250.13] "The Magistrate shall record".—

These words are imperative and require that before making any direction for payment of compensation, the Magistrate shall record and consider any objection which the complainant or informant may urge against the making of the direction.[136.]

[s 250.14] Imprisonment on default of payment of compensation [*Sub-section (3)*].—

Under this sub-section, the Magistrate may, by the order directing payment of compensation under sub-section (2), further order that in default of payment, the person ordered to pay compensation shall be imprisoned for a period not exceeding 30 days.

[s 250.15] Adjustment of amount of fine received in criminal case [*Sub-section (5)*].—

In the matter of a cheque bouncing, both civil and criminal proceedings were instituted. In the execution of the money decree passed in the civil proceeding, it was held that the executing Court cannot adjust or take into account the amount of fine received by the complainant in the criminal case.[137.]

[s 250.16] Power to appeal [*Sub-section (6)*].—

This sub-section means that whenever a complainant has been ordered to pay compensation exceeding Rs 100 by a second class Magistrate, the right of appeal is

given whether the compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding Rs 100.[138.]

[s 250.17] Appeal against order and time for payment [*Sub-section (7)*].—

This sub-section provides for the time for payment of compensation where the original case is appealable and also cases where it is not. The words "and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order" provide for cases in which, though there cannot be an appeal, the acquittal or discharge of the person to whom compensation has been awarded may be set aside in revision. The period of one month is given for making application to the superior Court.

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116. *Beni Madhub Kurmi v Kumud Kumar Biswas*, (1902) ILR 30 Cal 123, 128 (FB).
117. *Govindan*, (1958) ILR Mad 665 : AIR 1958 Mad 300 .
118. *Queen-Empress v Basava*, (1888) ILR 11 Mad 142.
119. *Mool Chand v Emperor Through Bhai Lal*, (1944) 20 Luck 49 .
120. *State of Rajasthan v Jainudeen Sheikh,* (2016) 1 SCC 514 : AIR 2015 SC 3469 : 2015 Cr LJ 4660 : 2015 (9) Scale 231 .
121. *Ramjeevan Koormi v Durga Charan*, (1894) ILR 21 Cal 979.
122. *Ishri v Bakhshi*, (1883) 6 All 96 ; *Queen-Empress v Sakar Jan Mahomed*, (1897) 22 Bom 934.
123. *King-Emperor v Sada*, (1901) 26 Bom 150 : 3 Bom LR 586 (FB).
124. *Re Valli Mitha*, (1920) ILR 44 Bom 463 : 22 Bom LR 195.
125. *Re Govind Hanmant*, (1900) 25 Bom 48 : 2 Bom LR 339.
126. *Bhaindhachal Prasad Rai v Lal Bihari Rai*, (1914) ILR 36 All 382 : AIR 1914 All 870 (2); *Ram Badanb v Janki*, (1923) ILR 45 All 363 : AIR 1923 All 332 ; *Natha Singh v Pala Singh*, PR No. 4 of 1896; *Kaura, PR* No. 33 of 1902.
127. *Emperor v Chhaba Dolsang*, (1916) 19 Bom LR 60 : AIR 1916 Bom 96 ; *Het Ram v Ganga Sahai*, (1918) ILR 40 All 615.
128. *Mehi Singh v Mangal Khandu*, (1911) ILR 39 Cal 157 FB; *Balli Pande v Chittan*, (1906) ILR 28 All 625; *Chedi v Ram Lal*, (1924) ILR 46 All 80 : AIR 1924 All 224 ; *Harichand v Fakir Sadrudin*, (1901) 3 Bom LR 841 ; *The King v Maung Khin Maung*, (1940) Ran 502 : AIR 1940 Rangoon 278 ; *Muhammad Alan*, (1940) Kar 119 .
129. *Bhagwan Singh v Harmukh*, (1906) 29 All 137 .
130. *Raoji*, (1894) Unrep CRC 700.
131. *Amulya Pal v Bhupen Sarkar*, 1988 Cr LJ 85 (Cal).
132. *Bhima*, (1886) Unrep CRC 309, Cr R No. 61 of 1886.
133. *Re Keshav Lakshman*, ILR (1876) 1 Bom 175 .
134. *Abdool Raheem v Mehrab Shah*, (1866) PR No. 89 of 1866.
135. *Nandkumar Krishnarao Navgire v Jananath Laxman Kushalkar*, (1998) 2 SCC 355 : 1999 Cr LJ 5022 .

136. *Pandurang v Laxman*, (1901) 3 Bom LR 777 ; *Re Mahadev Ramkrishna*, (1922) 24 Bom LR 805 ; *Ramsagar v Chandrika*, AIR 1961 Pat 364 : 1961 Cr LJ 366 ; *Kailash v Laxminarayan*, AIR 1966 Raj 263 : 1966 Cr LJ 1482 .

137. *Gayathri v Clement Mary*, AIR 2003 Kant 134 . To the same effect, *NK Gupta v Vijay Kumar Madan*, (2001) 3 ICC 120 (P & H).

138. *Pereira v Demello*, (1924) 26 Bom LR 1243 : 49 Bom 440 : AIR 1925 Bom 129 .

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CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 251] Substance of accusation to be stated.—

When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty, or has any defence to make, but it shall not be necessary to frame a formal charge.

This section provides for the procedure when the accused or his pleader (section 205) appears. Section 251 enjoins upon the Court to record the plea of the accused, when he is brought before it.[1.] Section 256 provides for the course to be adopted if the complainant does not appear. The words "and he shall be asked whether he pleads guilty or has any defence to make" are imperative in their significance. If the provisions of this section have not been complied with, the plea of guilty made by the accused in such circumstances would not amount to a plea of guilty.[2.]

The words "whether he pleads guilty, or has any defence to make" were substituted in the 1973 Code for the words "If he has any cause to show why he should not be convicted" appearing in section 250 of the old Code of 1898. The accused would be entitled to a hearing at the notice stage even in a summons trial case.[3.]

The previous phraseology gave the impression that the Magistrate had already decided to convict him whereas the present expression is evenly balanced between the prosecution and the accused.[4.] However, a trial cannot be vitiated merely on the ground that section 251 had not been complied with if such non-compliance has not caused any prejudice to the accused.[5.]

Before taking cognizance, the initial service of the summons for appearance of the accused on a complaint, being not a police report, cannot be said to the crucial date for commencement of the trial. The date of cognizance of the offence is alone the crucial date.[6.]

[s 251.1] "The particulars of the offence...shall be stated".—

It is necessary that the accused should have a clear statement made to him as to the particulars of the offence of which he is charged.[7.] Omission to state the particulars and to question him if he has any cause to show vitiates the trial.[8.]

[s 251.2] "It shall not be necessary to frame a formal charge".—

In a summons trial, there is a charge of an offence, although it is not necessary to embody it in writing in accordance with the provisions of sections 211–213 of the Code. But the provisions relating to joinder of charges and joint trial apply to the trial of summons-cases.[9.]

[s 251.3] Dispensing with attendance of accused.—

Sections 251 and 205(1) make it clear that in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel.[10.]

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1. *State of Gujarat v Lalit Mohan*, 1990 Cr LJ 2341 (Guj).
2. *State v Chandubhai Gordhanbhai*, (1960) 2 GLR 266 .
3. *SC Rastogi v Renu Kalra*, 2002 Cr LJ 2269 (Del).
4. *Karnataka v Mallappa*, 1979 Cr LJ 1482 (Kant).
5. *Manbodh Biswal v Samaru Pradhan*, 1980 Cr LJ 1023 (Ori).
6. *Tangadu Someswara Rao v State of AP*, 2002 Cr LJ 510 (AP).
7. *Acharjee Lall*, (1878) 3 CLR 87 ; *S Chinnaswamy v The State*, 1973 Cr LJ 358 .
8. *Gopal Krishna Saha v Matilal*, (1926) 54 Cal 359 ; *Purushottam Sabra v State of Orissa*, 1992 Cr LJ 1417 (Ori).
9. *San Dun*, (1905) 2 Cr LJ 739 : 3 LBR 52 FB.
10. *Bhaskar Industries Ltd v Bhiwani Denim & Apparels Ltd*, (2001) 7 SCC 401 : 2001 SCC (Cri) 1254 .

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CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 252] Conviction on plea of guilty.—

If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him thereon.

The Magistrate has the discretion to convict the accused if he pleads guilty. He is not bound to do so if he thinks it necessary to have evidence of the guilt of the accused. If the accused admits some or all of the charges alleged by the prosecution but pleads "not guilty", the Court is bound to proceed according to law by examining the witnesses for the prosecution and defence.[11.] The provisions of this section are mandatory[12.] and, being of a special character, take precedence and override the general provisions of section 281(1).[13.] A joint statement cannot be treated as plea of guilty under this section by all the accused persons.[14.] Also, an accused cannot register the plea of guilty on behalf of the co-accused.[15.]

Where in a summary trial a printed form was used mechanically and plea of the accused, whether he pleaded guilty or not, was not recorded, the sentence of fine was set aside and the case was remanded back for retrial.[16.]

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11. *Emperor v Somabhai*, (1907) 9 Bom LR 1346 .
12. *Kaushalya Das v State of Madras*, AIR 1966 SC 22 : 1966 Cr LJ 66 .
13. *Ibid*
14. *Thangjam Irabot Singh v The State*, (1961) 2 Cr LJ 583 ; *Akil Pasha v State of Mysore*, 1967 Cr LJ 1422 .
15. *State of Maharashtra v Dhruwa Woollen Mills Pvt Ltd*, 1991 Cr LJ 3142 (Bom).
16. *B Rajanna v State of Karnataka*, 1996 Cr LJ 1820 (Kant).

The Code of Criminal Procedure, 1973

CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 253] Conviction on plea of guilty in absence of accused in petty cases.—

(1) Where a summons has been issued under section 206 and the accused desires to plead guilty to the charge without appearing before the Magistrate, he shall transmit to the Magistrate, by post or by messenger, a letter containing his plea and also the amount of fine specified in the summons.

(2) The Magistrate may, in his discretion, convict the accused in his absence, on his plea of guilty and sentence him to pay the fine specified in the summons, and the amount transmitted by the accused shall be adjusted towards that fine, or where a pleader authorised by the accused in this behalf pleads guilty on behalf of the accused, the Magistrate shall record the plea as nearly as possible in the words used by the pleader and may, in his discretion, convict the accused on such plea and sentence him as aforesaid.

This is an enabling provision. By enacting this new section, the Legislature has provided a simple procedure for disposing of petty cases without the presence of the accused in Court. This will save the time of the Court and result in speedy disposal of such cases. The Magistrate is given discretion to convict the accused. It also enables the pleader authorised by the accused to plead guilty on behalf of his client.

The Code of Criminal Procedure, 1973

CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 254] Procedure when not convicted.—

(1) If the Magistrate does not convict the accused under section 252 or section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in Court.

This section lays down the procedure to be followed where the accused has not admitted all the accusation made against him or where the Magistrate does not convict the accused under section 252 or section 253 of the Code.

[s 254.1] Procedure where plea of guilty not entered [*Sub-section (1)*].—

If the accused does not plead guilty (section 252), the Magistrate is bound to hear the complainant and his witnesses; and he is not competent to acquit the accused without examining the complainant and his witnesses,[17.] nor can he, in the absence of such examination, convict him by putting questions to him.[18.]

It is the duty of the prosecution to call all the witnesses who prove their connection with the transaction connected with the prosecution, and who must be able to give important information. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. No such corresponding inference can be drawn against an accused.[19.]

[s 254.2] "Hear the accused and take all such evidence as he produces in his defence".—

The Magistrate is bound to examine all the witnesses produced by the accused. He has no discretion in the matter. He has no power to limit the number of witnesses. A conviction by the Magistrate who refused to examine a witness formally tendered on behalf of the accused is illegal.[20.]

[s 254.3] Summoning witnesses or documents [*Sub-section (2)*].—

A Magistrate is not bound to issue process to compel the attendance of any witness either on the application of the complainant or the accused. The whole thing rests in his discretion.[21.]

[s 254.4] Order for reimbursing witnesses [*Sub-section (3)*].—

Where a complainant is required to pay fees for summoning witnesses, and fails to do so, the Magistrate must deal with the case on the evidence before him and is not justified in dismissing the complaint.[22.] The Magistrate's order framing charges under section 254 cannot be interfered by the High Court unless it could be said that the prosecution was false, frivolous or vexatious or the one which was by way of abuse of the process of law.[23.]

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17. *Toulman*, (1891) Unrep CRC 539, Cr R No. 11 of 1891; *Kesri v Muhammad Bakhsh*, (1896) 18 All 221 ; *Ali Husain v Lachhmi Narain Mahajan*, (1931) 54 All 416 .
18. *Kishorchandra v Bhavnagar Municipality*, 1969 Cr LJ 1248 .
19. *Dhunno Kazi v Dhunno Kazi*, (1881) ILR 8 Cal 121; *Muhammmad Yunus*, (1922) 50 Cal 318 .
20. *Mohima Chandra Chukerbutty*, (1869) 4 Beng LR (Appx) 77 : 1 WR (Cr) 77.
21. *Mir Zulfiquai Ali*, (1954) Hyd 544.
22. *Korapulu v Monappa*, (1882) ILR 5 Mad 160.
23. *State of UP v Man Mohan*, (1986) 2 SCC 587 : 1986 Cr LJ 1245 : AIR 1986 SC 1652 .

The Code of Criminal Procedure, 1973

CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 255] Acquittal or conviction.—

(1) If the Magistrate, upon taking the evidence referred to in section 254 and such further evidence, if any, as he may, of his own motion, cause to be produced, finds the accused not guilty, he shall record an order of acquittal.

(2) Where the Magistrate does not proceed in accordance with the provisions of section 325 or section 360, he shall, if he finds the accused guilty, pass sentence upon him according to law.

(3) A Magistrate may, under section 252 or section 255, convict the accused of any offence triable under this Chapter, which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons, if the Magistrate is satisfied that the accused would not be prejudiced thereby.

Under this section, there must be either acquittal or conviction by the Magistrate, unless, of course, he cannot pass sentence sufficiently severe or he releases the accused on admonition or probation for good conduct. If the Magistrate finds the accused guilty, he must pass sentence on him according to law. This section also gives the Magistrate discretion to proceed in those cases where the evidence for the prosecution establishes an offence other than that referred to in the complaint or summons. If the Magistrate thinks that an offence different from that referred to in the complaint or summons is *prima facie* established, he must act according to the provisions of section 251. He must state the particulars of such offence to the accused so that he may be able to make his defence accordingly. The Magistrate before convicting the accused under sub-section (3) for a different offence should satisfy himself that by doing so the accused is not in any way prejudiced.

[s 255.1] "Taking the evidence".—

What is contemplated is "taking of evidence" by the Magistrate, and that cannot stand complied with by only looking into the police papers which do not form part of a record of the case, and what they contain is no evidence in law. An order of acquittal passed on the basis of perusing police papers of the case is illegal.[24.] An order of acquittal without examining the material prosecution witnesses was held illegal.[25.]

24. *The State of Gujarat v Thakorbhai Sukhabhai*, AIR 1968 Guj 15 : 1968 Cr LJ 59 ; *State of Madhya Pradesh v Shantilal Daya Shankar*, (1962) 1 Cr LJ 817 .

25. *State of Gujarat v Lalit Mohan*, 1990 Cr LJ 2341 (Guj).

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CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 256] Non-appearance or death of complainant.—

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided **that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.**

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

This section applies where the complainant does not appear in a summons-case. section 249 is the corresponding section in a warrant-case.

The exercise of power under section 256 is subject to two constraints: "Firstly, if the court thinks that in a situation it is proper to adjourn the hearing, then the Magistrate shall not acquit the accused. Secondly, when the Magistrate considers that personal attendance of the complainant is not necessary on that day, he has the power to dispense with his attendance and proceed with the case."[26.]

On default of the complainant's appearance, the Magistrate has a discretion either to dismiss the complaint and acquit the accused or to adjourn the hearing. The powers given under this section must be exercised reasonably and only in a case where the complainant has failed to appear without any just cause.[27.] The presence or absence of the lawyer may be taken into account by the Magistrate when he is deciding whether to adjourn the case or not. So too where the Public Prosecutor or other official represents the complainant, the case can go on.

Where a Magistrate refused to dismiss a complaint as on the date of filing the complaint, the complainant was not present, though he was present on the next day, it was held that since the date of filing the complaint was not the date fixed for appearance of the accused as required under section 256(1) of CrPC, the provisions of section 256 of CrPC were not attracted on that date.[28.]

Three courses are open to the Magistrate where the complainant is absent on the date of the hearing: (i) to acquit the accused; or (ii) to adjourn the case for a future date; or (iii) to dispense with the attendance of the complainant and proceed with the case. It is the sole discretion of the Court as to the course to be followed which must be judicially exercised.[29.]

An order under this section acquitting an accused is a final order of acquittal which operates as a bar under section 300 to the trial of the accused for the same offence.[30.]

Orders of acquittal under this section should not be passed in the early hours of the day and a Magistrate should wait for a reasonable time for the appearance of the complainant.[31.]

[s 256.1] "The complainant does not appear".—

If the complainant is represented by a pleader [section 2(q)], his personal appearance will not be regarded as indispensable.[32.] Absence of the complainant on the day fixed for the hearing is a sufficient reason for the dismissal of the complaint. The wide discretionary power is rested in the Magistrate under section 256 and a heavy responsibility rests on him in deciding whether to adjourn the case or to record the order of acquittal in the absence of the complainant on the first day of the hearing.[33.] The discretion has to be exercised judiciously.[34.]

[s 256.2] Long non-appearance.—

A complainant cannot contend that in spite of his long nonappearance, the Court should look after the case and take appropriate steps.[35.] Speedy trial is the fundamental right of the accused. The complainant cannot be allowed to keep the case pending for an indefinite period.[36.] Where a Magistrate adjourned the case as neither the complainant nor his counsel was present, but no reasons for adjournment were given, it was held that the Magistrate had a discretion in the matter of granting adjournment; even in the case of absence of the complainant, the order was neither wrong nor illegal.[37.]

[s 256.3] Default in recording evidence.—

Where despite sufficient opportunities having been granted to the complainant by the Court (there were 18 adjournments in the case for recording evidence), no evidence was brought on record by the complainant, there was no illegality in acquitting the accused.[38.]

[s 256.4] Order of dismissal in presence of accused.—

A distinction has to be made between a complaint dismissed prior to the summoning of the accused and that dismissed after summoning. Dismissal after summoning and in the presence of the accused results in acquittal. Against such order only an appeal can be filed and not revision.[39.]

[s 256.5] "The Magistrate shall...acquit the accused".—

The accused is entitled to be acquitted if the complainant is absent and the Court does not adjourn the hearing of the case.

When pursuant to a complaint under section 499/500 of IPC filed by the petitioner, the accused on being summoned put in appearance and were on bail but the complainant failed to appear before the Magistrate, the Magistrate was justified in dismissing the criminal complaint. The Magistrate also discharged the accused. However, under section 256 the only order which could be passed by the Magistrate because of absence was acquittal of the accused. Therefore, the Magistrate's order of discharge should be read as an order of acquittal.[40.]

An order of dismissal of a complaint in default passed in exercise of powers vested under section 256 amounts to acquittal of the accused against which an appeal lies before a superior court of appeal.[41.]

[s 256.6] Revival of complaint after acquittal.—

There is no provision in the Code empowering a Magistrate to revive a case after an order of acquittal under this section.[42.] An acquittal owing to the absence of the complainant bars a subsequent trial of the accused for the same offence.[43.] Even where a case is disposed of owing to the absence of the complainant and the accused, further proceedings are barred. The provision in section 300 that a fresh trial will not be barred unless the accused has in the first case been "tried" does not limit the effect of an order of acquittal under this section.[44.]

An acquittal on a date not fixed for hearing or when the complainant had no notice of the adjourned date is a nullity and does not bar further proceedings.[45.] But the order of acquittal should be set aside before the case can proceed.[46.] Where the entire evidence on the part of the complainant had already been recorded and the accused was not in the habit of appearing before the Court as a result of which the Court issued a non-bailable warrant which was pending, the Court erred in acquitting the accused under section 256.[47.]

[s 256.7] Revision against dismissal.—

Where summons were issued on a complaint, but the complainant failed to appear, it was held that the order dismissing the complaint had the effect of acquittal. The complainant did not avail the remedy of appeal available to him under section 378(4). A petition for revision against the order was dismissed.[48.]

[s 256.8] Non-appearance of complainant due to death [*Sub-section (2)*].—

This sub-section lays down in clear and unambiguous terms that the provisions of sub-section (1) shall also, as far as may be, apply to cases when due to the death of the complainant he remains absent. The words "as far as may be" suggest that the Magistrate will have to decide having regard to the facts and circumstances of each case. In a complaint under section 363/342 IPC by the father of the kidnapped boy, the Magistrate summoned the accused only under section 342 IPC, although a *prima facie* case was made out against the accused and subsequently the accused were acquitted under section 256 CrPC on the death of the complainant. It was held that the Magistrate did not act judicially on the death of the complainant in passing the order of acquittal, when he could have, without abruptly terminating the case, fixed another date

for hearing, allowing sufficient time and opportunity to another aggrieved person, i.e. the victim, to whom great injustice was done by not allowing him to be impleaded.[49.]

This section does not require that in a summons-case the accused must necessarily be acquitted on the death of the complainant.[50.] Where the original complainant died and her mother was substituted as the complainant, the Calcutta High Court held that the Magistrate has every power to allow such substitution upon demise of the original complainant if he is satisfied from the surrounding circumstances and material on record. This satisfaction has to be subjective satisfaction derived from the records.[51.] Where a complaint for defamation of Ahwasi Brahman Community was filed, the complainant being dead and the community not being a definite, particularised, identifiable collection of persons, the Allahabad High Court held that no other person could be allowed to conduct the prosecution on the death of the complainant. Entire proceedings were quashed.[52.] Where a complaint was filed under various sections of the Municipalities Act, but during the pendency of the complaint, the complainant Municipality ceased to exist and was succeeded by Panchayat, the complaint was quashed as there was no enabling provision for the Panchayat to pursue the complaint under the Municipalities Act.[53.]

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26. *Priyadarshini Cements Ltd v State of AP*, 2002 Cr LJ 4465 (AP).
27. *Naresh Prasad v Mahavir Singh*, AIR 1960 All 507 : 1960 Cr LJ 1058 ; *K Dhulabhai v P Ganeshbhai*, 1969 Cr LJ 729 .
28. *Ugam Raj v State of Rajasthan*, 1993 Cr LJ 2301 (Raj).
29. *CK Sivaraman Achari v DK Agarwal*, 1978 Cr LJ 1376 .
30. *Rasik Tatma v Bhagwat Tanti*, (1958) 37 Pat 23 : AIR 1958 Pat 239 .
31. *J George v Premi Solomon*, (1963) 13 Raj 785 : 1963 Cr LJ 719 ; *Ram Narain v Mool Chand*, AIR 1960 All 296 : 1960 Cr LJ 552 , dissented from.
32. *Ponnaganti Kotayyan*, (1903) 2 Weir 309.
33. *Mir Samrul Haque v Mir Muktar*, 1987 Cr LJ 1455 (Ori).
34. *Radhakrushna Das v M Das*, 1990 Cr LJ 2363 (Ori).
35. *Lloyds Finance Ltd v SKG Solvex Ltd*, 2002 Cr LJ 2764 (Bom).
36. *S Rama Krishna v S Rami Reddi*, AIR 2008 SC 2066 : (2008) 5 SCC 535 : 2008 Cr LJ 2625
37. *G Sundaresan v MS. Hardwares*, 1995 Cr LJ 3243 (Ker).
38. *Syed Tamul Hussain v State of Bihar*, 2002 Cr LJ 4537 (Jhar).
39. *Kalpana Tyagi v Sneh Lata Sharma*, 2003 Cr LJ 3395 (Del).
40. *Ram Nath Mahlawal v Bihari Lal*, 2002 Cr LJ 1710 (P&H).
41. *Krishna Kumar Gupta v Mohammad Jaros*, 2003 Cr LJ 102 (Del).
42. *Ram Coomar v Ramjee*, (1898) 4 Cal WN 26; *Mij Naga Theatre v PF Inspectors, Bangalore*, 1992 Cr LJ 1727 (Knt); *Ram Bhat Jain v Brar Rice & General Mills*, 2003 Cr LJ NOC 168 (P&H) : (2003) 1 Pun LR 439 , complaint dismissed for non-appearance of the complainant, there is no provision for entertaining application for restoration.
43. *Bhupatibhooshan Mukherji v Amiyabhooshan Mukherjee*, (1935) 62 Cal 1119 .

44. *Gaggilapu Paddaya of Palakot*, (1910) 34 Mad 253; *Emperor v Dulla*, (1922) ILR 45 All 58; *Re Dudekula Lal Sahib*, (1917) ILR 40 Mad 976 : AIR 1918 Mad 231 .
45. *Pritam Singh v State*, 1969 Cr LJ 1329 : AIR 1969 All 513 .
46. *Bhupatibhooshan Mukherji v Amiyabhooshan Mukherjee, supra.*
47. *Chandran v Padmanaban*, 2003 Cr LJ 1010 (Mad).
48. *HP Financial Corp v Continental Spinners Ltd*, 2003 Cr LJ 2750 (HP).
49. *Harendra v Nepal Singh*, 1996 Cr LJ 91 (All).
50. *Muniruddin Akand v Kasamuddin Munshi*, (1947) 1 Cal 99 .
51. *Gautam Ranjan Basu v Shanta Mukherjee*, 1995 Cr LJ 1131 (Cal).
52. *Vishwanath v Shambhu Nath Pandeya*, 1995 Cr LJ 277 (All).
53. *Hajee PM Meeranan v P Venugopal*, 1993 Cr LJ 364 (Ker).

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CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 257] Withdrawal of complaint.—

If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn.

This section applies to summons-cases. It is discretionary with the Magistrate to permit the complainant to withdraw his complaint or not. The section also makes it clear that the complainant will be permitted to withdraw his complaint against any or all the accused, if there are more than one. Where a case is instituted on a police report, the Magistrate cannot exercise his power of acquittal on an application of withdrawal made by the person at whose instance the police moved in the case.[54.]

Where the offence charged is a "warrant" and not a "summons" case, a Magistrate ought to proceed with the inquiry or trial in spite of the withdrawal of the complainant, if he finds the elements of an offence on the facts set forth in the complaint.[55.]

[s 257.1] Prerequisites for permitting withdrawal.—

The Supreme Court explained the prerequisites in the following words[56.]:

> The trial Magistrate acquitted the accused, in the absence of any request for the withdrawal of the case, without complying with the provisions of s. 257 Cr.P.C. The High Court refused to grant leave against the order of acquittal. Having regard to the possibility of the amount in question being paid during the pendency of criminal proceedings, the Supreme Court held that for exercising the power u/s. 257 Cr.P.C., there must exist a request of the complainant with sufficient grounds and recording to the satisfaction of the Magistrate on such grounds that are good for allowing the complainant to withdraw the complaint. In the absence of the compliance with precondition for exercising jurisdiction under the section, the order passed by the Magistrate and thereafter refusal by the High Court to grant leave in the matter concerned, was erroneous. The matter was directed to be decided by the trial court in accordance with law.

[s 257.2] "If a complainant...satisfies the Magistrate...there are sufficient grounds...to withdraw his complaint".—

This section is intended to apply to cases instituted upon "complaint". The next section applies to cases instituted otherwise than upon "complaint".

A case is withdrawn under this section without the consent of the accused. A case is compromised if with the consent of the accused it is withdrawn. When although it was the wife who filed the report with police against her husband, but the cognizance of the offence by the Court was based on the charge-sheet filed by the police, it was held that the wife had no right to withdraw the case.[57.] See also Comment on section 320, *infra*.

[s 257.3] "Shall thereupon acquit the accused".—

The Magistrate acquitting the accused must be competent to deal with the case; otherwise, the acquittal will not bar a fresh trial.

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54. *State of Gujarat v BP Zina*, 1970 Cr LJ 919 .
55. *Re Ganesh Narayan Sathe,* (1889) ILR 13 Bom 590.
56. *Provident Fund Inspector, Tirupati v Madhusudana Chaudhury*, (2000) 9 SCC 506 .
57. *Thathapadi Venkatalakshmi v State of Andhra Pradesh*, 1991 Cr LJ 749 (AP).

The Code of Criminal Procedure, 1973

CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 258] Power to stop proceedings in certain cases.—

In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

This section applies to cases instituted otherwise than upon a complaint.[58.] The underlying idea in empowering the Magistrate to stop the proceedings without pronouncing judgment or pronouncing a judgment of acquittal or releasing the accused seems to be to provide for an acquittal or discharge as the case may be, depending upon the stage at which the case has reached hearing. The powers given to the Magistrate to stop the proceedings at any stage have to be sparingly used and that too particularly in exceptional or unusual, circumstances attending the case.[59.] Where there are no special or unusual circumstances which make it difficult or impossible for the Magistrate to proceed with the case, he cannot invoke the provisions of this section and stop further proceedings.[60.]

It has been held by Constitution Bench of the Supreme Court that the power to add new accused under section 319 is very wide and extensive. While persons not named in the FIR can be added as accused and also those named in the FIR but not charge-sheeted can be added, even a person discharged earlier can be added after taking recourse to sections 300(5) and 398. The inquiry as contemplated by sections 300(5) and 398of CrPC can be an inquiry under section 319.[61.]

Orders of stoppage of proceedings under section 258of CrPC are not interlocutory. If the consequence of stop page is acquittal, remedy for the prosecution would be an appeal under section 378 of CrPC, and if the consequence is discharge, the remedy would be revision under section 397 of CrPC.[62.]

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58. *John Thomas v K Jagadeesan*, (2001) 6 SCC 30 : (2001) 106 Com Cas 619 : AIR 2001 SC 2651 : 2001 Cr LJ 3322 , the section does not apply to cases instituted on a private complaint. The words "and in any other case" occurring in the last part of the section were regarded by the Supreme Court to be only a sub-category or division consisting of summons cases instituted otherwise than upon complaints.

59. *The State of Gujarat v Sanghar Ladha*, 1971 Cr LJ 949 : AIR 1971 Guj 148 ; *State of Karnataka v Subramaya Setty*, 1980 Cr LJ NOC 129 (Knt).

60. *The State of Gujarat v Lohana Dhirajlal*, 1973 Cr LJ 82 .

61. *Hardeep Singh v State of Punjab*, AIR 2014 SC 1400 : (2014) 3 SCC 92 : 2014 Cr LJ 1118 (SC) (Five-Judge Constitution Bench).

62. *State of Gujarat v Maganlal Gordhan Das*, 1995 Cr LJ 1581 (Guj).

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CHAPTER XX TRIAL OF SUMMONS-CASES BY MAGISTRATES

[s 259] Power of Court to convert summons-cases into warrant-cases.—

When in the course of the trial of a summons-case relating to an offence punishable with imprisonment for a term exceeding six months, it appears to the Magistrate that in the interests of justice, the offence should be tried in accordance with the procedure for the trial of warrant-cases, such Magistrate may proceed to re-hear the case in the manner provided by this Code for the trial of warrant-cases and may recall any witness who may have been examined.

This section empowers the Magistrate to convert a summons- case into a warrant-case, (1) if the offence is punishable with imprisonment for more than six months and (2) if he is of the opinion that it would be in the interest of justice to try such case in accordance with the procedure for the trial of warrant-cases. The words "re-hear the case" indicate that the Magistrate should commence the proceedings from the very start or *de novo*.

The Allahabad High Court has held that if a case is tried as warrant-case, the Magistrate can use summons procedure in the midst of the case. However, this should be indicated by passing an order on the Order sheet. It was further held that the omission of such indication is not fatal, and it is only a curable irregularity.[63.]

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63. *Kishori Lal v Mahadeo*, 1993 Cr LJ 1173 (All).

The Code of Criminal Procedure, 1973

CHAPTER XXI SUMMARY TRIALS

[s 260] Power to try summarily.—

(1) Notwithstanding anything contained in this Code—

(a) any Chief Judicial Magistrate;

(b) any Metropolitan Magistrate;

(c) any Magistrate of the first class specially empowered in this behalf by the High Court,

may, if he thinks fit, try in a summary way all or any of the following offences:—

(i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(ii) theft, under section 379, section 380 or section 381 of the Indian Penal Code (45 of 1860), where the value of the property stolen does not exceed [1].[two thousand rupees];

(ii) receiving or retaining stolen property, under section 411 of the Indian Penal Code (45 of 1860), where the value of the property does not exceed [2].[two thousand rupees];

(iv) assisting in the concealment or disposal of stolen property, under section 414 of the Indian Penal Code (45 of 1860), where the value of such property does not exceed [3].[two thousand rupees];

(v) offences under sections 454 and 456 of the Indian Penal Code (45 of 1860);

(vi) insult with intent to provoke a breach of the peace, under section 504; and [4].[criminal intimidation punishable with imprisonment for a term which may extend to two years, or with fine, or with both], under section 506 of the Indian Penal Code (45 of 1860);

(vii) abetment of any of the foregoing offences;

(viii) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(ix) any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871 (1 of 1871).

(2) When, in the course of a summary trial it appears to the Magistrate, that the nature of the case is such that it is undesirable to try it summarily the Magistrate shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by this Code.

[s 260.1] CrPC (Amendment) Act, 2005 [*Clause (23)*].—

Under sub-section (1) of section 260 a Magistrate has a discretion to try offences specified therein either summarily or in a regular way. It is also proposed to provide that the offence of theft and other cognate offences, namely, offences under sections 379, 380, 381, 411 and 414 of the Indian Penal Code may be tried summarily where the value of the property involved does not exceed two thousand rupees instead of two hundred rupees at present (*Notes on Clauses*).

COMMENT

Summary trial implies speedy disposal. By summary case is meant a case which can be tried and disposed of at once. Summary trial is not intended for a contentious and complicated case which necessitates a lengthy inquiry.

The object of summary trial is to have a record sufficient for the purpose of justice but not so long as to impede speedy disposal of cases. The procedure prescribed for trial of summons-cases should be followed (section 262). At the conclusion of the trial the Magistrate enters the accused's plea and the finding in a form prescribed by Government. No formal charge is framed. There is no appeal in such a trial if a sentence of fine only not exceeding two hundred rupees has been awarded. There can be an application for revision to the High Court.

[s 260.2] Scope.—

In general, it will apply to offences not punishable with imprisonment for a term exceeding two years. It will also apply in cases of specific offences mentioned in clauses (ii) to (ix) of sub-section (1).

The Magistrates empowered to try cases summarily are: (a) Chief Judicial Magistrate, (b) Metropolitan Magistrate, (c) Magistrate of the first class (specially empowered by the High Court) and (d) Magistrate of the second class (specially empowered by the High Court in a limited number of cases—See the next section).

There is a provision for summary trial under the Drugs and Cosmetics Act, 1940. It was held that it was open to the Magistrate to try the case as warrant case also. The trial of the case by First Class Judicial Magistrate was held to be not illegal.[5.]

[s 260.3] "If he thinks fit".—

It is in the discretion of a Magistrate to try any of the offences specified in the section in a summary way. Whether a case is triable summarily or not must be determined by the offence complained of[6.] and the testimony of the complainant.[7.] If a case is a complicated one, it should not be tried summarily.[8.] If the accused is deaf and dumb it is convenient to try him summarily.[9.]

Where an accused is charged with two offences, one of which is triable summarily, and the other not so triable, it is not open to a Magistrate to discard the latter charge, and to proceed to try the case summarily.[10.]

[s 260.4] "Try in a summary way".—

This section does not enable the Magistrate to try any case or class of cases which he is not otherwise competent to try. It empowers him to try the cases that he is already competent to try by a particular procedure.[11.] For trial of offences under sections 14, 14A and 14AA of the Employees Provident Fund s Act, 1952 (19 of 1952) the trial Courts ought not to have tried summarily even if the accused desired to plead guilty.[12.] In a summary trial the procedure laid down by this Chapter should be strictly observed. A summary trial is summary only in respect of the record of its proceedings and not in respect of the proceedings themselves which should be complete and carefully conducted.

[s 260.5] Nature of punishment [*Clause (1)*].—

Offences to be tried summarily need not be punishable under the Indian Penal Code. Offences under special or local Acts can be tried summarily if they fulfil the condition of punishment laid down in this clause, e.g., Bengal Abkari Act.[13.] The imprisonment may be simple or rigorous.

[s 260.6] Power where summary trial not desirable [*Sub-section (2)*].—

If the mode of trial is sought to be altered in the midstream on the ground that the offence is such which cannot be tried in a summary way, the trial must from its inception be conducted in the regular manner[14.]

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1. Subs. by Act No. 25 of 2005, section 23(a), for "two hundred rupees" (w.e.f. 23-6-2006).
2. Subs. by Act No. 25 of 2005, section 23(a), for "two hundred rupees" (w.e.f. 23-6-2006).
3. Subs. by Act No. 25 of 2005, section 23(a), for "two hundred rupees" (w.e.f. 23-6-2006).
4. Subs. by Act No. 25 of 2005, section 23(b), for "criminal intimidation" (w.e.f. 23-6-2006).
5. *Rashpal Singh v State of Haryana*, 2003 Cr LJ 3407 (P&H).
6. *Jagjivan*, (1887) 10 All 55 ; *Bishu Shaik v Saber Mollah*, (1902) ILR 29 Cal 409.
7. *Fanidra Nath Chatterjee v Emperor*, (1909) 36 Cal 67 .
8. *Hari Gopal*, (1895) Unrep CRC 778, Cr R No. 42 of 1895; *Emperor v Dina Nath*, (1913) 35 All 173 ; *Emperor v Rustomji*, (1921) 23 Bom LR 984 : AIR 1921 Bom 370 .
9. *Deaf and Dumb Man v Unknown*, (1906) 8 Bom LR 849 .
10. *Ramanund Mahton v Koylash Mahton*, (1885) 11 Cal 236 ; *Sheo Bhajan Singh v Mosawi*, (1900) ILR 27 Cal 983.
11. *Balachand v Madsam Municipality*, AIR 1960 MP 20 .
12. *State of Maharashtra v Shiva Prakash Seth*, 1993 Cr LJ 2777 (Bom).
13. *Empress v Baidanath Das*, (1878) ILR 3 Cal 366 (FB).
14. *State of Gujarat v DN Patel*, 1971 Cr LJ 1244 .

The Code of Criminal Procedure, 1973

CHAPTER XXI SUMMARY TRIALS

[s 261] Summary trial by Magistrate of the second class.—

The High Court may confer on any Magistrate invested with the powers of a Magistrate of the second class power to try summarily any offence which is punishable only with fine or with imprisonment for a term not exceeding six months with or without fine, and any abetment of or attempt to commit any such offence.

This section empowers the Magistrate of the second class who has been invested with the powers by the High Court to try summarily any offence which is punishable only with fine or with imprisonment for a term not exceeding six months with or without fine. The power thus invested is a limited one.

The Code of Criminal Procedure, 1973

CHAPTER XXI SUMMARY TRIALS

[s 262] Procedure for summary trials.—

(1) In trials under this Chapter, the procedure specified in this Code for the trial of summons-case shall be followed except as hereinafter mentioned.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

The provisions of this section are imperative, and a breach thereof amounts to an illegality and not an irregularity.[15.] Sub-section (1) lays down that in all summary trials the summons-case procedure should be followed irrespective of the nature of the case, that is, whether it is a summons-case or a warrant-case.

[s 262.1] Term of imprisonment [*Sub-section (2)*].—

The sub-section lays down the limit of the term of sentence of imprisonment in summary trials. If the Magistrate considers that a longer sentence of imprisonment is necessary in the interests of justice, the trial should be held as in a warrant-case or a summons-case according to the nature of the offence. A sentence exceeding the period fixed by this section is illegal.[16.]

In a summary trial, an accused person convicted of more than one offence cannot be sentenced to imprisonment for a term exceeding three months in the aggregate under this sub-section. A sentence of three months' imprisonment may be inflicted on each charge to run concurrently but not consecutively.[17.]

The limit of imprisonment refers only to the substantive sentence, not to an alternative sentence of imprisonment in default of payment of fine. A Magistrate can impose a sentence of imprisonment in default of payment of fine in addition to the maximum sentence of three months' imprisonment which he has imposed for the offence.[18.]

There is no limit as to the amount of fine which may be imposed in a summary trial.[19.]

Section 143 of the Negotiable Instruments Act, 1881, empowers the Court to try cases for dishonour of cheques summarily in accordance with the provisions of sections 262 to 265 of the Code. It is further provided that in course of a summary trial, if it appears to the

Magistrate that the nature of the case requires passing of the sentence of imprisonment exceeding one year, the Magistrate, after hearing the parties, may record a finding to that effect and thereafter recall any witness and proceed in accordance with the provisions of the Code.[20.]

15. *Mangi Lal*, (1945) All 131 .
16. *Nandlal Harishanker v State of Gujarat*, 1969 Cr LJ 389 : AIR 1969 Guj 62 .
17. *Emperor v Nga Po Tay*, (1934) 12 Ran 122 : AIR 1934 Rangoon 116 .
18. *Empress v Asghar Ali*, (1883) 6 All 61 ; *The King v Po Htwa*, (1940) Ran 223 : AIR 1940 Rangoon 171 .
19. *Emperor v Dina Nath*, (1913) 35 All 173 .
20. *Indian Bank Association v UOI*, AIR 2014 SC 2528 : (2014) 5 SCC 590 : 2014 Cr LJ 3119 (SC).

The Code of Criminal Procedure, 1973

CHAPTER XXI SUMMARY TRIALS

[s 263] Record in summary trials.—

In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:—

(a) the serial number of the case;

(b) the date of the commission of the offence;

(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the finding;

(i) the sentence or other final order;

(j) the date on which proceedings terminated.

The register containing the particulars mentioned in this section forms the record in a summary trial. The evidence of witnesses need not be recorded, nor a formal charge framed. In every case where the accused does not plead guilty, a judgment containing the substance of evidence is necessary (*vide* section 264).

Where a Magistrate, in a case tried summarily, simply initialled the judgment without affixing his full signature thereto, the omission was held to be a mere irregularity not affecting the legality of the conviction.[21.]

When in a summary trial, the evidence has been recorded partly by one Magistrate who has taken notes of evidence and made them part of the record of the case and that Magistrate is succeeded by another Magistrate, the successor can decide the case on the evidence partly recorded by his predecessor and partly recorded by himself.[22.] It is not required that in every case where the case is sent to another Magistrate, the evidence must be re-heard. It depends upon the particular case and the manner in which the evidence has been recorded.[23.]

[s 263.1] "The Magistrate shall enter".—

The Magistrate must write the particulars himself. He cannot depute that duty to his clerk, nor is he authorised to affix his signature to the record or judgment by a stamp.[24.] Section 265(2), however, permits the preparation of record or judgment or both by means of an officer appointed by the Chief Judicial Magistrate in this behalf. The

record should be made at the time of the trial and not afterwards. Where a Magistrate without issuing process or making record of proceedings or dismounting from a pony on which he was riding convicted the accused of a municipal offence, it was held that as the record must have been prepared after the close of the trial from memory or rough notes, the procedure was illegal.[25.]

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21. *Puttappa v Maligamma*, (1954) Mys 147; contra *Re, Velivalli Brahmaiah*, AIR 1930 Mad 867 : (1931) ILR 54 Mad 252.
22. *Surat Bor Mun v Nagindas*, (1951) 54 Bom LR 800 .
23. *Reserve Bank Emp Assoc v State of Maharashtra*, AIR 1969 Bom 199 : (1969) 71 Bom LR 99 : 1969 Cr LJ 711 : ILR 1969 Bom 804 .
24. *Subramanya Ayyar v Queen*, (1883) ILR 6 Mad 396.
25. *Queen-Empress v Erugadu*, (1892) ILR 15 Mad 83.

The Code of Criminal Procedure, 1973

CHAPTER XXI SUMMARY TRIALS

[s 264] Judgment in cases tried summarily.—

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.

This section lays down that in every case tried summarily in which the accused does not plead guilty, the Magistrate must record the substance of the evidence and the judgment that is delivered must also contain a brief statement of the reasons for coming to a particular finding.

[s 264.1] "Substance of the evidence".—

The substance of the evidence is to be recorded at the time when the evidence is given in Court. Therefore, where the substance of the evidence is embodied in a judgment from memory or from short notes made at the time when evidence was given it does not amount to compliance with this section. The important or substantial part of the deposition of each witness should be recorded by the presiding authority.[26.] The evidence must be sufficient to justify the Magistrate's order.[27.] It must be so set forth in the judgment as to enable the appellate Court to perform its function.

The Allahabad High Court has held that if the evidence is not so set forth, the Magistrate may be required to do so even after re-examining the witnesses, or a re-trial may be ordered.[28.] The Bombay[29.] and the Calcutta[30.] High Courts have held that the omission to comply with the provisions of this section vitiates the trial.

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26. *Krishna Nayar Ram Nayar v State*, (1959) 61 Bom LR 684 : 1960 Cr LJ 324 : AIR 1960 Bom 107 .
27. *Ainuddi Sheikh v Queen-Empress*, (1900) 27 Cal 450 .
28. *Empress of India v Karan Singh*, (1875) 1 All 680 .
29. *Emperor v Nurudin Sheikh Adam*, (1928) ILR 30 Bom LR 954 : AIR 1928 Bom 433 .
30. *Queen v Kheraj Mullah*, (1873) 11 Beng LR 33 : 20 WR (Cr) 13.

The Code of Criminal Procedure, 1973

CHAPTER XXI SUMMARY TRIALS

[s 265] Language of record and judgment.—

(1) Every such record and judgment shall be written in the language of the Court.

(2) The High Court may authorise any Magistrate empowered to try offences summarily to prepare the aforesaid record or judgment or both by means of an officer appointed in this behalf by the Chief Judicial Magistrate, and the record or judgment so prepared shall be signed by such Magistrate.

This section emphasises that every such record i.e. the particulars mentioned in section 263 and the substance of evidence and judgment must be recorded in the language of the Court. It also lays down that the Magistrate concerned must himself sign such record and judgment. The Magistrate must write his full name and the mere putting in of the initials is not sufficient.[31.]

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31. *Re Vellivalli Brahmaiah*, (1930) ILR 54 Mad 252; **See** contra *Veerathaich v Ramaswami*, AIR 1964 Kant 11 : 1964 Cr LJ 52 ; *Seshagiri Rao v State of Mysore*, AIR 1954 Kant 150 : (1954) Mys 147.

The Code of Criminal Procedure, 1973

[1.][CHAPTER XXIA PLEA BARGAINING

The disposal of cases by method of "plea bargaining" is an alternative method to deal with the huge arrears of criminal cases. It is really a measure and redressal, as the same has been brought on statute, it has also added new dimensions in the realm of judicial reforms.

[s 265A] Application of the Chapter.—

(1) This Chapter shall apply in respect of an accused against whom—

(a) the report has been forwarded by the officer in charge of the police station under section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

(b) a Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under section 200, issued the process under section 204,

but does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman, or a child below the age of fourteen years.

(2) For the purposes of sub-section (1), the Central Government shall, by notification, determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

"Plea-bargaining" means pre-trial negotiations between the accused and prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution.[2.]

The provisions of the present Chapter can be invoked by the accused in the following cases:—

(1) Where in police case chargesheet/completion report has been filed against the accused that an offence, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force appears to have been committed by such an accused; or

(2) Where in a complaint case, a Magistrate has taken cognizance of an offence, other than an offence for which the punishment of death or of imprisonment for

life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under section 200, has issued the process under section 204,

(3) The provisions of this Chapter shall not apply—

(i) Where such offence affects the socio-economic condition of the country or

(ii) Where such offence has been committed against a woman, or a child below the age of fourteen years. (Also see section 265-L).

(iii) Where the accused is a previous convict of such an offence. (Section 265-B).

(iv) Where the accused is a habitual offender.[3.]

What are such economic offences shall be determined by the Central Government, by issuance of a notification.

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1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).
2. *State of Gujarat v Natwar Harchandji Thakor,* 2005 Cr LJ 2957 (2978, 2979) (Guj-DB).
3. *State of Gujarat v Natwar Harchandji Thakor*, 2005 Cr LJ 2957 (2978, 2979) (Guj-DB).

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[1][CHAPTER XXIA PLEA BARGAINING

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[s 265B] Application for plea bargaining.—

(1) A person accused of an offence may file application for plea bargaining in the Court in which such offence is pending for trial.

(2) The application under sub-section (1) shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.

(3) After receiving the application under sub-section (1), the Court shall issue notice to the Public Prosecutor or the complainant of the case, as the case may be, and to the accused to appear on the date fixed for the case.

(4) When the Public Prosecutor or the complainant of the case, as the case may be, and the accused appear on the date fixed under sub-section (3), the Court shall examine the accused *in camera*, where the other party in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily and where—

(a) the Court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case;

(b) the Court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of this Code from the stage such application has been filed under sub-section (1).

As laid by this section, an accused charged of an offence referred to in the preceding section intending to avail the benefit/concession of plea bargaining may file application for the purpose in the Court in which such offence is pending for trial. Such an application shall contain a brief description of the case relating to which the

application is filed, including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.

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1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[1.][CHAPTER XXIA PLEA BARGAINING

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[s 265C] Guidelines for mutually satisfactory disposition.—

In working out a mutually satisfactory disposition under clause (a) of sub-section (4) of section 265B, the Court shall follow the following procedure, namely:—

(a) in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case:

***Provided* that throughout such process of working out a satisfactory disposition of the case, it shall be the duty of the Court to ensure that the entire process is completed voluntarily by the parties participating in the meeting:**

***Provided further* that the accused, if he so desires, may participate in such meeting with his pleader, if any, engaged in the case;**

(b) in a case instituted otherwise than on police report, the Court shall issue notice to the accused and the victim of the case to participate in a meeting to work out a satisfactory disposition of the case:

***Provided* that it shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition of the case, that it is completed voluntarily by the parties participating in the meeting:**

***Provided further* that if the victim of the case or the accused, as the case may be, so desires, he may participate in such meeting with his pleader engaged in the case.**

The legislature has formulated guidelines intended to make sure that the process of plea bargaining, by the accused as per its application, results in genuine terms of settlement on the basis of which the accused may get the benefit of plea bargaining.

[s 265C.1] "Court shall issue notice".—

The issue of notice by the Court to the Public Prosecutor, the police officer who has investigate the case, the accused and the victim, is a mandatory requirement of the section.

[s 265C.2] "Voluntary by the parties participating".—

Duty has been cast upon the Court to satisfy itself that the parties are voluntarily participating in the process of working out a satisfactory disposition of the case.

[s 265C.3] "Participate in such meeting with his pleader".—

The victim or the accused may, if they desire, seek assistance of their respective pleaders to work out a satisfactory disposition of the case.

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1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[1][CHAPTER XXIA PLEA BARGAINING

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[s 265D] Report of the mutually satisfactory disposition to be submitted before the Court.—

Where in a meeting under section 265C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265B has been filed in such case.

This section gives the guidelines as to where a mutually satisfactory disposition is worked out between the parties; a report of the same is to be submitted before the Court. The report is to be signed by the presiding officer of the Court and all the parties who participated in the meeting. If no such disposition has been worked out, then the Court has to record such observation and proceed further with the case from the stage when the application for plea bargaining was filed.

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[s 265E] Disposal of the case.—

Where a satisfactory disposition of the case has been worked out under section 265D, the Court shall dispose of the case in the following manner, namely:—

(a) the Court shall award the compensation to the victim in accordance with the disposition under section 265D and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused;

(b) after hearing the parties under clause (a), if the Court is of the view that section 360 or the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force are attracted in the case of the accused, it may release the accused on probation or provide the benefit of any such law, as the case may be;

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;

(d) in case after hearing the parties under clause (b), the Court finds that the offence committed by the accused is not covered under clause (b) or clause (c), then, it may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[s 265F] Judgment of the Court.—

The Court shall deliver its judgment in terms of section 265E in the open Court and the same shall be signed by the presiding officer of the Court.

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[s 265G] Finality of the judgment.—

The judgment delivered by the Court under section 265G shall be final and no appeal (except the special leave petition under Article 136 and writ petition under articles 226 and 227 of the Constitution) shall lie in any Court against such judgment.

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[s 265H] Power of the Court in plea bargaining—

A Court shall have, for the purposes of discharging its functions under this Chapter, all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case in such Court under this Code.

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[1][CHAPTER XXIA PLEA BARGAINING

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[s 265I] Period of detention undergone by the accused to be set off against the sentence of imprisonment.—

The provisions of section 428 shall apply, for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter, in the same manner as they apply in respect of the imprisonment under other provisions of this Code.

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[1][CHAPTER XXIA PLEA BARGAINING

The disposal of cases by method of "plea bargaining" is an alternative method to deal with the huge arrears of criminal cases. It is really a measure and redressal, as the same has been brought on statute, it has also added new dimensions in the realm of judicial reforms.

[s 265J] Savings.—

The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of this Code and nothing in such other provisions shall be construed to constrain the meaning of any provision of this Chapter.

Explanation.—**For the purposes of this Chapter, the expression "Public Prosecutor" has the meaning assigned to it under clause (u) of section 2 and includes an Assistant Public Prosecutor appointed under section 25.**

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

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[s 265K] Statements of accused not to be used.—

Notwithstanding anything contained in any law for the time being in force, the statements or facts stated by an accused in an application for plea bargaining filed under section 265B shall not be used for any other purpose except for the purpose of this Chapter.

This section protects the accused against self-incrimination. Any statement made by the accused in his application of plea bargaining cannot be used for any other purpose except plea bargaining.

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[s 265L] Non-application of the Chapter.—

Nothing in this Chapter shall apply to any juvenile or child as defined in sub-clause (k) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000)]

It has been held that the Court, before exercising the provisions of Chapter 21A, has to issue a notice to the victim and hearing the victim is a mandatory requirement before deciding on the guilty plea of the accused. If that is not done, the proceedings stand vitiated.[4]

1. New Chapter XXIA, containing sections 265A to 265L, Ins. by the Criminal Law (Amendment) Act, 2005 (Act No. 2 of 2006), section 4 (w.e.f. 5-7-2006 *vide* Notification No SO 990(E), dated 3-7-2006).

4. *Girraj Prasad Meena v State of Rajasthan*, (2014) 13 SCC 674 : JT 2013 (13) SC 170 : 2013 (12) Scale 275 .

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CHAPTER XXII ATTENDANCE OF PERSONS CONFINED OR DETAINED IN PRISONS

This is entirely a new Chapter comprising of six sections introduced for the purpose of securing the attendance of persons, confined or detained in prisons, before Criminal Courts. It lays down certain conditions and circumstances under which such persons are to be produced before the Court. It appears that these sections have been incorporated having regard to the provisions of the Prisoners (Attendance in Courts) Act, 1955, which also makes provision for production of persons confined or detained in prisons.

[s 266] Definitions.—

In this Chapter,—

(a) "detained" includes detained under any law providing for preventive detention;

(b) "prison" includes,—

(i) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail;

(ii) any reformatory, Borstal Institution or other institution of a like nature.

The definitions of the two expressions "detained" and "prison" are inclusive and not exhaustive and as such are very wide. Thus, a person detained under the Preventive Detention Act, the Maintenance of Internal Security Act, *etc*. will be a person "detained". Similarly, besides regular prisons, a subsidiary jail, a reformatory, a Borstal Institution will also fall under the term "prison".

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[s 267] Power to require attendance of prisoners.—

(1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court,—

(a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or

(b) that it is necessary for the ends of justice to examine such person as a witness,

the Court may make an order requiring the officer in charge of the prison to produce such person before the Court for answering to the charge or for the purpose of such proceeding or, as the case may be, for giving evidence.

(2) Where an order under sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded to, or acted upon by the officer in charge of the prison unless it is countersigned by the Chief Judicial Magistrate to whom such Magistrate is subordinate.

(3) Every order submitted for countersigning under sub-section (2) shall be accompanied by a statement of the facts which, in the opinion of the Magistrate, render the order necessary, and the Chief Judicial Magistrate to whom it is submitted may, after considering such statement, decline to countersign the order.

This section empowers the Court to direct the officer-in-charge of the prison to produce a detenu before it if the Court is of the opinion that his presence is necessary (1) for answering to a charge of an offence or (2) for the purpose of any proceedings against him or (3) if it is necessary for the ends of justice to examine such person as a witness. Where an accused was arrested and detained in Maharashtra under NDPS Act, brought to Moradabad in U.P. in connection with another case, it was held that after the end of the trial at Moradabad, he has to be conveyed back to the prison, from where he was brought, and it cannot be said that his confinement under NDPS Act in Maharashtra automatically came to an end or became non-existent on his transfer to Moradabad.[1.] Where a person detained in jail at Indore was brought to Kota under a production

warrant for investigation of another offence, it was held to be illegal as the production warrant could only be issued for enquiry, trial or other proceedings or for answering charge or for being examined as a witness and not for investigation of another offence.[2.]

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1. *Mohd Daud v Superintendent, District Jail, Moradabad*, 1993 Cr LJ 1358 (All).
2. *Bharti Sachdeva v State of Rajasthan*, 1996 Cr LJ 2102 (Raj).

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CHAPTER XXII ATTENDANCE OF PERSONS CONFINED OR DETAINED IN PRISONS

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[s 268] Power of State Government to exclude certain persons from operation of section 267.—

(1) The State Government may, at any time, having regard to the matters specified in sub-section (2), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon so long as the order remains in force, no order made under section 267, whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(2) Before making an order under sub-section (1), the State Government shall have regard to the following matters, namely:—

(a) the nature of the offence for which, or the grounds on which, the person or class of persons has been ordered to be confined or detained in prison;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison;

(c) the public interest, generally.

This section empowers the State Government to stop operation of the order made under the previous section and enumerates the circumstances which should weigh with the Government before excluding certain persons from the operation of that order. Power conferred on the State Government should be construed strictly. Order under section 268 (2) should be a self-contained and a speaking order.[3.]

No person in respect of whom an order passed under section 268 operates can be detained in jail without a specific order of detention being passed against him by a competent Court.[4.]

[s 268.1] Reasoned order to be passed.—

An order restricting certain under trials from attending the Court must be supported by a statement of reasons showing the nature of the offence, the likelihood of disturbance and the public interest involved in the cases.[5.]

3. *Bhajan Vir Singh v State of Haryana*, 1991 Cr LJ 1311 (P&H).
4. *Surjit Singh v State of Punjab*, 1988 Cr LJ 533 (P&H).
5. *Mohd Ansari v Secretary*, *Govt of TN*, 2003 Cr LJ 524 (Mad).

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[s 269] Officer in charge of prison to abstain from carrying out order in certain contingencies.—

Where the person in respect of whom an order is made under section 267,—

- **(a) is by reason of sickness or infirmity unfit to be removed from the prison; or**
- **(b) is under committal for trial or under remand pending trial or pending a preliminary investigation; or**
- **(c) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or**
- **(d) is a person to whom an order made by the State Government under section 268 applies;**

the officer in-charge of the prison shall abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining:

***Provided* that where the attendance of such person is required for giving evidence at a place not more than twenty-five kilometers distance from the prison, the officer in charge of the prison shall not so abstain for the reason mentioned in clause (b).**

This section provides guidance to the officer-in-charge of the prison and lays down the grounds on which he should or should not abstain from carrying out the Court's order passed under section 267. The Allahabad High Court has held that only reasonable construction of the words "*is under committal for trial or under remand pending a preliminary investigation*" occurring in section 269 CrPC is that committal proceedings, trial or investigation, as the case may be, should be in actual progress and not merely pending. Where the proceedings are not in actual progress, an accused can be reasonably sent for the purpose of another investigation, committal proceedings or trial. Thus, the officer-in-charge of the prison may, with the consent of the concerned Court, carry out the order under section 267,of CrPC of the subsequent Court.[6.] A person accused of murder at Faizabad, while on bail, committed another murder in Lucknow, got cancelled his bail and got himself confined in Faizabad jail pending committal and was under remand under section 309 of CrPC. He challenged the competency of the Magistrate at Lucknow to pass on order under section 267 of CrPC, when he was already confined in a jail pending committal. It was held that the mere

fact that committal proceedings were pending in respect of the same accused at another place did not take away the jurisdiction of the Magistrate at a subsequent place of crime to pass an order under section 267 of CrPC, and as such order of the Magistrate at Lucknow did not suffer from any infirmity.[7]

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6. *Ranjeet Singh v State of UP*, 1995 Cr LJ 3505 (All).
7. *Ibid*.

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[s 270] Prisoner to be brought to Court in custody.—

Subject to the provision of section 269, the Officer in charge of prison shall, upon delivery of an order made under sub-section (1) of section 267 and duly countersigned, where necessary, under sub-section (2) thereof, cause the person named in the order to be taken to the Court in which his attendance is required, so as to be present there at the time mentioned in the order, and shall cause him to be kept in custody in or near the Court until he has been examined or until the Court authorises him to be taken back to the prison in which he was confined or detained.

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[s 271] Power to issue commission for examination of witness in prison.—

The provisions of this Chapter shall be without prejudice to the power of the Court to issue, under section 284, a commission for the examination, as a witness, of any person confined or detained in a prison; and the provisions of Part B of Chapter XXIII shall apply in relation to the examination on commission of any such person in the prison as they apply in relation to the examination on commission of any other person.

The section empowers the Court to issue commission for the examination of the person detained or confined in prison, if the Court thinks that the evidence of such person is necessary for the ends of justice and that his attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable.[8.]

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8. *Nain Singh v Nain Singh*, 1992 Cr LJ 2004 (J&K) : LNIND 1990 JNK 13 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 272] Language of Courts.—

The State Government may determine what shall be, for purposes of this Code, the language of each Court within the State other than the High Court.

The Code of Criminal Procedure, 1973

CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 273] Evidence to be taken in presence of accused.—

Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:

[1.] **[** *Provided* **that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused].**

Explanation.—**In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.**

[s 273.1] Criminal Law (Amendment) Act, 2013.—

The proviso inserted before the explanation to section 273 empowers the court to take appropriate measures, where the victim of rape or any other sexual offence is below 18 years, to ensure that such woman is not confronted by the accused at the time of recording her evidence. At the same time, the court will also ensure the right of cross-examination of the accused.

COMMENT

Section 273 opens with the expression "Except as otherwise expressly provided..." and by its very nature, the exceptions to the application of Section 273 must be those which are expressly provided in the Code. Sections 299 and 317 are such express exceptions provided in the Code and the Courts would be justified in recording evidence in the absence of the accused in the circumstances mentioned in Sections 299 and 317. Section 273, under its latter part, also provides for a situation in which evidence could be recorded in the absence of the accused, when it says "when his personal attendance is dispensed with, in the presence of his pleader".[2.]

This section makes it obligatory that evidence for the prosecution and defence should be taken in the presence of the accused. A trial is vitiated by failure to examine the witnesses in the presence of the accused.[3.] Mere cross-examination in the presence of the accused is not sufficient.[4.]

The rule enacted in this section makes it imperative that all evidence in an inquiry or trial shall be taken in the presence of the accused. That being so it is not sufficient under the section to read out to a witness his previous deposition in a former case and ask him if the statements made therein are true nor is it permissible to consider at all the evidence given in one case for the purpose of reaching conclusions in the other case. The two cases should be tried independently and determined on evidence

recorded in each case.[5.] If this is not done, the trial is vitiated and section 465 cannot cure it. Even consent by accused or his counsel cannot validate such proceedings.[6.] Each case must be decided on the evidence recorded in it; evidence recorded in another case cannot be taken into account in arriving at the decision. It is doubtful whether the evidence recorded in one criminal case can be treated as evidence in the other, even with the consent of the accused.[7.]

The explanation makes it clear that the word "accused" includes a person in relation to whom any proceedings under Chapter VIII of the Code, i.e., proceedings for taking security for keeping the peace and for good behaviour, have been commenced.

[s 273.2] "Personal attendance is dispensed with".—

Sessions Judge has power to dispense with the personal attendance of an accused and to allow him to appear by pleader during the Sessions trial. Such a power may properly be exercised in favour of *pardanashin* ladies,[8.] or on ground of ill-health.[9.]

Where a Sessions Judge in a murder case recorded the prosecution evidence in the absence of the accused, although exemption from appearance was not sought for, and sentenced him to death, the M.P. High Court set aside the conviction and remanded the case back for *de novo* trial as the trial stood vitiated for violation of the provision of section 273 CrPC.[10.]

[s 273.3] Evidence by video-conferencing.—

The Supreme Court has held that recording of evidence by conferencing is permissible. The evidence so recorded would fully meet the requirement of section 273. It would be as per procedure established by law. The term "presence" in the section does not mean actual physical presence in the court so as to meet the requirement that evidence must be recorded in the presence of the accused.[11.] The Supreme Court in *Sujoy Mitra v State of West Bengal,*[12.] allowed evidence to be taken through video conferencing facilities and directed the trial court to arrange for them.

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1. Ins. by the Criminal Law (Amendment) Act, 2013, (Act 13 of 2013), section 20 (w.r.e.f. 3-2-2013).
2. *Atma Ram v State of Rajasthan*, AIR 2019 SC 1961 .
3. *B Singh v State of Orissa*, 1990 Cr LJ 397 (Ori).
4. *Bigan Singh v King Emperor*, (1927) ILR 6 Pat 691 : (1928) 29 Cr LJ 260 ; *Allu v Emperor*, (1923) 4 Lah 376 : AIR 1928 Pat 143 .
5. *Ram Singh Mahala Singh*, (1950) 3 Punj 209; *Sukanraj v State of Rajasthan*, AIR 1967 Raj 267 : 1967 Cr LJ 1702 .
6. *Sukanraj v State of Rajasthan, Ibid*.

7. *Mitthulal v The State of Madhya Pradesh*, AIR 1975 SC 149 , at p 151 : 1975 Cr LJ 236 : (1975) 3 SCC 529 : 1974 (6) UJ 777 SC.
8. *Re Kandamani Devi*, (1922) 45 Mad 359 : AIR 1922 Mad 79 .
9. *Emperor v CWKing*, (1912) 14 Bom LR 236 .
10. *State of MP v Budhram*, 1996 Cr LJ 46 (MP).
11. *State of Maharashtra v Dr Praful B Desai*, 2003 Cr LJ 2033 : AIR 2003 SC 2053 : (2003) 4 SCC 601 .
12. *Sujoy Mitra v State of West Bengal*, (2015) 16 SCC 615 : 2015 (13) Scale 769 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 274] Record in summons-cases and inquiries.—

(1) In all summons-cases tried before a Magistrate, in all inquiries under sections 145 to 148 (both inclusive), and in all proceedings under section 446 otherwise than in the course of a trial, the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of his evidence in the language of the Court:

Provided **that if the Magistrate is unable to make such memorandum himself, he shall, after recording the reason of his inability, cause such memorandum to be made in writing or from his dictation in open Court.**

(2) Such memorandum shall be signed by the Magistrate and shall form part of the record.

This section enjoins upon a Magistrate to make a substance of evidence of a witness (1) in all summons-cases, (2) in all enquiries under sections 145 to 148 (both inclusive) (disputes regarding immovable properties) and (3) in all proceedings under section 446 regarding forfeiture of a bond. Such substance of evidence shall be taken down in the language of the Court. If the Magistrate is unable to make such memorandum himself, he can cause such memorandum to be made in writing or from his dictation in open Court. Such memorandum must be signed by the Magistrate and shall form part of the record.

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 275] Record in warrant-cases.—

(1) In all warrant-cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or by his dictation in open Court or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf:

13. [*Provided* that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.]

(2) Where the Magistrate causes the evidence to be taken down, he shall record a certificate that the evidence could not be taken down by himself for the reasons referred to in sub-section (1).

(3) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

This section lays down the manner in which evidence is to be recorded in warrant-cases tried before a Magistrate. If the evidence is not taken down by the Magistrate or by his dictation in Court, it casts a duty on the Magistrate to state reasons as to why it was taken down by an officer of the Court and he himself did not record the evidence. The evidence should be in the form of a narrative, but discretion is given to the Magistrate to record the evidence in the form of questions and answers.

[s 275.1] "Evidence of each witness shall... be taken down to writing".—

In each deposition should appear the name of the person examined, the name of his or her father, and, if a married woman, the name of her husband, the religion, caste, profession and age of the party or witness, and the village in which he or she resides. The proper way of recording evidence is to take it down in the first person, exactly as spoken by the witness.[14.] The Judge is not bound to make a verbatim record of any particular question and answer. If either side requests him to do so, the Judge may in his discretion act accordingly.

The word "witness" includes complainant. In the State of Madras, the complainant is always referred to as the first witness.

[s 275.2] Proviso to sub-section (1).—

This proviso was inserted by Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), w.e.f. 31-12-2009. This amendment was brought about to give effect to the decision of the Supreme Court in *State of Maharashtra v Dr Praful B Desai.*[15.] Section 273 requires evidence to be taken in presence of the accused. In the above case, the Supreme Court held that recording of evidence by video conferencing was permissible and the evidence so recorded can be said to be recorded in "presence" of the accused and would fully meet the requirements of section 273. The Supreme Court in the above case quoted with approval the observations of Bhagwati, J (as he then was) in its earlier decision in *National Textile Workers" Union v PR Ramakrishnan.*[16.]

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13. Ins. by the Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009), section 20 (w.e.f. 31-12-2009).

14. *Zoolfiqar Khan*, (1871) 16 WR (Cr) 36.

15. *State of Maharashtra v Dr Praful B Desai,* AIR 2003 SC 2053 : (2003) 4 SCC 601 : 2003 Cr LJ 2033 : 2003 (2) Mah LJ 868 .

16. *National Textile Workers' Union v PR Ramakrishnan,* AIR 1983 SC 75 : (1983) 1 SCC 228 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 276] Record in trial before Court of Session.—

(1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

[17][**(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.]**

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

Recording of evidence in trials before the Sessions Court should be in the form of question and answer; the Judge, however, has discretion to take down or cause it to be taken down in the form of a narrative. Where the Sessions Judge convicted a person and awarded punishment without hearing him on the quantum of sentence violating section 276(2) CrPC as amended in 1978, the sentence was set aside.[18]

[s 276.1] Reconstructed record of case.—

There was in this case non-consideration of the merits of the case and acquittal by giving benefit of doubt on surmises and conjectures which was held to be on facts not proper. Records of the case including those called for from trial court were found missing before hearing of the appeal. Records were reconstructed by trial Court in compliance with the order of the High Court. The High Court doubted the genuineness of the reconstructed case file and without going into merits of the case allowing the appeal and acquitting the accused. It was held that the High Court erred in doubting the authenticity of the reconstruction of records which were made by trial Court after due verification and in acquitting the accused without going into merits of the case.[19]

17. Subs. by Act No. 45 of 1978, section 20, for sub-section (2) (w.e.f. 18-12-1978).

18. *Mohd Shafi Bhat v State of J&K*, 1996 Cr LJ 2040 (J&K).

19. *Kanwar Bahadur Singh v Shiv Baran Singh*, (2001) 9 SCC 149 : AIR 2003 SC 2066 ; **Also see** *Mahender Singh Dhaliya (Dr) v State (CBI)*, 2003 Cr LJ 1908 (Del), killing of wife in a foreign country.

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 277] Language of record of evidence.—

In every case where evidence is taken down under section 275 or section 276,—

(a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;

(b) if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record;

(c) where under clause (b) evidence is taken down in a language other than the language of the Court, a true translation thereof in the language of the Court shall be prepared as soon as practicable, signed by the Magistrate or presiding Judge, and shall form part of the record:

***Provided* that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation.**

A witness may give evidence either in the language of the Court or in any other language. The section provides for different contingencies which may arise in the event of the witness giving evidence in the language of the Court or in any other language.

The proper and convenient way for recording evidence is to take it down in the first person exactly as spoken by the witness.[20.]

In a murder case, a witness deposed in Marathi, which was the language of the court there, and the evidence was read over to him and was admitted by him to be correct and a memorandum of evidence was made by the Trial Judge in English, it was held that when a question arose as to what exactly the witness said, it was the Marathi deposition, which had to be taken into account.[21.]

20. *Zoolfiqar Khan*, (1871) 16 WR (Cr) 36, 37.

21. *State of Maharashtra v Bhau Rao*, 1996 Cr LJ 673 (Bom).

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 278] Procedure in regard to such evidence when completed.—

(1) As the evidence of each witness taken under section 275 or section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

This section requires that the evidence of a witness when completed should be read over to him in the presence of the accused or his pleader.[22.] The evidence should be read after it is completed and not at the end of the day after all the witnesses have been examined.[23.] When the correction slips were filed much after the evidence of the witness was recorded and the slips were unsigned, the refusal by the trial judge to effect the changes was held to be correct.[24.] The reading of the deposition to a witness himself is not sufficient.[25.] The object of reading over a deposition to a witness is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. The section does not make it necessary that the evidence should be read by the Court itself.

The effect of failure to read over the depositions of witnesses is to vitiate, in proper cases, the whole proceedings.[26.]

Section 281 provides for the recording of the examination of accused persons.

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22. *Jyotish Chandra Mukerjee v Emperor*, (1909) ILR 36 Cal 955; *Amrita Lal Hazra v Emperor*, (1915) ILR 42 Cal 957.

23. *Deorao v Emperor*, ILR (1946) Nag 946 .

24. *Mir Mohd Omar v State of WB*, 1989 Cr LJ 2070 : AIR 1989 SC 1785 : (1988) 4 SCC 456 .
25. *Emperor v Jogendra Nath Ghose*, (1915) ILR 42 Cal 240 : AIR 1914 Cal 789 .
26. *Emperor v Ujagar Singh*, (1945) 2 Cal 198 : AIR 1949 Cal 302 : 1949 Cr LJ J 560 .

The Code of Criminal Procedure, 1973

CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 279] Interpretation of evidence to accused or his pleader.—

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Signs and gestures do not form a language, though loosely they may be called the language of the deaf and dumb. But that is not meant by this section.[27.]

The Supreme Court has held that where the appellant was represented by two eminent advocates who knew both English and Tamil, it could not be said that any prejudice has been caused to the appellant because he did not know English or Tamil, and the violation of sub-section (1) of this section was merely an irregularity.[28.]

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27. *Re Oomayan*, AIR 1960 Mad 20 : 1960 Cr LJ 91 .

28. *Shivanarayan Kabra v State of Madras*, AIR 1967 SC 986 : 1967 Cr LJ 946 ; *KM Subramani v State of AP*, 2003 Cr LJ 3526 , trial in a language not understood by the accused, nor interpreted to him. The court ordered *de novo* trial.

The Code of Criminal Procedure, 1973

CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 280] Remarks respecting demeanour of witness.—

When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

The object of this section is to give to the appellate Court some aid in estimating the value of the evidence recorded by another Court. A Judge may note the demeanour of a witness whilst under examination, but it is generally unsafe to pronounce an opinion on the credibility of the witness until the whole of his evidence has been taken. The demeanour of the witness under other circumstances ought not to be taken notice of by the Judge.

The demeanour of a witness which goes to affect the Court in appreciating his evidence must be noted down at the proper stage during or at the close of the examination of the witness. To note about the demeanour of a witness in the course of the judgment, though not illegal, is not fair and any such note about the demeanour should be known to the counsel of the parties, who may have suggestions to make about the observations and inferences to be drawn therefrom.[29.]

It has been held by the Supreme Court that the remarks representing the demeanour of the witness under section 280 made in the judgment, though not made either during or at the close of the examination of the witness by a trial Judge, should be given due weight by the Appellate Court in the appraisal of the evidence given by such witness. But where the trial Judge had not indicated any reason which impelled him to make remarks in the judgment, the High Court was held right in not paying much attention to the remarks.[30.]

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29. *Zafar Husain v State of UP*, (1956) 2 All 736 .

30. *Ganeshbhai Shankarbhai v State of Gujarat*, AIR 1972 SC 1618 : 1972 Cr LJ 1029 : (1972) 2 SCC 73 .

The Code of Criminal Procedure, 1973

CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 281] Record of the examination of accused.—

(1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

This section deals with the mode of recording examination of the accused by a Metropolitan Magistrate and any Magistrate other than a Metropolitan Magistrate or by Court of Session. Whereas the Metropolitan Magistrate is required to make a memorandum of the substance of the examination of the accused, any other Magistrate or the Presiding Judge of the Sessions Court is required to record in full the whole of such examination including every question put to him and the answer given by him.

The examination of an accused under this section is subject to the purpose referred to in section 313, *viz.*, "to enable him to explain any circumstances appearing against him

and not to supplement the case for the prosecution against him to show that he is guilty."[31.]

An accused person cannot properly be examined at the commencement of an inquiry or trial, and before any evidence has been taken, for there is nothing before the Court which he can be called upon to explain.[32.]

[s 281.1] Magistrate to make memorandum of substance of examination [*Sub-section (1)*].—

This sub-section does not apply in a case where the accused pleads guilty. In such a case, the provisions of section 252 being special provisions would be applicable and would override the provisions of this sub-section.[33.]

The practice of prosecution not to inform the Metropolitan Magistrate about previous convictions of an accused person before his trial is salutary as it is founded on the desire of the prosecuting authorities to see that the accused has fair play. But they may indicate to the Magistrate in a case in which he is not bound to take evidence, but where the accused has previous convictions, that they think that the case is one in which it is desirable that the evidence should be recorded. An intimation of that sort cannot prejudice the trained mind of a Magistrate and the difficulty of finding, after he has tried the case, that he ought to have recorded evidence can be saved. Where the Magistrate has tried a case without recording the evidence and he finds that a longer sentence than six months ought to be passed, he should record the evidence afresh.[34.]

[s 281.2] "Every question put to him and every answer given by him, shall be recorded in full".—

This is of great importance, for a statement made in answer to a question put may have a different meaning if considered without such question.

When questions have in fact been put, the failure to record them by the Magistrate is curable under section 463, provided that the error has not prejudiced the accused in his defence on the merits. But if the questions were not put at all, section 463 does not apply.[35.] Section 463 removes defect of form, but not a defect of substance.[36.]

[s 281.3] "In the language in which the accused is examined or, if that is not practicable, in the language of the Court".—

Ordinarily, the statement should be recorded in the language in which the accused was examined. The object in view is to obtain the words used by the accused, and by this means to learn the meaning of what he may have said. If it is not practicable to record the examination in the language in which it is made, it may be recorded in the language of the Court. Where the statement is made in a foreign language unknown to the Court, the language in which that statement is conveyed to the Court by the interpreter is the language in which the statement should be recorded.[37.] Where the Magistrate recorded in English a statement made in Urdu and the Court officer recorded it in Bengali, the language of the Court, the latter was treated as the record and the former as the memorandum.[38.] Where a confession was recorded in English and not in the language in which it was made, it was held that though the Magistrate could have recorded the confession in the language in which it was made and the provision of this sub-section

had not been fully complied with, it was a defect which was curable under section 463 of the Code.[39.]

[s 281.4] "Signed by the accused".—

Where an accused person cannot sign his name, his mark is sufficient for the requirements of this section. The record of confession must bear the signature of the accused; otherwise, it is not admissible in evidence.[40.]

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31. *Rangi*, (1886-87) 10 Mad 295.
32. *Howthorne*, (1891) 13 All 345 ; *Queen-Empress v Sagal Samba*, (1894) ILR 21 Cal 642.
33. *Mahant Kaushalya Das v State of Madras*, AIR 1966 SC 22 : 1966 Cr LJ 66 .
34. *Emperor v PX D'Souza*, (1932) 34 Bom LR 286 : ILR (1932) 56 Bom 200 : AIR 1932 Bom 180 .
35. *Sardarmiya v Emperor*, (1937) Nag 416 : AIR 1937 Nag 257 .
36. *Emperor v Kommoju Brahman*, (1939–40) ILR 19 Pat 301.
37. *The Empress v Vaimbillee*, (1880) 5 Cal 826 .
38. *Lalchand v Queen-Empress*, (1891) ILR 18 Cal 549, 554.
39. *Emperor v Kommoju Brahman*, (1939) 19 Pat 301 : AIR 1940 Pat 163 ; *Ambai Majhi v State*, 1966 Cr LJ 851 . *Ramesh Chand v State of HP*, 2002 Cr LJ 3949 (HP), Hindi record of evidence was not available, English record was complete in all respects, accepted for disposal of the case
40. *Neharu Mangatu v E,* ILR (1937) Nag 268 .

The Code of Criminal Procedure, 1973

CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 282] Interpreter to be bound to interpret truthfully.—

When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

The Code of Criminal Procedure, 1973

CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

A.—Mode of taking and recording evidence

[s 283] Record in High Court.—

Every High Court may, by general rule, prescribe the manner in which the evidence of witnesses and the examination of the accused shall be taken down in cases coming before it; and such evidence and examination shall be taken down in accordance with such rule.

The Code of Criminal Procedure, 1973

CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

B.—Commissions for the examination of witnesses

In civil cases, the Courts have power to issue commissions for examination of witnesses under sections 75 to 78 and O XXVI, rules 1-8, of the Civil Procedure Code. Sections 284-290 vest like powers in Magistrates and Criminal Courts.

The power to issue commissions in criminal cases is conferred on (1) any Court or (2) any Magistrate. It is confined only to those cases where the examination of a witness is necessary for the ends of justice, and an unreasonable amount of delay, expense or inconvenience would be caused in procuring his attendance. The witness on commission may be examined either on interrogatories or *viva voce* by the parties. The depositions so taken may be read in evidence by either party and shall form part of the record of the case. It is open to the Court or Magistrate to adjourn the trial or inquiry for the reception of such evidence.

The provisions of this Chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for re-issue of the commission together with his cross interrogatories.[41.]

[s 284] When attendance of witness may be dispensed with and commission issued.—

(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter:

***Provided* that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.**

(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.

The taking of evidence on commission in criminal cases is most sparingly resorted to, i.e., in extreme cases of delay, expense or inconvenience,[42.] e.g., for a *pardanashin lady*[43.] or an ailing person.[44.] The Rajasthan High Court has held that *pardanashin*

ladies as of right are not exempted from appearance in a Criminal Court.[45.] The Bombay High Court has also held that the provisions of this section are to be sparingly used and only when absolutely essential and necessary. It has further held in the same case that when a witness, for all practical purposes, is a complainant in a defamation case, his attendance cannot be dispensed with by issuing a commission for his examination merely because of his being a Minister.[46.]

The terms of the section are very wide. They refer not only to an inquiry and a trial but to any other proceeding.[47.]

The Supreme Court has held that as a general rule in criminal proceedings, the important witnesses on whose testimony the case against the accused has to be established must be examined in Court and usually the issuing of commission should be restricted to formal witnesses or to such witnesses who cannot be produced without unreasonable delay or inconvenience. The evidence against the accused should be recorded in his presence and in open Court so that the accused may have an opportunity to cross-examine effectively the witnesses, and the presiding officer may have the advantage and opportunity of hearing the witnesses and of noting their demeanour. Witnesses should not be examined on commission except in extreme cases of delay, expense or inconvenience and in particular the examination through interrogatories should be resorted to only in unavoidable cases.[48.] Section 284 has been enacted with the definite object of seeing that the witnesses are examined in time and the matter is not delayed.[49.]

[s 284.1] Inconvenience.—

The inconvenience that has to be considered by the Court on an application under this section is not only the inconvenience to the parties but also the inconvenience that would be caused to the witness who is sought to be examined on commission. An apprehension of arrest from which a witness, who is sought to be examined on commission, suffers would be "inconvenience" within the terms of this section. The possibility of a witness who is a foreigner losing his job in his country if he were to disobey his employers and come to India to give evidence in a criminal case would be harm or injury which will also fall within the term "inconvenience" in this section. So also, the risk to the personal safety of a witness occasioned by the intimidation and threats given by the accused would be harm or injury within the term "inconvenience" of this section.[50.]

The High Court possesses, in cases not provided for in this section, the inherent power to make an order that it deems necessary. It has also the power to allow payment of expenses in such cases, that is cases not falling within the present section.[44]

[s 284.2] "Witness".—

The term witness includes a complainant.[51.]

[s 284.3] "Delay".—

The term "delay" as used in this section postulates that there is a possibility of the witness being procured, though the prosecution might not be able to say when he could be procured.[52.]

[s 284.4] "May issue a commission".—

If no particulars indicating willingness of the witness to be examined on commission are given and even his address is also not given, the Court cannot issue a roving commission to Court or authority at different places.[53] The Court passes an order for examination of witnesses on commission, when it is satisfied not only about the necessity of such evidence but also about the effective enforceability of commission for examination of witnesses. Where, therefore, it is found after issue of a commission for examination of witnesses in a foreign country that reciprocal agreement with that country does not, in fact, exist, the Court should refuse to extend time (see section 285).[54]

[s 284.5] Order for expenses of commission for examining witnesses [*Sub-section (2)*].—

This sub-section empowers the Court to direct the prosecution when issuing commission to pay such amount as the Court considers reasonable to meet the expenses of the accused. The Court will not be right in singling out one accused, if there are more than one, and not giving the same facilities to him on the ground that he had intimidated and tampered with foreign witnesses in initial stages. This is against the interest of justice.[55]

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .
42. *Basant Bibi*, (1889) 12 All 69 ; *Hem Coomaree Dassee v Queen-Empress*, (1897) ILR 24 Cal 551.
43. *Basant Bibi, ibid; Hem Coomaree Dassee, ibid.; Abhayeswari Debi v Kishori Mohan Banerjee*, (1915) ILR 42 Cal 19; but **See** *Hurro Soondery Chowdharain*, (1878) 4 Cal 20 ; *Re Din Tarini Debi*, (1888) ILR 15 Cal 775.
44. *Jamuna Singh v Emperor*, (1924) 3 Pat 591 : AIR 1925 Pat 55 .
45. *Man Kanwar v Saleh Raj*, (1958) Raj 267 ; *Om Prakash v State*, AIR 1964 Raj 230 : 1964 Cr LJ 579 .
46. *Gulabrao v SD Raje*, (1972) 74 Bom LR 720 : 1973 Cr LJ 948 .
47. *Abhayeswari Debi v Kishori Mohan Banerjee*, (1915) ILR 42 Cal 19, 24.
48. *Dharmanand Pant v State of Uttar Pradesh*, AIR 1957 SC 594 : (1957) SCR 321 : 1957 Cr LJ 894 .
49. *State of Gujarat v Lalit Mohan*, 1990 Cr LJ 2341 (Guj).
50. *The State of Maharashtra v Rajkumar Kochhar*, (1970) 72 Bom LR 797 .
51. *Abhayeswari Debi v Kishori Mohan Banerjee*, (1915) ILR 42 Cal 19.
52. *The State of Maharashtra v Rajkumar Kochhar*, (1969) 72 Bom LR 797 .
53. *Hussain Umar v Dalipsinghji*, AIR 1970 SC 45 : 1970 Cr LJ 9 : (1969) 3 SCC 429 .
54. *Ratilal Bhanji Mithani v State of Maharashtra*, AIR 1972 SC 1567 : 1972 Cr LJ 1055 : (1972) 3 SCC 793 .
55. *RB Mithani v State of Maharashtra*, AIR 1971 SC 1630 : 1971 Cr LJ 1188 : (1971) 1 SCC 523 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

B.—Commissions for the examination of witnesses

In civil cases, the Courts have power to issue commissions for examination of witnesses under sections 75 to 78 and O XXVI, rules 1-8, of the Civil Procedure Code. Sections 284-290 vest like powers in Magistrates and Criminal Courts.

The power to issue commissions in criminal cases is conferred on (1) any Court or (2) any Magistrate. It is confined only to those cases where the examination of a witness is necessary for the ends of justice, and an unreasonable amount of delay, expense or inconvenience would be caused in procuring his attendance. The witness on commission may be examined either on interrogatories or *viva voce* by the parties. The depositions so taken may be read in evidence by either party and shall form part of the record of the case. It is open to the Court or Magistrate to adjourn the trial or inquiry for the reception of such evidence.

The provisions of this Chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for re-issue of the commission together with his cross interrogatories.[41.]

[s 285] Commission to whom to be issued.—

(1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found.

(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification prescribe in this behalf.

This section provides for the issue of commission (1) when the witness is within the territories to which this Code extends; (2) when the witness is without such territory; and (3) when the witness is in a foreign country.

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

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[s 286] Execution of commissions.—

Upon receipt of the commission, the Chief Metropolitan Magistrate or Chief Judicial Magistrate, or such Metropolitan or Judicial Magistrate as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant-cases under this Code.

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

B.—Commissions for the examination of witnesses

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The provisions of this Chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for re-issue of the commission together with his cross interrogatories.[41.]

[s 287] Parties may examine witnesses.—

(1) The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, Court or officer to whom the commission is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate, Court or officer by pleader, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

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In civil cases, the Courts have power to issue commissions for examination of witnesses under sections 75 to 78 and O XXVI, rules 1-8, of the Civil Procedure Code. Sections 284-290 vest like powers in Magistrates and Criminal Courts.

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The provisions of this Chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for re-issue of the commission together with his cross interrogatories.[41.]

[s 288] Return of commission.—

(1) After any commission issued under section 284 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court or Magistrate issuing the commission; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of the Indian Evidence Act, 1872 (1 of 1872), may also be received in evidence at any subsequent stage of the case before another Court.

Depositions taken on commission in criminal cases may be admitted under section 33 of Indian Evidence Act, 1872 (I of 1872), if the requirements of the proviso to that section have been complied with.[56.]

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

56. *Queen-Empress v Ramchandra Govind Harshe*, (1895) 19 Bom 749.

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

B.—Commissions for the examination of witnesses

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[s 289] Adjournment of proceeding.—

In every case in which a commission is issued under section 284, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

This section empowers the Court issuing commission to adjourn the inquiry, trial or other proceedings for a specified time reasonably sufficient for execution and return of commission. Where, however, it is found after the issue of commission for examination of witnesses in a foreign country that reciprocal agreement with that country does not exist, the Court has the power to refuse extension of time.[57.]

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

57. *Ratilal Bhanji Mithani v State of Maharashtra*, AIR 1972 SC 1567 : 1972 Cr LJ 1055 : (1972) 3 SCC 793 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

B.—Commissions for the examination of witnesses

In civil cases, the Courts have power to issue commissions for examination of witnesses under sections 75 to 78 and O XXVI, rules 1-8, of the Civil Procedure Code. Sections 284-290 vest like powers in Magistrates and Criminal Courts.

The power to issue commissions in criminal cases is conferred on (1) any Court or (2) any Magistrate. It is confined only to those cases where the examination of a witness is necessary for the ends of justice, and an unreasonable amount of delay, expense or inconvenience would be caused in procuring his attendance. The witness on commission may be examined either on interrogatories or *viva voce* by the parties. The depositions so taken may be read in evidence by either party and shall form part of the record of the case. It is open to the Court or Magistrate to adjourn the trial or inquiry for the reception of such evidence.

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[s 290] Execution of foreign commissions.—

(1) The provisions of section 286 and so much of section 287 and section 288 as relate to the execution of a commission and its return shall apply in respect of commissions issued by any of the Courts, Judges or Magistrates hereinafter mentioned as they apply to commissions issued under section 284.

(2) The Courts, Judges and Magistrates referred to in sub-section (1) are—

(a) any such Court, Judge or Magistrate exercising jurisdiction within an area in India to which this Code does not extend, as the Central Government may, by notification, specify in this behalf;

(b) any Court, Judge or Magistrate exercising jurisdiction in any such country or place outside India, as the Central Government may, by notification, specify in this behalf, and having authority, under the law in force in that country or place, to issue commissions for the examination of witnesses in relation to criminal matters.

The Court passes an order for examination of witnesses in commission when the Court is satisfied not only about the necessity of such evidence but also about the effective enforceability of commission for examination of witnesses. When Court finds that there are no reciprocal arrangements in existence, it is not inclined to make any order.[58.]

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

58. *Ratilal Bhanji Mithani v State of Maharashtra,* AIR 1972 SC 1567 : (1972) 3 SCC 523 : 1972 Cr LJ 1055 , 1058 : (1972) 3 SCC 793 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

B.—Commissions for the examination of witnesses

In civil cases, the Courts have power to issue commissions for examination of witnesses under sections 75 to 78 and O XXVI, rules 1-8, of the Civil Procedure Code. Sections 284-290 vest like powers in Magistrates and Criminal Courts.

The power to issue commissions in criminal cases is conferred on (1) any Court or (2) any Magistrate. It is confined only to those cases where the examination of a witness is necessary for the ends of justice, and an unreasonable amount of delay, expense or inconvenience would be caused in procuring his attendance. The witness on commission may be examined either on interrogatories or *viva voce* by the parties. The depositions so taken may be read in evidence by either party and shall form part of the record of the case. It is open to the Court or Magistrate to adjourn the trial or inquiry for the reception of such evidence.

The provisions of this Chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for re-issue of the commission together with his cross interrogatories.[41.]

[s 291] Deposition of medical witness.—

(1) **The deposition of a civil surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under this Chapter, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.**

(2) **The Court may, if it thinks fit, and shall on the application of the prosecution or the accused, summon and examine any such deponent as to the subject-matter of his deposition.**

This section allows the examination of a Civil Surgeon taken and duly attested by a Magistrate, to be given in evidence in any inquiry, trial or other proceeding before a Court. It does not in any way preclude the Court from calling the Civil Surgeon and examining him. And this course ought to be pursued in every case in which the deposition taken is essentially deficient or requires further explanation or elucidation.

This section is intended to be confined to cases in which a medical witness is not called at the trial. It cannot be extended to cases where the medical witness is called and examined. Where, therefore, a doctor's evidence is recorded in the Sessions Court, his deposition before the committing Magistrate or the post-mortem examination report which formed part of that deposition cannot be legally admitted in evidence under this section at the Sessions trial.[59.]

A medical man, while giving evidence, may refresh his memory by referring to a report which he has made of his post-mortem examination, but the report itself cannot be

treated as evidence and no facts can be taken therefrom.[60.] But notes of post-mortem examination prepared by a medical officer are admissible in evidence where the same are duly proved by the testimony of the medical officer who has performed the examination and has recorded the same. The notes of post-mortem examination are not intended to be mechanically admitted on the record of a case. The medical officer must be called upon to give evidence on matters which have a bearing on the questions to be decided by the Court, and he must also be called upon to depose whether the record made by him in the notes of the post-mortem examination are true and if the medical officer deposes to the truth of the record made by him, the record itself may be treated as evidence.[61.] Where the doctor is dead or not available for examination in Court under circumstances mentioned in section 32 of the Indian Evidence Act, the injury report or post-mortem report is admissible and relevant.[62.]

[s 291.1] Scope.—

This section confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man.[63.] The evidence must relate to matters medical only.

[s 291.2] "Taken and attested...in the presence of the accused".—

This fact must either appear from the Magistrate's record or be proved by the evidence of witnesses. The presence of the accused is essential.[64.]

[s 291.3] Court may examine such deponent [*Sub-section (2)*].—

This sub-section gives a discretion to the Court to summon and examine a medical witness, if it thinks fit but makes it obligatory upon the Court to summon and examine such witness if the prosecution or the accused asks for such examination.

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

59. *Bharosey v Emperor*, (1946) 22 Luck 15 .

60. *Roghuni Singh v The Empress*, (1883) ILR 9 Cal 455; *Govind v State of Gujarat*, AIR 1967 Guj 288 : 1967 Cr LJ 1633 .

61. *Loku Basappa Pujari v State*, (1959) 61 Bom LR 1271 : AIR 1960 Bom 461 .

62. *Hadi Kirsani v State*, AIR 1966 Ori 21 : 1966 Cr LJ 45 .

63. *Waris Khan*, (1940) 15 Luck 429 .

64. *Jhubboo Mahton v Jhubboo Mahton*, (1882) ILR 8 Cal 739; *Kachali Hari v Queen-Empress*, (1891) ILR 18 Cal 129.

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B.—Commissions for the examination of witnesses

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[65.][[s 291A] Identification report of Magistrate—

(1) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:

***Provided* that where such report contains a statement of any suspect or witness to which the provisions of section 21, section 32, section 33, section 155 or section 157, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), apply, such statement shall not be used under this sub-section except in accordance with the provisions of those sections.**

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject-matter of the said report.]

[s 291A.1] CrPC (Amendment) Act, 2005 [*Clause (24)*].—

Under the existing provisions of the Code, an identification memo is required to be proved in the Court by examination of the Magistrate, who conducted the proceedings. These facts are generally not disputed. In order to save time of the Court, a new section 291A is being inserted with a view to making memorandum of identification prepared by the Magistrate admissible in evidence without formal proof of facts stated therein with a provision that the Court may, if it thinks fit, on the application of the prosecution

or of the accused summon and examine such Magistrate as to the subject matter contained in the memorandum of identification (*Notes on Clauses*).

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

65. New section 291A inserted by the CrPC. (Amendment) Act, 2005 (25 of 2005), s. 24, Enforced w.e.f. 23-6-2006 *vide* Notification. No. SO 923(E), dt. 21-6-2006.

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

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The provisions of this Chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for re-issue of the commission together with his cross interrogatories.[41.]

[s 292] Evidence of officers of the Mint.—

(1) Any document purporting to be a report under the hand of any such [66.][officer of any Mint or of any Note Printing Press or of any Security Printing Press (including the officer of the Controller of Stamps and Stationery) or of any Forensic Department or Division of Forensic Science Laboratory or any Government Examiner of Questioned Documents or any State Examiner of Questioned Documents, as the case may be,] as the Central Government may, by notification, specify in this behalf, upon any matter or thing duly submitted to him for examination and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.

(2) The Court may, if it thinks fit, summon and examine any such officer as to the subject-matter of his report:

***Provided* that no such officer shall be summoned to produce any records on which the report is based.**

(3) Without prejudice to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), no such officer shall, [67.][except with the permission of the General Manager or any officer in charge of any Mint or of any Note Printing Press or of any Security Printing Press or of any Forensic Department or any officer in charge of the Forensic Science Laboratory or of the Government Examiner of Questioned Documents Organization or of the State Examiner of Questioned Documents Organisation, as the case may be,] be permitted—

(a) to give any evidence derived from any unpublished official records on which the report is based; or

(b) to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

This section deals with admissibility and use of any document purporting to be a report of the officers of the Mint without the examination in Court of the officer concerned. The Court is, however, given discretion to summon and examine any such officer as to the subject-matter of his report, but the Court has no power to direct such officer to produce any records on which the report is based. He is also not bound to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing or to give any evidence derived from any unpublished official record on which the report is based except with the permission of the officers specified in sub-section (3).

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

66. Subs. by Act No. 2 of 2006, section 5(a), for "gazetted officer of the Mint or of the India Security Press (including the office of the Controller of Stamps and Stationery)" (w.e.f. 16-4-2006). Earlier section 292 was amended by Act 25 of 2005, section 25 and thereafter section 25 of Act 25 of 2005 was omitted by Act No. 2 of 2006, section 8 (w.e.f. 16-4-2006).

67. Subs. by Act No. 2 of 2006, section 5(b), for "except with the permission of the Master of the Mint, or the Indian Security Press or the Controller of Stamps and Stationery, as the case may be" (w.e.f. 16-4-2006).

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[s 293] Reports of certain Government Scientific experts.—

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceedings under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

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

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

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

[68.][(b) the Chief Controller of Explosives;]

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, [69.][Deputy Director or Assistant Director] of a Central

Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

[70]**[(g) any other Government Scientific Expert specified by notification by the Central Government for this purpose.]**

[s 293.1] CrPC (Amendment) Act, 2005 [*Clause (26)*].—

The designation "the Chief Inspector of Explosives" appearing in the Indian Explosives Act, 1884, has been changed to "the Chief Controller of Explosives" by the Indian Explosives (Amendment) Act, 1978. The opportunity has, therefore, been taken to make the consequential amendment to section 293 where the expression "the Chief Inspector of Explosives" occurs (*Notes on Clauses*).

COMMENT

This section makes provision for accepting in evidence reports made by certain Government Scientific Experts. It applies to the report of a "Chemical Examiner or Assistant Chemical Examiner". It does not extend to the report made by an Additional Chemical Examiner,[71.] or the Professor of Anatomy at the Government Medical College.[72.] A report made by a municipal analyst cannot be used as evidence unless the analyst is called as a witness in order to prove that the contents of the report are true.[73.] The Supreme Court had in a case under the Prevention of Food Adulteration Act, 1954, held that the accused had a right to call Public Analyst to be examined and cross-examined and the fact that the Certificate of Director of Central Laboratory supersedes a report of Public Analyst and is conclusive and final did not limit this right of the accused. If, however, the Court finds that such a prayer to examine the Public Analyst is made for the purpose of vexation and delay or for defeating the ends of justice the Court can reject such a prayer.[74.] Similarly, the Supreme Court has in regard to the report of Finger Prints Bureau held that as long as the report of the Director of the Finger Prints Bureau shows that his opinion is based on observations which lead to a conclusion that his opinion can be accepted, there is no necessity of examining the person making the report. But should there be any doubt it can always be decided by the calling of the person making the report.[75.] Failure to keep recovered blood-stained clothes in a sealed cover till its dispatch to the Chemical Analyst results in exclusion of the recovery from evidence.[76.]

In the absence of any request from the accused for summoning the Chemical Analyser and unless he shows that the report is deficient and needs personal elucidation, the trial Court can admit it in evidence and need not call the Analyser for examination.[77.]

The section applies only to certain experts like Chemical Examiner or Assistant Chemical Examiner to the Government, Chief Inspector of Explosives, Director of the Finger Print Bureau, Director, Dy. Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Laboratory and the Serologist to the Government besides Director of Haffkeine Institute, Bombay. The report of the handwriting expert even if it has been given by the expert working in the Forensic Science Laboratory would not be *per se* admissible under section 293 unless the maker of the said report is summoned and examined as a witness and the other side is given opportunity to cross-examine the witness.[78.]

Court has to exercise discretion, on the facts of each case, whether expert has to be examined.[79.]

Where report of a finger print expert is used as evidence against the accused, neither the Court feeling it necessary to examine him nor the prosecution or the accused filing any application to summon him, an objection cannot be taken at the appellate stage against non-examination of the expert.[80.]

The section uses the word "may" and not "shall". Cases may arise in which it may be necessary in the interests of justice that the Chemical Examiner be called and examined as a witness, e.g., in a matter of arsenic poisoning. It is not necessary to call the Chemical Examiner in all cases in which a chemical analysis has been made and in which the result of such analysis is a determining factor in the case.[81.]

Sub-section (4) enumerates the Government Scientific Experts whose reports fall under the present section. The opinion of an expert, Senior Scientific Assistant (Chemistry), Central Forensic Science Laboratory, would be a relevant piece of evidence in view of section 45 of Indian Evidence Act, although he does not fall in the categories of officers enumerated in section 293 of CrPC.[82.]

The expression "director" has been held to include "joint-director". A report signed by joint-director of the Forensic Science Laboratory was held to be admissible in evidence.[83.]

[s 293.2] Serologist's report.—

The report of a serologist was allowed to be used as evidence without the need for any formal proof.[84.]

Even if serologist did not enter the witness box, for that reason alone his report does not become inadmissible in evidence.[85.]

[s 293.3] Report of chemical examiner.—

Where the opinion of the doctor was based on the report of the chemical examiner and the same report being available in the record, it was held that such report could be used by the court in evidence.[86.]

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

68. Subs. by Act No. 25 of 2005, section 26(a), for clause (b) (w.e.f. 23-6-2006). Clause (b), before substitution, stood as under:

"(b) the Chief Inspector of Explosives;"

69. Ins. by Act No. 45 of 1978, section 21 (w.e.f. 18-12-1978).

70. Added by Act No. 25 of 2005, section 26(b) (w.e.f. 23-6-2006).

71. *Autul Muchi*, (1884) 10 Cal 1026 .

72. *Emperor v Ahilya*, (1922) 24 Bom LR 803 : 47 Bom 74.
73. *Emperor v Suleman Shamji*, (1943) 45 Bom LR 895 : AIR 1943 Bom 448 .
74. *Ram Dayal v Municipal Corp of Delhi*, AIR 1970 SC 366 : 1970 Cr LJ 515 : (1969) 3 SCC 35 .
75. *Himachal Pradesh Administration v Om Prakash*, AIR 1972 SC 975 : 1972 Cr LJ 606 : (1972) 1 SCC 249 .
76. *State of Maharashtra v Parbhu Barku Gade*, 1995 Cr LJ 1432 (Bom).
77. *Dasu v State of Maharashtra*, 1985 Cr LJ 1933 .
78. *Nirmal v State of Punjab*, 2002 Cr LJ 447 (P&H).
79. *State of Kerala v Arun Valenchary*, 2002 Cr LJ 2512 (Ker).
80. *Phool Kumar v Delhi Administration*, (1975) 1 SCC 797 : AIR 1975 SC 905 : 1975 Cr LJ 778 .
81. *Bachha*, (1934) 57 All 256 , disapproving *Happu v Emperor*, (1933) 56 All 228 : AIR 1933 All 837 ; *Emperor v Behram Irani*, (1944) 47 Bom LR 481 : AIR 1944 Bom 321 .
82. *Amarjit Singh v State*, 1995 Cr LJ 1623 (Del).
83. *Ammini v State of Kerala*, AIR 1998 SC 260 : 1998 Cr LJ 481 : (1998) 2 SCC 301 .
84. *Dhanajaya Reddy v State of Karnataka*, AIR 2001 SC 1512 : 2001 Cr LJ 1712 : (2001) 4 SCC 9 .
85. *Rajesh Rai v State of Sikkim*, 2002 Cr LJ 1385 (Sikkim—HC).
86. *State of AP v Gangula Staya Murthy*, AIR 1997 SC 1588 : 1997 Cr LJ 774 : (1997) 1 SCC 272 .

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[s 294] No formal proof of certain documents.—

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

***Provided* that the Court may, in its discretion, require such signature to be proved.**

The object in enacting this new section is to shorten the proceedings. It provides the mode or manner in which the documents relied upon by the prosecution and defence can be proved without any formal proof thereof. The proviso, however, gives discretion to the Court to call for the proof of the signature on the documents.[87.]

Where a person taking specimen fingerprints of the accused was not examined as a witness at the trial, but his affidavit was filed, it was held that his evidence on affidavit

was admissible as it was of a formal character.[88.]

Answering a reference, a Full Bench of the Rajasthan High Court held that the documents which were produced in the court, regarding whom no formal proof was required and they were admitted by the opposite party, as genuine, they could be read by the court as substantive piece of evidence.[89.] In a case under sections 304A/279 IPC, the post- mortem report was admitted in evidence without being proved and no opportunity was afforded to the accused to admit or deny its genuineness, the Kerala High Court held it inadmissible being violative of section 294 CrPC and set aside the conviction.[90.]

[s 294.1] Private documents Sub-section (3).—

This sub-section applies to private documents and not public documents, certified copies of order of civil courts, *Paharries* and FIR are public documents within the meaning of section 74 of the Evidence Act and, therefore, no formal proof thereof is necessary. They can be admitted in evidence by virtue of section 77 of the Evidence Act.[91.] Under sub-section (3), post-mortem report filed by prosecution under sub-section (1) may be read as substantive evidence of the testimony of the doctor who prepared or issued it, if genuineness is not disputed by the accused.[92.]

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .
87. *Virisingh v State of Uttar Pradesh*, 1992 Cr LJ 1383 (All).
88. *Shankaria v State of Rajasthan*, AIR 1978 SC 1399 : 1978 Cr LJ 1414 : (1978) 4 SCC 453 .
89. *Shabbir Mohammad v State of Rajasthan*, 1996 Cr LJ 2015 (Raj).
90. *PC Poulose v State of Kerala*, 1996 Cr LJ 203 (Ker).
91. *Md Akbar v State*, 2002 Cr LJ 3167 (AP).
92. *Boraiah v State*, 2003 Cr LJ 1031 (Kant—FB).

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[s 295] Affidavit in proof of conduct of public servants.—

When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servants, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

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[s 296] Evidence of formal character on affidavit.—

(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

The object of this section is to accelerate the disposal of cases. The provision is accordingly made for filing of an affidavit of a witness whose evidence is of a formal character. If, however, evidence of a person is not of a formal character, but goes to the very root of the matter, no resort can be made to the provisions of this section.[93.] Whether an evidence is of formal character or otherwise depends upon its nature in the context of the facts of the case.[94.]

The respondent was charge-sheeted by the police for the offence under section 9 of the Opium Act. He was found in possession of 4.5 kg of opium wrapped in glazed paper. The sample of the material was forwarded to the chemical examiner, who reported that it was opium. Two police personnel produced affidavits regarding the role played by them in forwarding the sample to the chemical examiner. The trial Magistrate found that the evidence of the prosecution was enough to convict him of the offence under section 9 of the Opium Act. The Sessions Court upheld the conviction and sentence passed by the trial court. The High Court in revision quashed the conviction

and sentence passed on the accused-respondent by rejecting the evidence of policemen tendered by means of affidavits. The prosecution appealed against the verdict of the High Court.

The Supreme Court set aside the judgment of the High Court and said: "Quite often different steps adopted by police officers during the investigation might relate to formalities prescribed by law. Evidence, if necessary, on those formalities, should normally be tendered by affidavits and not by examining all such policemen in court. If any party to a lis wishes to examine the deponent of the affidavit, it is open to him to make an application before the court that he requires the deponent to be examined or cross-examined in Court... When any such application is made, it is the duty of the court to call such person to the court for the purpose of being examined."

[s 296.1] Object and purpose of formal evidence.—

"The normal mode of giving evidence is by examining the witness in court. But that course quite often involves, loss of time to the witness, the trouble to reach the court and wait till he is called by the Court, besides all the strain in answering questions and cross-question in an open Court. It also involves costs, which on many occasions are not small. The enabling provision of section 296 is thus a departure from the usual mode of giving evidence. The object of providing such an exception is to help the court to save time and cost, besides relieving the witness of his troubles, when all that the witness has to say in court relates only to some formal points."[95.]

Such witness can only be subjected to cross-examination as to facts stated in his affidavit. It is not open to the accused to insist that before cross-examination he must first depose in examination in chief.[96.]

[s 296.2] Duty of Court to call formal witness.—

If any party to a case wishes to examine the deponent of the affidavit, it is open to him to make an application before the court that he requires the deponent to be examined or cross-examined in Court. When any such application is made, it is the duty of the Court to call such person to the Court for the purpose of being examined.[97.]

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

93. *Nirmaljit Singh Hoon v State of West Bengal*, AIR 1972 SC 2639 : 1973 Cr LJ (SC) 237 : (1973) 3 SCC 753 .

94. *State of Punjab v Naib Din*, (2001) 8 SCC 578 : 2002 SCC (Cri) 33 .

95. *State of Punjab v Naib Din*, (2001) 8 SCC 578 : 2002 SCC (Cri) 33 .

96. *Mandvi Co-op Bank Ltd v Nimesh B Thakore*, AIR 2010 SC 1402 : (2010) 3 SCC 83 .

97. *State of Punjab v Naib Din*, (2001) 8 SCC 578 : 2002 SCC (Cri) 33 .

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CHAPTER XXIII EVIDENCE IN INQUIRIES AND TRIALS

B.—Commissions for the examination of witnesses

In civil cases, the Courts have power to issue commissions for examination of witnesses under sections 75 to 78 and O XXVI, rules 1-8, of the Civil Procedure Code. Sections 284-290 vest like powers in Magistrates and Criminal Courts.

The power to issue commissions in criminal cases is conferred on (1) any Court or (2) any Magistrate. It is confined only to those cases where the examination of a witness is necessary for the ends of justice, and an unreasonable amount of delay, expense or inconvenience would be caused in procuring his attendance. The witness on commission may be examined either on interrogatories or *viva voce* by the parties. The depositions so taken may be read in evidence by either party and shall form part of the record of the case. It is open to the Court or Magistrate to adjourn the trial or inquiry for the reception of such evidence.

The provisions of this Chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for re-issue of the commission together with his cross interrogatories.[41.]

[s 297] Authorities before whom affidavits may be sworn.—

(1) Affidavits to be used before any Court under this Code may be sworn or affirmed before—

[98.] **[(a) any Judge or any Judicial or Executive Magistrate, or]**

(b) any Commissioner of Oaths appointed by a High Court or Court of Session, or

(c) any notary appointed under the Notaries Act, 1952 (53 of 1952).

(2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.

(3) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended.

[s 297.1] Oath on affidavit by whom to be administered.—

An Oath Commissioner, *ipso facto*, has no authority to administer oath and receive a solemn affirmation in respect of the High Court. The Oath Commissioner has to be appointed for the said purpose as per CrPC by the High Court or Sessions Court.[99.]

[s 297.2] Recovery affidavit [*Sub-section (2)*].—

The person who effected the recovery has to verify the fact in an affidavit which has to state separately the facts which the deponent can prove from his own knowledge and such facts as he has a reasonable ground to believe to be true. The deponent has clearly to state the grounds of such belief. The affidavit becomes a link evidence. In a case of recovery of poppy husk, the recovery constable prepared three affidavits. But the verification in the affidavits was not in terms of the requirement of sub-section (2), namely facts of personal knowledge and facts believed to be true were not separately stated. The affidavits being defective, they were not admitted in evidence. Minus these affidavits, it could not be said that the sample sent for analysis was the same which was tested by the Chemical Examiner. There being no link evidence, the accused was entitled to the benefit of doubt. His conviction was set aside.[100.]

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41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

98. Subs. by Act No. 45 of 1978, section 22, for clause (a) (w.e.f. 18-12-1978)..

99. *Manju v Ghanshyam*, AIR 2008 M.P. 168 : (2008) 1 MPHT 54 (DB).

100. *Santokh Singh v State of Punjab*, 2003 Cr LJ 2925 (P&H).

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[s 298] Previous Conviction or Acquittal how proved.—

In any inquiry, trial or other proceeding under this Code a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,—

- **(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or**
- **(b) in case of a conviction either by a certificate signed by the officer-in-charge of the jail in which the punishment or any part thereof was undergone or by production of the warrant of commitment under which the punishment was suffered,**

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

This section provides a special mode in which a previous acquittal or a previous conviction may be proved. A previous acquittal can be proved by an extract from the Court record or by a certificate from the jailor, or by warrant of commitment. The previous convictions must be proved strictly and in accordance with law, and unless so proved, no Court can take them into consideration.[101.] The examination of the accused by a Magistrate in respect of those convictions is inadmissible.[102.] In each case, the identity of the accused should be proved, e.g., by finger impression.[103.]

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

101. *Emperor v Sheikh Abdul*, (1916) 43 Cal 1128 .

102. *Yasin v King-Emperor*, (1901) 28 Cal 689 , 693.

103. *King-Emperor v Abdul Hamid*, (1905) 32 Cal 759 .

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[s 299] Record of evidence in absence of accused.—

(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try [104.][or commit for trial], such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

[s 299.1] State Amendment

Uttar Pradesh.—*The following amendments were made by U.P. Act 16 of 1976, section 7 (w.e.f. 1-5-1976)*.

S 299.—In its application to the State of Uttar Pradesh, in section 299, in sub-section (1), for the words "competent to try such person" substitute the

words "competent to try such person or to commit him for trial".

This section deals with recording of evidence, (1) where the accused is absent and there is no immediate prospect of his arrest, and (2) where the offender is unknown. In the first case, the Court can record depositions of prosecution witnesses.

These can be offered at the trial in three cases: (1) if the witness is dead; (2) if he is incapable of giving evidence; or (3) if his attendance would cause unreasonable delay, expense or inconvenience. Secondly, where the offender is unknown and the offence committed is punishable with death or imprisonment for life, the High Court or the Sessions Judge may direct a first-class Magistrate to record prosecution evidence. Depositions so recorded may be used at the trial (1) if the witness is dead, or (2) is incapable of giving evidence, or (3) is beyond the limits of India.[105.]

It is clear from the language of the section that the Court which records the proceedings under it must first record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of his arrest.[106.] Where no such order is recorded, it is enough if the Court is satisfied as to the requirements.[107.] The Court is then bound to proceed under the section.[108.]

Where of two persons accused of murder the principal offender absconds and pardon is tendered to the other, the evidence of the latter may be recorded under this section.

"Absconding" does not necessarily mean absconding from one's residence. Where a person having committed an offence in a particular country leaves it, he must be said to "abscond" so far that country and its laws are concerned.[109.]

41. *D'Imbrain v Someshwar Chaudhury*, (1934) 61 Cal 824 .

104. Ins. by Act 45 of 1978, section 23 (w.e.f. 18-12-1978).

105. *Nirmal Singh v State of Haryana,* AIR 2000 SC 1416 : 2000 Cr LJ 1803 : (2000) 4 SCC 41 , where the Supreme Court analysed the provisions of the section.

106. *Emperor v Rustam*, (1915) 38 All 29 , 31; *Ghurbin Bind v Queen Empress*, (1884) ILR 10 Cal 1097; *Queen-Empress v Ishri Singh*, (1886) ILR 8 All 672; *Daya Ram*, (1925) 6 Lah 489; *Monbodh*, (1944) Nag 511.

107. *Bhagwati v Emperor*, (1918) 41 All 60 ; *Daya Ram, supra*.

108. *Wasudev*, (1900) 2 Bom LR 707 .

109. *Umrao Khan*, (1957) Raj 560 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 300] Person once convicted or acquitted not to be tried for same offence.—

(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub-section (1) of section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code.

***Explanation*.—The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.**

Illustrations

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(c) A is charged before the Court of Session and convicted of the culpable

homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(d) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within sub-section (3) of this section.

(e) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may subsequently be charged with, and tried for, robbery on the same facts.

(f) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with and tried for, dacoity on the same facts.

[s 300.1] Autrefois Acquit or Autrefois Convict.—

This section lays down that a person once convicted or acquitted cannot be tried for the same offence. It is based on the maxim *nemo debetbis vexari*, which means that a person cannot be tried a second time for an offence which is involved in the offence with which he was previously charged. In order to bar the trial of any person already tried, it must be shown (1) that he has been tried by a competent Court for the same offence or one for which he might have been charged or convicted at that trial, on the same facts, (2) that he has been convicted or acquitted at the trial, and (3) that such conviction or acquittal is in force.[1.]

The whole basis of this section is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal. If the Court was not so competent, it is irrelevant that it would have been competent to try other cases of the same class or indeed the case against the particular accused in different circumstances, eg, if a sanction had been obtained.[2.] Where the conviction of a person and the sentence passed on him are set aside on the ground of want of proper sanction, it cannot be said that there was a proper trial at all and the result of the decision cannot operate under this section as a bar to a fresh trial after receipt of a fresh sanction.[3.]

The provisions of the Code upon the question of previous acquittal are different from the principles underlying the English doctrine of *autrefois acquit* in this that the Code makes a clear distinction between "discharge" and "acquittal." The rule of English law, requiring the accused to have been tried as well as acquitted in order to bar further proceedings and embodied in this section, is inapplicable to statutory acquittals under sections 321, 256 and 320.

Under Article 20(2) of the Constitution of India, no person shall be prosecuted and punished for the same offence more than once.

[s 300.2] Issue estoppel and double jeopardy-distinction.—

Issue estoppel only prevents the acceptance of evidence which may disturb the finding already recorded. It does not, like the principle of double jeopardy, prevent the trial of any offence. Issue estoppel is a facet of the doctrine of *autrefois acquit*.[4.]

[s 300.3] Protection against double jeopardy [*Sub-section (1)*].—

This sub-section operates in cases covered by section 221(1) and (2) and not in cases covered by section 220(1). Hence, where the accused are charged with and convicted of the offence of conspiracy [section 120B, Indian Penal Code (IPC)] they can again be charged with and convicted of the separate offences of cheating (section 420, IPC) committed by them in pursuance of that conspiracy, under this sub-section.[5.]

[s 300.4] Prosecution under Negotiable Instruments Act.—

Where the accused had already been convicted under section 138 Negotiable Instruments (NI) Act, it was held that he could not be again tried or punished on the same facts under section 420 or any other provision of the IPC or any other statute. Section 300(1) CrPC is wider than Article 20(2) of the Constitution. It bars prosecution on the same facts for any other offence also.[6.]

For the applicability of the principle of double jeopardy, the earlier and the latter offence for which the accused is tried must be same. The test to determine whether both offences are the same is not the identity of allegations but identity of ingredients of the offences. Thus, where a person is tried for the offence of dishonour of cheque, he can be again tried for offences of criminal breach of trust, cheating and abetment. Since the ingredients of the offences are not the same, the doctrine of double jeopardy does not apply.[7.]

[s 300.5] "Tried".—

There must be a trial of the accused, i.e., hearing and determination on the merits. In a summons-case, the accused is said to be "tried" when he appears and answers to the intimation under section 251, which takes the place of a formal charge. In a case triable exclusively by a Court of Session, the trial commences after a charge is framed under section 228. There is no trial before the charge is framed but an inquiry only.

Once a summons has been issued to the accused and section 256 has come into operation, the accused must be deemed to have been tried within the meaning of this section, though the summons may not have been served and the accused may not have appeared.[8.] The words "who has once been tried" mean against whom proceedings have been commenced in Court, i.e., against whom the Court has taken cognizance of the offence and issued process.[9.] Where on a police report, the Magistrate had passed order that the accused be discharged, and on reinvestigation, the police can file a fresh charge-sheet against the accused on the same facts, section 300 did not bar such proceedings.[10.] When there was divergence of opinions regarding analysis of sample of food items and the report of the Director of Central Food Laboratory superseded the report of the Public Analyst and the Magistrate dropped the proceedings till the complainant chose to file a fresh complaint on the basis of the report of the Director, it was held that the dropping of the proceedings would not amount to final decision of the case and the filing of a second complaint incorporating the particulars of the report of the Director, Central Food Laboratory, was not barred.[11.]

If there is a gross irregularity or illegality in a trial, such trial will not bar a retrial.

[s 300.6] "Court of competent jurisdiction".—

The acquittal or conviction, in order to be an actual defence to the charge, must be by a Court of competent jurisdiction.[12.] If the Court which held the first trial was not competent to try the charge put forward at the second trial, this section would have no application.[13.] A trial by a Court not having jurisdiction is void *ab initio*, and the accused, if acquitted, is liable to be re-tried.[14.] Where a case under sections 161/116 of the Penal Code was distributed to the Special Judge and section 165A was not included in the schedule at the time, the Judge took cognizance of the case but subsequently the charge and conviction was under section 165A, it was held that the section applied to the Magistrates and not to a Special Judge whose jurisdiction arose not on his taking cognizance under section 190 of the Code but only on the case for an offence specified in the schedule being distributed to him by the State Government by a notification. Such a defect of jurisdiction, therefore, could not be cured. The Special Judge was consequently not a Court of competent jurisdiction and the proceedings before him were null and ineffectual.[15.] Jurisdiction is legal authority to determine the case on the merits. Where the Court has no jurisdiction over the subject-matter, it is not competent to try [see illustrations (e) and (f)].

[s 300.7] "For an offence".—

The act or omission against which proceedings are taken must amount to an offence. A person against whom security proceedings are taken under section 107 cannot be said to have committed an offence. Security proceedings do not come within the purview of this section.[16.] A dismissal in default of an application for maintenance under sections 125 and 126 of the Code does not amount to an acquittal of an offence, and a second application on the same facts is, therefore, maintainable and not barred by this section.[17.]

Where the accused was convicted and sentenced with imprisonment and fine, it was held that the suit filed by the widow of the deceased for damages is not hit by the principle of double jeopardy contained in section 300 or Article 20(2) of the Constitution, simply because a civil action for damages is not prosecution and a decree for damages is not punishment.[18.]

[s 300.8] "Convicted or acquitted".—

Second trial is barred when the accused is convicted or acquitted, ie, the cause must have been heard and determined. There is a distinction between "acquittal" and "discharge." Discharge of the accused does not amount to an acquittal. A person is said to be discharged when he is relieved from legal proceedings by an order which does not amount to judgment which is the final order in a trial terminating in either conviction or acquittal of the accused. An order of discharge is not a judgment. Discharge may take place either after the preliminary inquiry or during a trial before a Magistrate before the accused has been called upon to plead. When there is no *prima facie* case against the accused and he has not been put on his defence, nor any charge drawn up against him to which he could plead, he should be discharged and not "acquitted." A man who in law is only "discharged" may again be charged with the same offence if other testimony should be discovered; but a man who has been "acquitted" can never be put on his trial again for the offence of which he has been acquitted. A discharge leaves the matter at large for all purposes of judicial inquiry, and there is nothing to prevent the Magistrate discharging the accused, from inquiring again into

the case.[19.] When the Special Judge discharged the accused for the reason that there was no proper sanction and that he had no jurisdiction to take cognizance of the offence and therefore the entire prosecution proceedings were void *ab initio*, it could not be construed as acquittal. Hence, second trial was held not barred.[20.]

There is no provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed.[21.] The Calcutta High Court has held in a Full Bench case that a Presidency Magistrate (now Metropolitan Magistrate) is competent to rehear a warrant-case in which he has discharged the accused.[22.] Subsequently, in another Full Bench case, it has laid down that in a warrant-case a Magistrate who has discharged the accused is competent, without an order being passed under section 399 setting aside the order of discharge, to take fresh proceedings against the accused in respect of the same offence.[23.]

A wrong order of acquittal will not bar a subsequent trial. But, if a person, who ought to have been acquitted, is erroneously ordered to be discharged only, the order of discharge will be treated as one of acquittal and will bar a retrial.

However, when a Magistrate acquitted the accused in a private complaint for the absence of the complainant and no steps were taken by the complainant to set aside the acquittal, a fresh complaint on the same facts was held to be barred by section 300.[24.] Where the accused had appealed against conviction and the appellate Court ordered re-trial, framing of fresh charges and trial could only be for that offences for which he had been convicted and not for those for which he had been acquitted.[25.]

[s 300.9] "While such conviction or acquittal remains in force".—

That is, so long as the judgment or order has not been set aside by a Court of appeal or revision. If it is set aside, the accused can again be put on his trial, because the previous trial is annulled thereby.

[s 300.10] "Shall...not be liable to be tried again for the same offence".—

The first conviction or acquittal is a bar to a second trial if the offence is the same. If the offence be different and based on different facts, though based on the same evidence, the previous trial does not bar a second trial. "Same offence" means not the same *eo nomine* but the same criminal act or omission.

It was held that the explanation to section 300 clearly mandates that the dismissal of a complaint, or the discharge of an accused, would not be construed as an acquittal. The Respondent had been discharged in furtherance of the previous complaint made by the appellant in respect of the offence under section 376 of IPC, without any trial having been conducted against him. Hence, the proceedings in the second complaint were not barred.[26.]

[s 300.11] "Nor on the same facts for any other offence".—

This is a very important limitation. The offence must be the same or some other for which a separate charge might have been made at the first trial on the same facts. If a

charge might have been made for another offence in the first trial, the accused cannot be tried again for such offence. The protection afforded by this section extends to different offences only when they are based on the same facts and fall within the provisions of section 221(1) or section 221(2).[27.] The finality of the finding of fact at an earlier stage to be binding and conclusive in subsequent stage in the same case would depend on the question as to what the allegations were, what facts were required to be proved and what findings were arrived at.[28.]

If in respect of an occurrence a person has already been charged and acquitted of the offence of mischief under section 426 of the IPC, then he cannot be subsequently tried in respect of the same occurrence for the offence of mischief under section 427 of the IPC by artificially raising the value of the damage to Rs 50 or upwards caused by the alleged mischief.[29.]

[s 300.12] Trial on separate charge [*Sub-section (2)*].—

Where the charge on the second trial is for a distinct offence, the trial is not barred. See section 220 of this Code and section 71 of the IPC.[30.] A conviction for affray (section 160, Penal Code) on a prosecution initiated by the police was held no bar to a subsequent trial for causing hurt (section 323, Indian Penal Code) on a complaint laid by the party injured.[31.] When the previous case was tried, the prosecution did not know of other offences committed even though they were committed along with those for which the accused was tried. Therefore, he could not be charged of conspiracy. Subsequently, he could be charged of such an offence and such trial would not be barred by section 300.[32.]

Prior consent of the State Government is required to be taken before a new prosecution is launched on the basis of this provision, so that the accused is not proceeded against for the second time as a matter of course. This acts as a safeguard against abuse of power under the sub-section. The provision applies where a second charge-sheet has been filed after acquittal of the applicant with the consent of the State Government for a distinct offence in which the separate charge might have been made against him at the formal trial under section 220(1).[33.]

[s 300.13] Rule of issue estoppel.—

This rule in a criminal trial is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted under this sub-section. The rule is not the same as the plea of double jeopardy or *autrefois acquit* which latter prevents the trial of any offence. The rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court at a previous trial.[34.] Where a writ petition was earlier filed following confiscation of gold under sections 71 and 74 of the Gold (Control) Act, 1968, the decision in the writ petition would not operate as issue estoppel in subsequent criminal prosecution under section 85(1)(ii) of the Gold (Control) Act, 1968, for possession of undeclared primary gold.[35.] The High Court had disposed of a revision petition on merits, in a case in which the State was also a party. Subsequently, the State filed another revision against the same order and the High Court again passed an order on merits. The orders in the

subsequent petition were set aside under section 482 of CrPC. It was held that the rule of issue estoppel would apply in such a case. It is a settled law that a verdict given by a Competent Court is binding and conclusive in all subsequent proceedings.[36.] A criminal complaint was filed against the accused for manufacturing fire-arms without licence. In an earlier writ petition, the same allegation of manufacturing fire-arms could not be established. The Karnataka High Court held that the subsequent criminal case of identical nature and against the same accused under the Arms Act was barred by issue estoppel.[37.]

A Dentist was prosecuted for extracting the healthy tooth instead of the decayed tooth of the complainant, but the accused was already exonerated of the charge by the Civil Court as he was found not responsible for the extraction of the healthy tooth, the Madras High Court held that the very same person could not be put on trial under section 338 of IPC as the finding of the Civil Court was binding on the Criminal Court.[38.] Where originally the terms of imprisonment under various provisions in several cases were specifically ordered by the High Court to run consecutively, but subsequently the sentences were directed to run concurrently without any reference to the earlier order, the Kerala High Court held that rule of "Issue estoppel" would not apply as the subsequent order was "*non-est*" being passed "*per incuriam*".[39.] Where the complaint was dismissed for non-prosecution and the accused was discharged, it was held that the second complaint was not barred but it would be subject to limitations.[40.]

A complaint was filed under section 20 of NDPS Act by an Excise Inspector, who was legally not authorised to file the complaint, the complaint was dismissed, and the accused was discharged. On the same facts, the second complaint was filed by the competent person against the same accused in the proper Court, it was held that there was no violation of section 300(1) of CrPC.[41.]

In a complaint case under sections 363/342 of IPC, the Magistrate summoned the accused only under section 342 of IPC although he found that *prima facie* case was made out against the accused and subsequently, the accused were acquitted under section 256 of CrPC on the death of the complainant. The brother of the complainant then filed a second complaint which was dismissed as barred by section 300 of CrPC. The Allahabad High Court held that the Magistrate did not act judicially in passing the order of acquittal when the kidnapped boy was the other aggrieved person to whom great injustice was done and as such acquittal under section 256 of CrPC does not allow section 300 of CrPC to operate and to cause hindrance in filing a second complaint because the first complaint was not concluded on merits.[42.]

[s 300.14] Subsequent trial for further consequences [*Sub-section (3)*].—

The effect of this sub-section is illustrated by illustrations (b) and (d) to the section. The facts or circumstances must be such as to indicate a different kind of offence of which there could be no conviction at the first trial. The new evidence must constitute a different kind of offence for which the accused could not have been tried at the first trial. The new facts or consequences must have occurred since the conviction or acquittal at the first trial. For, if the new facts or consequences were known to the Court at the time of the first trial, a second trial for an offence constituted by the new facts would be barred. A and B were charged for causing simple hurt (section 323, Indian Penal Code) to C. The case was compounded, and both the accused persons were acquitted. Subsequently, C died of the injury inflicted by A and B. It was held that A and B could be tried for culpable homicide (section 304, Indian Penal Code).[43.]

[s 300.15] Trial before incompetent Court [*Sub-section (4)*].—

Illustrations (e) and (f) illustrate the significance of this sub-section. In illustration (e), the offence of robbery is not triable by a Magistrate of the second class. It is triable only by a Magistrate of the first class. In illustration (f), the offence of dacoity is not triable by a Magistrate of the first class; it is triable only by a Court of Session.

[s 300.16] Position of discharged accused [*Sub-section (5)*].—

Prior approval of the Court which discharged the person or of its superior Court acts as a safeguard against misuse of power by the prosecuting authorities.

[s 300.17] Sub-section (6).—"Section 26 of the General Clauses Act".—

This section provides "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence." An illegal conviction under another Act is no bar to a prosecution under the Penal Code.

[s 300.18] Dismissal of complaint, discharge of accused [*Explanation*].—

The cases referred to in the Explanation are all cases where there was no trial determining the matter. None of the orders here specified can be regarded as constituting an acquittal in a trial.

[s 300.19] Trial without sanction.—

The earlier prosecution was without valid sanction. The trial Court was not bound to record a judgment of conviction or acquittal. The Court said that even if the same was recorded, it could be said to have been rendered illegally and without jurisdiction. A subsequent trial with proper sanction was not barred. Hence, the order of the High Court quashing the fresh charge-sheet on the ground that no fresh trial was permissible was liable to be set aside with direction to dispose of the matter expeditiously.[44.]

As to discharge in summons-cases, see section 258; in warrant-cases, see section 245.

[s 300.20] Acquittal on withdrawal.—

The acquittal of an accused on allowing withdrawal of complaint operates as an acquittal.[45.]

[s 300.21] Departmental adjudication.—

A decision in a criminal proceeding is not binding on departmental proceedings since the sections and the charges in the departmental adjudication are entirely different to the ones levelled before the Criminal Court.[46.]

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1. *Govt of Bombay v Abdul Wahab*, (1945) 47 Bom LR 998 : (1946) Bom 258 FB; *Mohammad Safi v The State of West Bengal*, AIR 1966 SC 69 : 1966 Cr LJ 75 ; *Kharkan v The State of UP*, AIR 1965 SC 83 : (1965) 1 Cr LJ 116 ; *Assistant Commr, Customs v LR Melwani*, (1968) 72 Bom LR 782 .
2. *Yusofalli Noorbhoy v The King*, (1950) 52 Bom LR 1 : 76 IA 158 : AIR 1949 PC 264 .
3. *M Gopalakrishna Naidu v The State*, (1952) ILR Nag 52; *Baij Nath Prasad v State of Bhopal*, AIR 1957 SC 494 : 1957 Cr LJ 594 : 1957 SCR 650 .
4. *Sangeetaben Mahendrabhai Patel v State of Gujarat*, AIR 2012 SC 2844 : (2012) 7 SCC 621 : (2012) 3 SCC (Cri) 445 .
5. *Re Ochhavlal Bhikhabhai*, (1933) 35 Bom LR 985 : AIR 1933 Bom 447 .
6. *Kolla Veera Raghav Rao v Gorantla Venkateswara Rao*, AIR 2011 SC 641 : (2011) 2 SCC 703 .
7. *Sangeetaben Mahendrabhai Patel v State of Gujarat*, AIR 2012 SC 2844 : (2012) 7 SCC 621 : (2012) 3 SCC (Cri) 445 .
8. *Bhoopatibhushan Mukherji v Amiyabhooshan Mukherji*, (1935) 62 Cal 1119 .
9. *Re Dudekula Lal Sahib*, (1917) ILR 40 Mad 976 : (1917) 33 Mad LJ 121 : AIR 1918 Mad 231 . **See** *Kotayya v Venkayya*, (1917) 40 Mad 977.
10. *Namasivayam v State of Madras*, 1982 Cr LJ 707 .
11. *Sadhu Ram v State of Haryana*, 1990 Cr LJ 2662 (P&H).
12. *Re Samsudin*, (1896) 22 Bom 711; *Abdul Ghani v Emperor*, (1902) 29 Cal 412 : AIR 1939 Cal 65 .
13. *Purnananda Das Gupta v Emperor*, (1939) 1 Cal 1 (SB).
14. *Emperor v Jivram Dankarji*, ILR (1916) 40 Bom 97 : 17 Bom LR 881; *Emperor v Ambaji*, (1928) 30 Bom LR 380 : 52 Bom 257 : AIR 1928 Bom 143 ; *Shankar Tulshiram v Kundlik Anyaba*, (1928) 30 Bom LR 1435 : 53 Bom 69 : AIR 1928 Bom 530 .
15. *Bhajahari Mondal v State of West Bengal*, AIR 1959 SC 8 : 1959 Cr LJ 98 .
16. *Re Muthia Moopan*, (1913) ILR 36 Mad 315; *Queen-Empress v Imam Mondal*, (1900) 27 Cal 662 ; *Bhagwat Singh v Emperor*, (1926) ILR 48 All 501 : AIR 1926 All 403 .
17. *AW Khan v Zaitun Bi*, (1950) ILR Nag 222; *Rangomoyee v Sudhirkumar*, AIR 1965 Tri 29 ; *Nafees v Asif*, AIR 1963 All 143 : 1963 Cr LJ 394 .
18. *Suba Singh v Davinder Kaur*, AIR 2011 SC 3163 : (2011) 13 SCC 296 .
19. *Emperor v Amanat Kadar*, (1928) 31 Bom LR 146 : AIR 1929 Bom 134 ; *Emperor v Chinna Kaliappa Gounden*, (1906) 29 Mad 126 FB; *Ram Bharose v Baban*, (1914) 36 All 129 ; *Rama Sharma v Pinki Sharma*, 1989 Cr LJ 2153 (Pat).
20. *K Thankappan v UOI*, 1989 Cr LJ 2374 (Ker).
21. *Queen-Empbess v Dolegobind Dass*, (1901) ILR 28 Cal 211.
22. *Dwarka Nath Mondul v Beni Madhab Banerji*, (1901) 28 Cal 652 FB.
23. *Mir Ahwad Hossein v Mahomed Askari*, (1902) 29 Cal 726 (FB) : (1901) ILR 29 Cal 726.

24. *Rabindra Dhal v Jairam Sethi* 1982 Cr LJ 2144 (Ori); *Suchana Roy v Paresh Kr Roy*, 1978 Cr LJ 555 (Cal).
25. *State of Maharashtra v Shriram*, 1980 Cr LJ 13 (Bom).
26. *Ravinder Kaur v Anil Kumar*, (2015) 8 SCC 286 : AIR 2015 SC 2447 : 2015 Cr LJ 2839 : 2015 (5) Scale 417 .
27. *Queen Empress v Subedar Krishnappa*, (1899) 1 Bom LR 15 .
28. *Amrittal Mehta v State of Gujarat*, AIR 1980 SC 301 : (1980) 2 SCR 72 : 1980 Cr LJ 214 : (1980) 1 SCC 121 .
29. *ANM Ashraf v Surendra Nath Sen*, (1945) 1 Cal 494 .
30. *Emperor v Dagdi Dagdya*, (1928) 30 Bom LR 342 : AIR 1949 Cal 252 .
31. *Emperor v Ram Sukh*, (1925) ILR 47 All 284 : AIR 1928 Bom 177 .
32. *IM Sharma v State of AP*, 1978 Cr LJ 392 (AP).
33. *Munnalal Verma v State of MP*, 2002 Cr LJ 2602 (MP).
34. *Manipur Administration v Bira Singh*, AIR 1965 SC 87 : (1965) 1 Cr LJ 120 ; *Piara Singh v State of Punjab*, AIR 1969 SC 961 : 1969 Cr LJ 1435 ; *State of Andhra Pradesh v Kokkiligade, Meeraiah*, AIR 1970 SC 771 : 1970 Cr LJ 759 ; *Harkori v State of Rajasthan*, AIR 1998 SC 1491 : 1998 Cr LJ 847 , issue estoppel, conviction was based on evidence of two witnesses, of the three convicts two were granted leave to appeal. The Supreme Court said that in the appeal by the third convict the evidence of the two witnesses could not be regarded as unbelievable. *Shankar Mahto v State of Bihar*, 2002 Cr LJ 3775 (SC): AIR 2002 SC 2857 : JT 2002 (5) SC 512 : 2002 (5) Scale 382 : (2002) 6 SCC 43 , the Supreme Court not to go into merits of conviction in other cases. *Jatinder Singh v Ranjit Kaur*, AIR 2001 SC 784 : 2001 Cr LJ 1015 , second complaint on same allegations maintainable if the first complaint did not result in conviction. Dismissal of the first complaint was because of default and not on merits.
35. *GN Deshpande v Ishwaribai U Ahuja*, 1992 Cr LJ 2665 (Bom).
36. *Ram Adhar v State of MP*, 1992 Cr LJ 3196 (MP).
37. *State of Karnataka v G Lakshman*, 1993 Cr LJ 2331 (Knt).
38. *Veerabagu (Dr.) v Devraj*, 1995 Cr LJ 3148 (Mad).
39. *Chellappan v State of Kerala*, 1975 Cr LJ 150 (Ker).
40. *AH Pathan v Amin Textiles*, 1995 Cr LJ 1843 (Guj), as laid down in AIR 1962 SC 876 : 1962 Cr LJ 770 .
41. *Abdul Rahman Asnarukunju v State of Kerala*, 1995 Cr LJ 2192 (Ker).
42. *Harendra v Nepal Singh*, 1996 Cr LJ 91 (All).
43. *Emperor v Sailani*, (1914) ILR 36 All 4.
44. *State of Karnataka, (through CBI) v C Nagarajaswamy*, AIR 2005 SC 4308 : (2005) 8 SCC 370 : 2005 Cr LJ 4534 .
45. *Keciyo Coconut Oils Pvt Ltd v State of Kerala*, 2002 Cr LJ 1087 (Ker).
46. *Basha v State of Karnataka*, 2003 Cr LJ 988 (Kant).

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 301] Appearance by Public Prosecutors.—

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

[s 301.1] State Amendment

West Bengal.—Following Amendments made by West Bengal Act 26 of 1990, section 4 (w.e.f. 1-9-1991).

For sub-section (1) of section 301 the following sub-section shall be *substituted*:—

"(1) (*a*) The Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal,

(*b*) The Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry or trial."

The Legislature has expressly referred to the Assistant Public Prosecutor besides the Public Prosecutor because a new office of Assistant Public Prosecutor is created by the Code for Courts of Magistrates by virtue of section 25 of this Code. If a private person instructs counsel or pleader, he can only appear subject to the specific provisions which reserve to the Public Prosecutor or Assistant Public Prosecutor the management of the case. The Public Prosecutor or the Assistant Public Prosecutor may avail himself of the assistance of counsel retained by a private individual. In so availing himself of the counsel's services, the Public Prosecutor or the Assistant Public Prosecutor by no means deprives himself of the management of the case. The two may work in harmony; if they do not, the counsel may retire, or the Public Prosecutor or the Assistant Public Prosecutor may claim to keep the further conduct of the case solely to himself.[47.] But, the counsel so appointed by a private party can, with the permission of the Court, submit written arguments after the evidence is closed in the case. When section 301(2) specifically says that the lawyer engaged by the private person can submit written arguments, it was held that there was no scope for going behind the letters of the law to hold that such a lawyer could address the Court orally also.[48.] In *K Anbazhagan v State of Karnataka,*[49.] it was held that the Supreme Court

cannot permit filing of written submissions under section 301(2) as no such plea was taken before the High Court. However, a larger bench in *K Anbazhagan v State of Karnataka*[50.] permitted so, where the Advocate-General is called upon to appear in any case of importance, the Public Prosecutor or the Assistant Public Prosecutor cannot be considered as separately representing the State while the Advocate-General is a mere *amicus curiae*.[51.]

The three-Judge Bench in *K Anbazhagan v State of Karnataka*[52.] held that sections 2(u), 24, 25, 25A and 301 have to be appreciated in a schematic context. All the provisions are to be read and understood as one singular scheme. They cannot be read bereft of their text and context. If they are read as parts of different schemes, there Page 34 is bound to be anomaly. Such an interpretation is to be avoided, and the careful reading of the CrPC, in reality, avoids the same.

This section is applicable to all Courts of criminal jurisdiction, but section 302. Section 301 applies to the trials before the Magistrate as well as Court of Session. [53.]

In a bride-burning case, the father-in-law of the deceased was tried for the offence under section 304B of IPC. The brother of the deceased woman engaged a private counsel for the conduct of the trial. The Supreme Court upheld the decision of the High Court that the counsel appointed by the private person was to act under the directions of the Public Prosecutor. The Court said that the High Court correctly approached the issue and, therefore, no interference was necessary.[54.] A privately engaged pleader may do everything in the case provided; it is done under the control and direction of the Public Prosecutor.[55.]

Where a private person steps in under sub-section (2), he cannot totally obliterate the role of Public Prosecutor. The other pleader can only assist the Public Prosecutor. He has no locus or any right to plead on behalf of the prosecution and conduct the case.[56.]

In *Dhariwal Industries Ltd v Kishore Wadhwani,*[57.] the Bombay High Court of Judicature had modified the order whereunder the Additional Chief Metropolitan Magistrate had permitted the appellant to be heard at the stage of framing of charge under section 239, by expressing the view that the role of the complainant is limited under section 301 and he cannot be allowed to take over the control of prosecution by directly addressing the Court, but has to act under the directions of Assistant Public Prosecutor in charge of the case. The Supreme Court while referring to *Shiv Kumar v Hukam Chand*[58.] and *JK International v State (Govt of NCT of Delhi)*[59.] explained the distinction between sections 301 and 302 of CrPC and held that the role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as section 302 of CrPC is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.

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47. *Narayan M Pendse*, (1874) 11 BHCR 102.
48. *Re Rekhan Ojha*, 1988 Cr LJ 278 (Cal).
49. *K Anbazhagan v State of Karnataka*, (2015) 6 SCC 156 : 2015 (5) Scale 577 .
50. *K Anbazhagan v State of Karnataka*, (2015) 6 SCC 158 : 2015 (5) Scale 577 .
51. *Thadi Naravana v The State of Andhra Pradesh*, AIR 1960 AP 1 (FB).

52. *K Anbazhagan v State of Karnataka*, (2015) 6 SCC 158 : 2015 (5) Scale 577 .
53. *Shiv Kumar v Hukam Chand*, (1999) 7 SCC 467 : (1999) 6 JT 385 .
54. *Shiv Kumar v Hukum Chand*, (1999) 7 SCC 467 : (1999) 6 JT 385 .
55. *Sama Ram v State of Rajasthan*, 2002 Cr LJ 3134 (Raj).
56. *B Janakiramaiah Chetty v AK Parthasarathi*, 2002 Cr LJ 4062 (AP).
57. *Dhariwal Industries Ltd v Kishore Wadhwani*, AIR 2016 SC 4 369 : 2016 Cr LJ 5078 : 2016 (8) Scale 735 : (2016) 10 SCC 378 .
58. *Supra*.
59. *JK International v State (Govt of NCT of Delhi)*, AIR 2001 SC 1142 at pp 1144–1145 : 2001 Cr LJ 1264 : (2001) 90 DLT 157 : (2001) 3 SCC 462 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 302] Permission to conduct prosecution.—

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

***Provided* that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.**

(2) Any person conducting the prosecution may do so personally or by a pleader.

The proper authority to deal with an application for permission to conduct the prosecution is the Magistrate himself. In the prosecution of a case of murder, an advocate privately engaged is not a proper person to conduct the prosecution, for the Government stands not necessarily for a conviction but for justice.[60.] It is only when a private counsel is entrusted with an independent charge of the case that permission is necessary under this section. So long as he acts under the supervision, guidance or control of the Public Prosecutor he can examine and cross-examine the witnesses.[61.]

There is no provision in the Code that arguments shall be heard by a Magistrate in magisterial cases. In not allowing the prosecution to argue its case, a Magistrate is, therefore, not guilty of any illegality, however, desirable it may be that a Magistrate should give opportunity for argument.[62.]

[s 302.1] Who can be entrusted conduct of prosecution [*Sub-section (1)*].—

The sub-section gives a discretion to the Magistrate to permit the prosecution to be conducted by any person other than a Police Officer below the rank of Inspector. But no such permission is necessary in the case of Law officers of the Government mentioned therein, as it is a right of the State to ordinarily conduct all prosecutions. The proviso completely prohibits the Magistrate from granting any permission to the police officer to conduct prosecution if he has taken part in the investigation of the offence probably because of apprehension that such an officer is not likely to put before the Court the prosecution case as fairly as any other independent prosecutor.

An Excise Officer is not an "officer of police" within the meaning of this proviso.[63.] The examination of witnesses by a police officer in direct contravention of the proviso is an illegality which would vitiate, and render void the entire proceedings.[64.]

A company prosecuted its former Manager under section 408 IPC and the Companies Act, and the charge was ordered to be framed, which was challenged in the High Court, meanwhile the company was amalgamated with another company, it was held that the

new company could continue as complainant to prosecute the accused with the permission of the Court.[65.]

[s 302.2] Power of attorney holder.—

The original complainant died during trial. An application to continue the proceedings was filed by the power of attorney holders of the heirs of complainant. This was held to be not permissible. Such an application has to be made by the heirs themselves. No such application was filed by them. The power of attorney holders could not be treated to be the pleader of heirs.[66.]

[s 302.3] Scope of private person's participation in conduct of prosecution.—

The private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the Court on his behalf. Further, if a private person is aggrieved by the offence committed against him or against anyone in whom he is interested, he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the Court to consider his request. If the Court thinks that the cause of justice would be served better by granting such permission, the Court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates' Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor.[67.] In *Dhariwal Industries Ltd v Kishore Wadhwani,*[68.] the Bombay High Court of Judicature had modified the order whereunder the Additional Chief Metropolitan Magistrate had permitted the appellant to be heard at the stage of framing of charge under section 239, by expressing the view that the role of the complainant is limited under section 301 and he cannot be allowed to take over the control of prosecution by directly addressing the Court, but has to act under the directions of Assistant Public Prosecutor in charge of the case. The Supreme Court while referring to *Shiv Kumar v Hukam Chand*[69.] and *JK International v State (Govt of NCT of Delhi)*[70.] explained the distinction between sections 301 and 302 of CrPC and held that the role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as section 302 of CrPC is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.

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60. *Ahmed*, (1950) Kar 482 .
61. *Roop K Shorey v The State*, AIR 1967 Punj 42 : 1967 Cr LJ J 251 .
62. *Radhey Shyam*, (1944) 20 Luck 91 .
63. *Emperor v Gopal Shinde*, (1933) 35 Bom LR 376 : AIR 1933 Bom 234 , 235.
64. *Sellamuthu Padqyachi v State*, 1953 Mad WN (Grl) 233 at 236 : ILR (1955) Mad 329 .
65. *Mannath Bal Chandran v Forbes Compbell & Co Ltd*, 1996 Cr LJ 2131 (Bom).

66. *Jimmy Jahangir Madan v Bolly Cartyappa Kindley*, AIR 2005 SC 48 : (2004) 12 SCC 509 : 2005 Cr LJ 112 .

67. *JK International v State (Govt of NCT of Delhi)*, AIR 2001 SC 1142 at pp 1144-1145 : 2001 Cr LJ 1264 : (2001) 90 DLT 157 : (2001) 3 SCC 462 .

68. *Dhariwal Industries Ltd v Kishore Wadhwani*, 2016 AIR 2016 SC 4 369 : 2016 Cr LJ 5078 : 2016 (8) Scale 735 : (2016) 10 SCC 378 .

69. *Supra.*

70. *JK International v State (Govt of NCT of Delhi)*, AIR 2001 SC 1142 at pp 1144–1145 : 2001 Cr LJ 1264 : (2001) 90 DLT 157 , (2001) 3 SCC 462 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 303] Right of person against whom proceedings are instituted to be defended.—

Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

This section not only contemplates that the accused should be at liberty to be defended by a pleader at the time the proceedings are actually going on but also implies that he should have a reasonable opportunity, if in custody of the police, of getting into communication with his legal adviser for the purpose of his defence.[71.] The addition of the words "of his choice" at the end indicates that no advocate or pleader is to be foisted on the accused and he should be permitted to be defended by a pleader or advocate in whom he has full confidence. The right of an accused to consult a legal practitioner of his choice has been upheld by the Supreme Court.[72.] There should be effective representation of the accused who is undefended by appointing a counsel. Sessions Judges should not commence trial immediately after appointing a counsel for accused without giving the counsel sufficient time for consulting the accused and generally preparing the case.[73.]

An advocate who is accused of a criminal offence or is a party in a Civil Court is fully entitled to conduct his own defence or his own case. But an advocate who is accused with others of a criminal offence cannot appear at the trial as counsel for his co-accused. Counsel cannot appear in the same matter both as counsel and party.[74.] But where the advocate of an accused was cited as witness by the prosecution in a charge-sheet but the prosecution was unable to say as to how his evidence would be relevant or material for the purpose of establishing the prosecution case, it was held that the advocate could not be prohibited from appearing for the accused.[75.]

A criminal case cannot be decided against the accused in absence of counsel. Court should appoint an Amicus Curiae to defend the accused, as the liberty of a person is the most important feature of the Constitution.[76.]

The Supreme Court has held that the right conferred by this section does not extend to a right in an accused person to be provided with a lawyer by the State or by the Police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one, or to engage one himself, or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity.[77.] This section, however, does not prohibit the appointment of a counsel by the Court at State expense. No hard and fast rule can be laid down as to the time which must elapse between the appointment of the counsel and the beginning of the trial; but, on the circumstances of each case, the Court of Session must ensure that the time granted to the counsel is sufficient to prepare for the defence.[78.]

The present position is to be found in the following section where provision for lawyer as of right in certain cases, and after notification is made by the State Government in others, has been made. In an appeal against conviction under section 324 of IPC

before the Sessions Judge, the accused was represented by a counsel, but the counsel did not appear when the case was called on for hearing. The judgment was rendered by the appellate Court with the assistance of the Public Prosecutor and on perusal of the records. It was held that the order was not vitiated.[79.]

In a triple murder case, the accused persons expressed their inability to engage lawyer for their defence, the Sessions Court appointed two lawyers to defend them, and subsequently, one more lawyer was appointed a day before the trial began, all of them participated in the trial actively without making any grievance about their engagement or non-supply of any paper, it was held that no irregularity was committed in this regard which might have vitiated the trial.[80.]

[s 303.1] Accused's right to be defended by pleader.—

In criminal cases, unlike civil, it is not necessary to file a *vakalatnama*. Filing of a memo of appearance by an advocate with a declaration that he has instructions from his client to represent him in the case would be sufficient.[81.]

As regards the power to grant pardon to the accomplice the law laid down by the Supreme Court can be summarised thus:

(1) The power to grant pardon enjoined under sections 306 and 307 of the Code is a substantive power and it rests on the judicial discretion of the Court.

(2) The power of the Court is not circumscribed by any condition except the one, namely, that the action must be with a view to obtaining the evidence of any person who is supposed to have been directly or indirectly concerned in, or privy to, an offence.

(3) The Court has to proceed with great caution and on sufficient grounds recognising the risk which the grant of pardon involved of allowing an offender to escape just punishment at the expense of the other accused.

(4) The secrecy of the crime and paucity of evidence, solely for the apprehension of the other offenders, recovery of the incriminating objects and production of the evidence otherwise unobtainable might afford reasonable grounds for exercising the power.

(5) The disclosure of the person seeking pardon must be complete.

(6) While tendering pardon, the Court should make an offer to the one least guilty among the several accused.

(7) The reasons for tendering pardon must be recorded and also about the factum of accepting of pardon by the concerned.[82.]

[s 303.2] Agent with power of attorney.—

An agent with power of attorney who is authorised by the accused but not by the Court cannot become a pleader. He cannot appear for the accused before a Criminal Court.[83.]

[s 303.3] *Locus standi* to question conviction.—

A writ petition under Article 32 of the Constitution was moved by a political leader challenging the conviction of the assassins of General Vaidya, it was held that a total stranger to the trial could not be permitted to question the correctness of the conviction.[84.]

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71. *Re Llewelyn Evans*, (1926) 28 Bom LR 1043 : 50 Bom 741 : AIR 1926 Bom 551 ; *S Sundarsigh*, (1930) 12 Lah 16.
72. *Re Madhu Limaye*, AIR 1969 SC 1014 : 1969 Cr LJ 1440 : (1969) 1 SCC 292 ; *The State of Maharashtra v Rajkumar Kochhar*, (1969) 72 Bom LR 797 .
73. *Chellapan v State of Kerala*, 1971 Cr LJ 1021 : 1971 KLJ 543 .
74. *Subramanya Sarma*, AIR 1941 Mad 808 : (1941) Mad 1019.
75. *Re Karuthiah*, 1968 Cr LJ 690 .
76. *Md Sukur Ali v State of Assam*, AIR 2011 SC 1222 : (2011) 4 SCC 729 : (2011) 2 SCC (Cri) 481 .
77. *Tara Singh v The State*, (1951) SCR 729 : AIR 1951 SC 441 : 52 Cr LJ 1491.
78. *Bashira v State of UP*, (1969) 1 SCR 32 : 1968 Cr LJ 1495 : AIR 1968 SC 1313 .
79. *Sadhu Charan Panda v State of Orissa*, 1987 Cr LJ 1220 (Ori).
80. *Debendra Pradhan v State of Orissa*, 1996 Cr LJ 326 (Ori).
81. *Ajay Mehta v State of Karnataka*, 2003 Cr LJ 350 (Kant).
82. *Konajiti Rajababu v State of AP*, 2002 Cr LJ 2990 (AP).
83. *TC Mathai v District & Sessions Judge*, AIR 1999 SC 1385 : 1999 Cr LJ 2092 : (1999) 3 SCC 614 .
84. *Simaranjit Singh Mann v UOI*, AIR 1993 SC 280 : 1993 Cr LJ 37 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 304] Legal aid to accused at State expense in certain cases.—

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for_

(a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.

This section was added by the 1973 Code, which enables the Sessions Court to assign a pleader for the defence of the accused at the expense of the State provided he is unrepresented, and the Court is satisfied that he has no sufficient means to engage a pleader. The selection of such pleader, the facilities to be given to him by the Court and his remuneration are to be governed by the rules that may be framed by the High Court in this regard with the previous approval of the State Government. Provision is made in sub-section (3) to extend the same facilities to any class of trials before other Courts by the State Government.[85.]

"Indigence should never be a ground for denying fair trial or equal justice... particular attention should be paid to appoint competent advocates, equal to handling complex cases, not patronising gestures to raw entrants at the Bar. Sufficient time and complete papers should also be made available, so that the advocate chosen may serve the cause of justice."[86.] The accused petitioner was convicted for various offences under the Penal Code. He was in custody for the entire period of 11/2 years. No counsel was provided. It was held that it was a case of grave illegality.[87.]

In the criminal appeal the counsel appointed by the Court for the accused was not present at the time of the hearing. The appeal was disposed of without hearing him. It was held that the case be remanded for fresh hearing.[88.]

The Supreme Court of India has held that the obligation to provide legal aid to the indigent accused does not arise only when the trial commences but arises right since the accused is produced before the nearest Magistrate as required by section 57 of the Code and Article 22(1) of the Constitution.[89.] However, the accused cannot obtain a

writ of mandamus for enforcing this obligation. He must apply for it under section 304.[90.] The Supreme Court has held that a conviction of an accused given in a trial in which the accused was not provided legal aid would be set aside as being in violation of Article 21 of the Constitution.[91.] The accused had pleaded guilty. He was convicted without appointing a counsel for the accused under the Legal Aid Scheme. It was not vitiated when the trial judge was satisfied about the plea being voluntary, genuine and true.[92.]

An accused having sufficient means cannot claim for free legal assistance of a lawyer at the expenses of the State, particularly when he has already engaged a defence counsel of his choice.[93.]

In the Rajiv Gandhi murder case, the lawyers appointed to defend the indigent accused persons moved the High Court for raising their fees so as to make it at par with that of prosecution lawyers on the principle of "equal pay for equal work", as they would be getting only Rs 50 a day as permitted under rule 9 of Legal Aid to Poor Accused Rules, 1976. It was held that "equal pay for equal work" rule was not attracted as the criteria in the appointment of prosecution lawyers is different from those of the defence as free legal aid to indigent persons. However, the remuneration of each defence lawyer appointed as such was fixed as the High Court deemed reasonable, fair and just in the circumstances.[94.]

An accused in Session Trial applied to be provided a particular lawyer at State expenses as envisaged under section 304 of CrPC, but another lawyer was appointed to defend him. The High Court held that when an accused is capable of engaging a lawyer of his choice, no Court could deny him that right, but when he was not in a position to engage the services of any lawyer, and prays for being provided with a lawyer at State expense, it would be choice of the Court, and not of the accused to choose a lawyer for defending him. The Court is not under a legal obligation to permit him such choice.[95.]

The right to legal aid to the accused is not limited to the stage of trial. It arises the moment he is arrested in connection with a cognizable offence. But the said right is only for representing the accused in court proceeding. It does not extend to his interrogation in police custody. Thus, in the case of Bombay terror attack of 2008, where offer of lawyer was made to him at the time of arrest which he denied and demanded a lawyer from his home country, it was held by the Supreme Court that the action of the accused was nothing but his independent decision. Therefore, on getting convinced that no legal aid was forthcoming from his home country, he made a demand for an Indian lawyer which was immediately provided, it cannot be said that any constitutional right was denied to the accused.[96.]

Power to direct retrial is exercisable only in exceptional and rare cases. The demand of justice should be the guiding factor for exercising such power. The interest of the society cannot be ignored while protecting the right of the accused to fair trial. Thus, in a case of bomb blast in a bus resulting in the death of 4 persons and injuries to many others, the Court found that the trial stood vitiated for being held without providing legal aid to the accused. However, it was held by the Supreme Court that the incident being 14 years old and the accused being in custody ever since his arrest, cannot be ground to acquit him. Therefore, the order of retrial was held to be justified for the reason of the gravity of the offences[97.]

85. *Dilawar Singh v State of Delhi*, AIR 2007 SC 3234 : (2007) 12 SCC 641 : 2007 Cr LJ 4709 , the accused was not represented by any counsel, the Court was to appoint *amicus curiae*.

86. Per Krishna Iyer J, in *RM Wasawa v State of Gujarat*, AIR 1974 SC 1143 : (1974) 3 SCC 581 : 1974 Cr LJ 799 .

87. *Mah Chand v State of Delhi*, 1990 Cr LJ 682 (Del).

88. *State of Haryana v Ram Diya*, 1990 Cr LJ 1327 : AIR 1990 SC 1336 : (1990) 2 SCC 701 .

89. *Khatri v Bihar*, 1981 Cr LJ 470 : (1981) 1 SCC 627 .

90. *Ranjan Dwivedi v UOI*, 1983 Cr LJ 1052 : AIR 1983 SC 624 : (1983) 3 SCC 307 .

91. *Suk Das v Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401 : AIR 1986 SC 991 : 1986 Cr LJ 1084 .

92. *Tyron Nazarath v State of Maharashtra*, 1989 Cr LJ 123 (Bom).

93. *Ashok Kumar v State of Rajasthan*, 1995 Cr LJ 1231 (Raj).

94. *T Suthenraja v State of Tamil Nadu*, 1995 Cr LJ 1496 (Mad).

95. *Tahsildar Singh v State of MP*, 1995 Cr LJ 1678 (MP).

96. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, AIR 2012 SC 3565 : (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481 .

97. *Mohd Hussain v State*, AIR 2012 SC 3860 : (2012) 9 SCC 408 : (2012) 3 SCC (Cri) 1139 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 305] Procedure when corporation or registered society is an accused.—

(1) In this section, "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

This new section lays down the procedure to be followed when a corporation or a registered Society is an accused. By enacting this section, the Legislature has filled in a lacuna in the old Code which did not provide for any representation when societies and other body corporate were accused in criminal cases.

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 306] Tender of pardon to accomplice.—

(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record—

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)—

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate; taking cognizance of the offence shall, without making any further inquiry in the case, —

(a) commit it for trial—

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

This section deals with the subject of tender of pardon to an accomplice. It can come into effect only when the offence is one which is (i) punishable with imprisonment of seven years or upwards; or (ii) triable exclusively by the Court of Session; or (iii) triable by a Special Judge under the Criminal Law Amendment Act, 1952.[98.] The pardon may be granted by the Chief Judicial Magistrate or the Metropolitan Magistrate; it can also be granted by any Magistrate of the first class inquiring into or trying the offence. The former category of Magistrates can tender pardon at any stage of the investigation or inquiry into or trial of the offence, whereas the latter category of Magistrates can do so at any stage of inquiry or trial.

Once a case has been committed, the power to grant pardon thereafter lies only with the Court to which the case has been committed.[99.]

The Magistrate tendering pardon has to maintain a record stating (1) the reason for his tendering pardon, and (2) whether or not the same was accepted. On application by the accused, the Magistrate is bound to supply him a copy of such record free of cost. The person accepting the tender of pardon is required to be examined as a witness in Court and is to be detained in custody until the conclusion of the trial unless he has been already released on bail. The Magistrate concerned need not scrutinize the evidence of the approver but has to straightway either commit the accused to the Court of Session, if the offence is exclusively triable by that Court or to the Court of Special Judge as the case may be and in any other case make it over to the Chief Judicial Magistrate who is required to try the case himself. Where the special Judge examines the approver, he need not thereafter commit the case to another Special Judge.[100.]

[s 306.1] Object.—

The object of this section is to obtain true evidence of offences by the grant of pardon to accomplices so as to prevent the escape of the offenders from punishment for lack of evidence.[101.] Therefore, recording the statement of a person who is to be pardoned before granting him pardon is not illegal.[102.] It is a substantive power derived from statutory provisions. It is not an inherent power of a Criminal Court. The Court said: Penal laws require that the punishment shall be inflicted on every person found guilty of an offence. The grant of pardon results in the grantee escaping the punishment for the offence. The nature of the power of pardon under sections 306 and 307 of CrPC is essentially different that the nature of such power under the Constitution of India whereby the President and/or Governor are empowered to grant pardon. Those powers are exercised after a person is found guilty. Under sections 306 and 307 of CrPC, the pardon is tendered during the investigation, enquiry or trial, as the case may be. The object is to obtain evidence of an accomplice so as to facilitate conviction of others. The power to grant pardon is not an inherent power of a Criminal Court. It is a substantive power which has to be specifically conferred.[103.]

The object and purpose of examining the person accepting tender of pardon as a witness is limited. The proceeding which takes place before the Magistrate at that stage is neither an inquiry nor a trial. Therefore, the submission that the approver should be examined as a witness in open Court and not in the chamber and that while so examining the Magistrate should keep the accused present and afford him an opportunity to cross-examine the approver was not to be accepted. The provision does not require that the person who is granted pardon must be examined in the presence of the accused and that the accused has a right to appear and cross-examine him at that

stage also.[104.] It has been held by the Supreme Court that direct or indirect involvement of the person in the offence or he being privy to the offence is the basis for grant of pardon and not the extent of his culpability. Thus, the evidence of the person pardoned can be the basis of conviction.[105.]

[s 306.2] "Any person supposed to have been directly or indirectly concerned".—

The word "supposed" must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man who, although admitted to be a party to the crime, is unconvicted.[106.] No pardon can be tendered to a person who has been actually convicted, or whose complicity in the crime is not admitted by himself. In a case for criminal breach of trust and cheating, the trial Court granted pardon to one of the accused on his application, the High Court held that grant of pardon was quite legal as the person was an accomplice, happened to be privy to the offences charged and was directly involved in the transactions. It was also held that it is not necessary that grant of pardon should always be at the behest of prosecution.[107.]

A woman who saw her sister being killed by her husband and made statements incriminating the husband but not herself, it was held that she could neither be made a co-accused nor she could be pardoned to make her an approver witness. She was a witness without anything else.[108.] A person seeking pardon may not be an actual culprit. The question of exculpating one's own-self may not arise. All that is necessary is that he be directly or indirectly concerned in or privy to the offence.[109.]

[s 306.3] "Investigation or inquiry into, or the trial of, the offence".—

When the order granting pardon is after investigation, the Magistrate should hear the accused persons because it is a judicial proceeding.[110.] Order granting pardon is revisable.[111.]

[s 306.4] "Full and true disclosure".—

The approver must make a full and true disclosure before the committing Magistrate as well as before the Sessions Court. He cannot withdraw it after making it once.[112.] The tender of pardon to an approver has to precede and not to follow on the making of full and true disclosure.[113.] A witness making self-incriminatory statements in the evidence voluntarily is not covered by section 306 or section 307. The Court may act in its discretion against him.[114.]

The aim of the Court in granting pardon to an accused is only to obtain his evidence as a witness. The fact that there is already a recorded confession under section 164 of the CrPC, cannot be a factor weighing against the tender of pardon.[115.]

The tender of a pardon does not prevent the prosecution from proceeding against an approver as an accused where he has not performed the conditions of the pardon.[116.] This section does not enable the Court of Session to deal with an approver, in case he

does not comply with the conditions of his pardon and forfeits it, without a fresh inquiry and commitment by a Magistrate.[117.]

A person who has been granted pardon must be released if he has fulfilled the conditions of the pardon.

A pardon would cover not only the offence then under trial, but any other offence relating to the same transaction which might be subsequently charged, ie, any other offence relating to the same facts as constituted that offence or any part of that offence. It is immaterial whether all the offences were triable by the same Court.[118.]

[s 306.5] Procedure for granting pardon [*Sub-section (3)*].—

The failure on the part of the Magistrate to record his reasons for tendering pardon to the approver is merely an irregularity which does not affect the right of the accused to be tried by the Sessions Judge.[119.] The provisions of this section pre-suppose that the pardon which was tendered to a person was accepted by him. A mere tender of pardon does not attract the provision. This section does not apply where a pardon, though tendered, is not accepted. The person who has accepted pardon must be examined as witness.[120.]

Other co-accused persons cannot tell the Court that the statement of the person seeking pardon was false and therefore pardon should not be granted. Similarly, the accused cannot question the stage at which pardon has been granted.[121.]

Where though the accused were not given opportunity to cross-examine the approver when his statement was recorded by the Magistrate, but no objection was raised either before or soon after committal of the case, the opportunity was, however, granted, after the committal, it was held that the trial was not vitiated.[122.]

When an accused is granted pardon, he ceases to be an accused and becomes a witness for the prosecution. However, where an approver submitted application to become an approver well before the pronouncement of judgment, it was held that the delay in filing the application is no ground to refuse pardon.[123.]

Both the Special Judge and the Magistrate have concurrent jurisdictions to grant pardon during investigation. Thus, where order granting pardon was passed by Magistrate in good faith even after the appointment of Special Judge under the Prevention of Corruption Act, 1988, it was held by the Supreme Court that this is only a curable irregularity which does not vitiate proceedings since the case was under investigation.[124.]

[s 306.6] Application by accused.—

Ordinarily, it is for the prosecution to ask that a particular accused out of several may be tendered pardon. But the accused can also directly apply to the Court for grant of pardon. In that case, the Court must first refer the request of the accused to the prosecuting agency and ask for a statement on the request of the accused. Prosecution would agree to the tender of pardon if it considers it to be in the interest of successful prosecution of the other offenders.[125.]

[s 306.7] Approver to be examined as witness [*Sub-section* (4)(a)].—

It is imperative that the person who has accepted tender of pardon must be examined as a witness in the Court of the Magistrate taking cognizance and at the subsequent trial of every person tried for the same offence provided it is possible for the Government to produce him. Non-compliance with the provisions of this section renders the trial illegal.[126.] It is a condition precedent to committal.[127.] The examination of the approver has to be conducted after the grant of pardon. He has to be examined as a witness in the presence of the accused and also to be cross-examined.[128.] Though an approver is *particeps criminis*, as soon as a pardon is granted to him with a view to obtaining his evidence, he becomes a witness *qua* the case in which he is to be examined, and continues to assume that role up to the time when his failure to comply with the condition causes a forfeiture of the pardon.[129.] Circumstantial evidence may constitute substantial and sufficient corroboration of an approver's statement in material particulars.[130.]

Where the Magistrate first committed the case to Sessions without examining the approver, but examined him later, on the directions of the Sessions Court, it was held that the mistake stood rectified and the trial was not vitiated. It was also held that the release of approver on bail by the High Court would neither affect the validity of the pardon granted to him nor the trial would be vitiated.[131.]

Application of an approver's evidence has to satisfy a double test; his evidence must show that he is a reliable witness and that test is common to all. The second test of approver's evidence is that it must be sufficiently corroborated.[132.] This is not to say that the evidence of an approver has to be considered in two water tight compartments; it must be considered as a whole along with other evidence.[133.] At the examination of the approver, his evidence need not be recorded on oath. False evidence can be proved in any other manner than with reference to the statement on oath.[134.]

[s 306.8] Value of testimony.—

The testimony of an approver which was full of contradictions and improvements was held to be unreliable and liable to be discarded.[135.] Where substantive evidence becomes available through the approver, the prosecution is bound to use the same. The Magistrate has to exercise his discretion bearing in mind the object of section 306.[136.]

The statement made before the Magistrate at the time of grant of pardon was allowed to be used as a corroborative material though not much importance was attached to it since it was only a former statement.[137.]

[s 306.9] Detention till termination of trial [*Sub-section* (4)(b)].—

For the purpose of ascertaining the nature of the custody of an approver, his competency as a witness does not divest him of the character of an accused person until by fulfilment of his undertaking he earns and secures his discharge; and he must therefore be detained in similar custody as the other accused persons,[138.] unless he is already on bail. He cannot be detained in police custody.[139.] Custody means judicial custody and not police custody.[140.] The approver is not discharged until the judicial

proceedings pending against the accused are finished.[141.] The object of requiring an approver to remain in custody until the termination of the trial is not to punish the approver for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, to prevent him from the temptation of saving his erstwhile friends and companions and to secure his person to await the judgment of the law. The temptation on the part of an approver to flee from justice as a result of threat or coercion is supposed to outweigh all inducements to remain growing out of pecuniary obligation, no matter to what amount.[142.] Where neither no useful purpose will be served by his further detention nor administration of justice is likely to be adversely affected, the Court may release him on bail.[143.] Grant of pardon is not an interlocutory order. Hence, revision petition against is maintainable.[144.]

The approver cannot be detained till the period of appeal expires after the conviction of the accused.[145.]

[s 306.10] "Commit it for trial" [*Sub-section (5)(a)*].—

Every case in which a pardon is tendered (i.e., where there is an approver) must be committed for trial to the Court of Session, provided the Magistrate is satisfied that a *prima facie* case has been made out against the accused.[146.] When a Magistrate has tendered pardon, the trial must be by Sessions Court or Special Judge or Chief Judicial Magistrate. When the case is committed to the Sessions Court under section 306(5)(a), the Sessions Judge can make over the case for trial to the Additional or Assistant Sessions Judge.[147.] The Magistrate can discharge him under section 245 if he thinks that a *prima facie* case has not been made out.[148.] Where two separate cases are filed against an accused, one by charge-sheet and the other by complaint, with composite allegations and composite investigations for both, an approver granted pardon in a charge-sheet case can be treated as an approver in complaint case also.[149.] If there is no double examination of the approver as provided under section 306(4) and (5), he could not be prejudiced.[150.]

The fact that the prosecution did not prosecute the accomplice under section 306 of CrPC, nor was not granted pardon, was held to be immaterial.[151.]

An approver was given pardon. Thereafter, he was tried alongwith the accused for giving false evidence or suppressing anything essential. The Code has prescribed procedure for such action. If the Court is satisfied that the approver did not give full details of the crime and the Public Prosecutor has failed to initiate action, the Court can itself proceed against him by exercising inherent powers under section 482.[152.] In *Dilip Sudhakar Pendse v CBI*,[153.] the question was whether the committal of the case involving offence not exclusively triable either by the Special Judge or by the Sessions Judge but triable by the Chief Metropolitan Magistrate cannot be committed to the Sessions Court. It was a case following under "any other case" under section 306(5)(b). It was therefore to be made over to Chief Metropolitan Magistrate.

[s 306.11] Power of Special Judge to grant pardon.—

Under section 5(2) of the Prevention of Corruption Act, 1988, the power of the Special Judge to grant pardon is an unfettered power subject to stipulation made in the section itself. Such power can be exercised at any stage and there is no stipulation that the power can be exercised by the Special Judge only at the stage of trial. The deeming

clause introduced in section 5(2) is for a very limited purpose mentioned in section 5(2) of the Act.[154.]

[s 306.12] Economic offences.—

Where the prosecution was under the Income-tax Act, 1961, the Court said that the accused could not claim immunity from prosecution for any offence of economic nature.[155.]

[s 306.13] Revisional Court.—

Revisional Court has power to see whether the jurisdiction vested in the Court to grant pardon has been exercised judiciously or not.[156.]

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98. *State of Punjab v HG Khotari*, AIR 1960 SC 360 : 1960 Cr LJ 524 .
99. *A Deivendran v State of TN*, AIR 1998 SC 2821 : 1998 Cr LJ 814 : (1997) 11 SCC 720 .
100. *V Krishmaswami v State of Tamil Nadu*, 1987 Cr LJ 1012 (Mad).
101. *Alagirisami Naickeu v Emperor*, (1910) ILR 33 Mad 514, 517.
102. *KL Gulati v State of UP*, 1976 Cr LJ 1825 (All).
103. *Harshad S Mehta v State of Maharashtra*, (2001) 107 Com Cas 365 : (2001) 8 SCC 257 .
104. *Ranadhir Basu v State of WB*, (2000) 3 SCC 161 : AIR 2000 SC 908 : 2000 Cr LJ 1417 ; *State of HP v Surinder Mohan*, AIR 2000 SC 1862 : 2000 Cr LJ 1429 . A similar statement is to be found in *Senthamarai v S Krishnaraj*, 2002 Cr LJ 2375 (Mad); *Phulan Shah State of UP*, 2002 Cr LJ 1520 (All).
105. *State of Rajasthan v Balveer*, AIR 2014 SC 1117 : (2013) 16 SCC 321 : 2014 Cr LJ 314 (SC).
106. *Queen-Empress v Kallu*, (1884) 7 All 160 ; *Bhagya*, (1895) Unrep CRC 750.
107. *SK Baruah v Assam Tea Brokers Ltd*, 1995 Cr LJ 2361 (Gau).
108. *Rakesh Kr Singh v State of Assam*, 2003 Cr LJ 3206 (Gau).
109. *Senthamarai v S Krishnaraj*, 2002 Cr LJ 2375 (Mad).
110. *Prabhat Ranjan Sarkar v The State of Bihar*, 1974 Cr LJ 957 .
111. *State of UP v Kailash Nath Agarwal*, AIR 1973 SC 2210 : 1973 Cr LJ 1196 : (1973) 1 SCC 751 .
112. *Emperor v Kothia*, (1906) 30 Bom 611 : 8 Bom LR 740; *Alagirisam iNaickeu v Emperor*, (1910) 33 Mad 514, 517.
113. *Horilal*, (1941) Nag 372.
114. *SS Chaudhary v UP*, 1978 Cr LJ 391 .
115. *RR Nair v Supdt of Police*, 1981 Cr LJ 1424 .
116. *Re Dagdoo*, (1921) 46 Bom 120 : 23 Bom LR 839 : AIR 1922 Bom 177 a.
117. *Emperor v Nana Amrita*, (1934) 36 Bom LR 1211 : AIR 1935 Bom 70 .

118. *Queen-Empress v Ganga Charan*, (1888) 11 All 79 .
119. *Faqir Singh v King Emperor*, (1938) 65 IA 388 : 40 Bom LR 1254 : (1938) 19 Lah 628.
120. *Bipin Behari Sarkar v State of West Bengal*, AIR 1959 SC 13 : 1959 Cr LJ 102 .
121. *Senthamarai v S Krishnaraj*, 2002 Cr LJ 2375 (Mad).
122. *Noba Kumar Das v State of Assam*, 2002 Cr LJ 1950 (Gau).
123. *Mrinal Das v State of Tripura*, AIR 2011 SC 3753 : (2011) 9 SCC 479 .
124. *PC Mishra v State (CBI)*, AIR 2014 SC 1921 : (2014) 14 SCC 629 : 2014 Cr LJ 2482 (SC).
125. *Konajeti Rajababu v State of AP*, 2002 Cr LJ 2990 (AP).
126. *Mahla v Emperor*, (1929) 11 Lah 230 : AIR 1931 Lah 38 ; *Re Chief Judicial Magistrate v Trivendrum*, 1988 Cr LJ 812 (Ker); *Jagjit Singh v State of Delhi*, 1986 Cr LJ 1658 (Del).
127. *Re Ramaswamy*, 1976 Cr LJ 770 (Mad).
128. *Sitaram Sao v State of Jharkhand*, AIR 2008 SC 391 : (2007) 12 SCC 630 .
129. *Khariati Ram*, (1931) 12 Lah 635; *Faqir Singh y Crown*, (1934) 16 Lah 594.
130. *Maghar Singh v State of Punjab*, AIR 1975 SC 1320 : 1975 Cr LJ 1102 : (1975) 4 SCC 234 .
131. *Suresh Chandra Bahri v State of Bihar*, AIR 1994 SC 2020 : 1994 Cr LJ 3271 : (1995) Supp 1 SCC 80.
132. *Sarvanabhavanand Govindaswamy v State of Madras*, AIR 1966 SC 1273 : 1966 Cr LJ 949 ; *Lachhi Ram v State of Punjab*, AIR 1967 SC 792 : 1967 Cr LJ 671 .
133. *Sarvanabhavan and Govindaswamy v State of Madras, Ibid*.
134. *V Krishnaswami v State of Tamil Nadu*, 1987 Cr LJ 1012 (Mad).
135. *PV Narasimha Rao v State*, 2002 Cr LJ 2401 (Del).
136. *Senthamarai v S. Krishna Raj*, 2002 Cr LJ 2375 (Mad).
137. *Ramprasad v State of Maharashtra*, 1999 Cr LJ 2889 SC : (1999) 5 SCC 30 . The Court further held that the fact that the name of one of the accused persons was not disclosed at the time of recording of confession was not of much consequence because the witness implicated himself as well as others.
138. *Hari Ram v Kundan Lal*, (1931) 12 Lah 604, 623.
139. *Khairati Ram, supra*.
140. *Dan Bahadur Singh v Emperor*, (1943) All 289 ; *Khairati Ram, supra*.
141. *Emperor v Intya Salabat Khan*, (1913) ILR 37 Bom 146 : 14 Bom LR 897.
142. *Mehra*, (1957) Punj 1941.
143. *Prem Chand v State*, 1985 Cr LJ 1534 (Del); *Noor Taki v State of Rajasthan*, 1986 Cr LJ 1488 (Raj): AIR 1987 Raj 52 .
144. *Maosi Nainsi Jain v State of Maharashtra*, 1985 Cr LJ 1818 .
145. *Surendra Lal Chowdhury v Sultan Ahmed*, (1934) 62 Cal 430 : AIR 1935 Cal 206 .
146. *Faquir Singh v Crown*, (1934) 16 Lah 594.
147. *State of Kerala v Monu D Surendran*, 1991 Cr LJ 27 (Ker).
148. *Emperor v Nana Amrita Savant*, (1934) 36 Bom LR 1211 : AIR 1935 Bom 70 .
149. *JK Ralhan v State*, 1984 Cr LJ 1538 (Del).
150. *V Krishnaswami v State of Tamil Nadu*, 1987 Cr LJ 1012 (Mad) : (2011) 5 SCC 161 : (2011) 2 SCC (Cri) 551 .
151. *Chandran v State of Kerala*, AIR 2011 SC 1594 : (2011) 5 SCC 161 .
152. *Renuka Bai v State of Maharashtra*, AIR 2006 SC 3056 : (2006) 7 SCC 442 : (2006) 4 Crimes 46 .
153. *Dilip Sudhakar Pendse v CBI*, (2013) 9 SCC 391 .
154. *Bangaru Laxman v State (through CBI)*, AIR 2012 873 : (2012) 1 SCC 500 : (2012) 1 SCC (Cri) 487 .

155. *Dipesh Chandal v UOI*, 2003 Cr LJ 2510 (Pat).
156. *Konajeti Rajababu v State of AP*, 2002 Cr LJ 2990 (AP).

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 307] Power to direct tender of pardon.—

At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

The preceding section deals with tender of pardon by Magistrates; this section applies to tender of pardon by the Court of Session, the Special Judge or the Chief Judicial Magistrate. Pardon under this section can be tendered not only during a trial, but also before trial. Where pardon is granted by the Court to whom the case has been committed for trial, compliance with the provisions of section 306(4) is not necessary.[157.]

A pardon can be tendered to an accused tried with others, notwithstanding that he has pleaded guilty, but not to a person who has pleaded guilty and has been convicted on his plea.[158.]

The revisional Court possesses jurisdiction to consider the correctness, legality or propriety of an order of pardon particularly as the tender of pardon is a proceeding of the Criminal Court and the revising authority can call for the records to satisfy itself as to the regularity of a proceeding of an inferior Court.[159.]

The Kerala High Court has held that recording a statement under section 164 of CrPC is not a "condition" for granting pardon and the Sessions Court can tender a pardon on the same condition as given in section 306(1) of CrPC.[160.]

In a triple murder and robbery case, the grant of pardon to the approver was challenged in appeal against death sentence, the Madras High Court confirming death sentence held that the power to grant pardon was not exclusively given to the Sessions Judge, but the Chief Judicial Magistrate was also empowered under section 306 of CrPC to grant pardon, particularly when papers were sent to him by the Sessions Judge. The Court said that since the accused, who applied for pardon was on bail no question of coercion or undue influence over him arose.[161.]

[s 307.1] Delay in recording statement.—

The delay in recording statement of the approver on the basis of which the pardon was granted to him could be a circumstances to be kept in mind by way of caution while appreciating evidence of the approver, but it could not in itself be a ground for rejecting his testimony. The facts showed in this case that he was repentant from the very beginning.[162.]

[s 307.2] Prosecution to decide necessity.—

It is for the prosecution to decide whether there is necessity for a pardon. If the prosecution so decides, the Court has to agree to it. The Supreme Court said in this case[163.]:

> Although the power to actually grant the pardon is vested in the Court, obviously the Court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecution's job. As was observed by the Supreme Court in *Lt. Commander Pascal Fernandes v. State of Maharashtra*,[164.] "Ordinarily, it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judges he must first refer the request to the prosecuting agency... The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case." Judged by this standard, the first order of the Sessions Judge refusing pardon to the Respondent...., even though it was actively canvassed for by the Special Public Prosecutor, was wrong. It was not for the Session Judge to have considered the possible weight of the approver's evidence, even before it was given. In any case, the evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. But the suspicion may be removed and if the evidence of an approver is found to be trustworthy and acceptable then that evidence might well be decisive in securing a conviction.[165.] The Sessions Judge could not and indeed should not have assessed the probable value of the possible evidence of the Respondent in anticipation and wholly in the abstract.

[s 307.3] Grant of pardon and withdrawal from prosecution.—

These two are different functions which the prosecution performs. The Supreme Court said in this case[166.]:

> The role of the prosecutor u/s. 307 is distinct and different from the part he is called on to play under the provisions of s. 321. Under s 321, the Public Prosecutor or the Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried. The most noticeable difference between this section and s. 307 of the Act is that unlike the grant of pardon u/s. 307, withdrawal from prosecution u/s. 321 is unconditional although it does provide for the express permission of the Central Government in specified cases. Section 321 also does not spell out the circumstances under which the power may be exercised, either by the prosecution or by the Court in granting consent. In contract, the power of tendering pardon u/s. 307 is restricted to one consideration alone, namely, the obtaining of evidence from the person to whom pardon is granted relating to the offences being tried. But the power u/s. 321 not only emphasises the role of the executive in the trial of offences but also that the executive can exercise the power at any time during the trial but before the judgment is delivered. This is relevant in construing the language of s. 64 of Narcotic Drugs and Psychotropic Substances Act, 1985.[167.]

[s 307.4] Functions under sections 306 and 307.—

The Supreme Court has held that section 307 is invokable at the post committal stage, while section 306 is invokable at the pre-committal stage. The Court further said that while granting pardon under section 307, the trial Court has to comply with the requirements of section 306(1) and not those of section 306(4).[168.]

157. *A Deivendran v State of TN*, AIR 1998 SC 2821 : 1998 Cr LJ 814 : (1997) 11 SCC 720 .

158. *Queen-Empress v Kallu*, (1884) 7 All 160 .

159. *State of UP v Kailash Nath Agarwal*, AIR 1973 SC 2210 : 1973 Cr LJ 1196 : (1973) 1 SCC 751 .

160. *K Anil Kumar v State of Kerala*, 1996 Cr LJ 1942 (Ker).

161. *Re Deivendran*, 1996 Cr LJ 2209 (Mad).

162. *Narayan Chetanram Chaudhary v State of Maharashtra*, (2000) 8 SCC 457 : 2000 Cr LJ 4640 .

163. *Jasbir Singh v Vipin Kumar Jaggi*, AIR 2001 SC 2734 , at p 2739 : (2001) 132 ELT 529 : (2001) Ker LT 396 : (2001) 8 SCC 289 .

164. *Lt Commander Pascal Fernandes v State of Maharashtra*, AIR 1968 SC 594 : 1968 Cr LJ 530 .

165. *Citing Suresh Chandra Bahri v State of Bihar*, AIR 1994 SC 2420 : 1994 Cr LJ 3271 : 1994 AIR SCW 3420 : (1995) 1 Supp SCC 80 .

166. *Jasbir Singh v Vipin Kumar Jaggi*, AIR 2001 SC 2734 at 2739–2740.

167. *Jasbir Singh v Vipin Kumar Jaggi*, AIR 2001 SC 2734 at 2739 to 2740 : (2001) 8 SCC 289 .

168. *Narayan Chetanram Chaudhary v State of Maharashtra*, AIR 2000 SC 3352 : 2000 Cr LJ 4640 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 308] Trial of person not complying with conditions of pardon.—

(1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:

Provided **that such person shall not be tried jointly with any of the other accused:**

Provided further **that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.**

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under sub-section (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made; in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial, the Court shall—

(a) if it is a Court of Session, before the charge is read out and explained to the accused;

(b) if it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

Under this section, a certificate of the Public Prosecutor is a condition precedent to the prosecution of an approver to whom a tender of pardon has been made but who has failed to comply with the conditions of the tender.[169.]

The approver breaks the condition of pardon if he wilfully conceals anything essential or gives false evidence.[170.] The onus is on the prosecution to prove that the approver has forfeited his pardon.[171.]

Sub-sections (4) and (5) lay down that when a person to whom a pardon is tendered is being tried, he shall at the commencement of the proceedings be asked as to whether he raises a plea that he has complied with the conditions on which the pardon was granted, and, if he does so plead, the Court shall record its finding on the point and if it finds that the conditions have been complied with, shall acquit the accused.[172.] Failure to comply with the imperative provisions of these sub-sections vitiates the trial.[173.]

[s 308.1] Trial of approver for not fulfilling conditions not to be joint [*First proviso*].—

If an approver has forfeited his pardon, he cannot be tried along with the other accused but the approver is a competent witness against other accused and does not cease to be so even after the withdrawal of his pardon, and, if a fresh trial was taking place, previous refusal of the prosecution to examine him could not debar them from examining him at the fresh trial.[174.]

[s 308.2] High Court permission for trial for false evidence [*Second proviso*]. —"Shall not be tried for the offence of giving false evidence".—

The object of this proviso is to safeguard a person whose pardon has been withdrawn against prosecution for giving false evidence unless the propriety of such prosecution has been considered and determined by the High Court. The discretion vested in High Court is to be exercised with extreme caution.[175.] An application to the High Court for sanction to prosecute an approver for giving false evidence should be by a motion on behalf of Government in open Court.[176.]

[s 308.3] Statements at time of accepting pardon to be evidence [*Sub-section (2)*].—

Where an approver has been tendered a pardon and he has accepted the tender, his statement recorded by a Magistrate under section 164 or by a Court under sub-section (4) of section 306 will be admissible in evidence against him at a subsequent trial, after forfeiture of the pardon, for an offence in respect of which a pardon was so tendered.[177.] A confession of a person recorded before pardon was accepted by him is not admissible in evidence under this provision. Such a confession is admissible under the general provisions of section 164.[178.]

169. *Emperor v Maria Basappa*, (1924) 26 Bom LR 1240 : AIR 1925 Bom 135 ; *Ali*, (1924) 5 Lah 379.

170. *Emperor v Kothia*, (1906) 30 Bom 611 : 8 Bom LR 740.

171. *Ibid*, *Bala*, (1901) 3 Bom LR 271 : 25 Bom 675; *Shashi Rajbanshi v Emperor*, (1915) ILR 42 Cal 856; *Kullan v Emperor*, (1908) ILR 32 Mad 173; *Emperor v Khiali*, (1917) ILR 39 All 305 : AIR 1917 All 316 .

172. *Ali*, (1924) 5 Lah 379.

173. *Harilal*, (1940) Nag 668.

174. *The State v Bhoora*, AIR 1961 Raj 274 .

175. *Emperor v Mathura*, (1933) 56 All 288 ; *The State v Atma Ram*, AIR 1966 HP 18 : 1966 Cr LJ 262 .

176. *Queen-Empress v Manick Chandra Sarkar*, (1897) ILR 24 Cal 492; *Emperor v Madiga*, (1909) ILR 32 Mad 47.

177. *Rambharose*, (1944) Nag 274 FB.

178. *Miral*, (1943) Kar 285 .

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 309] Power to postpone or adjourn proceedings.—

[179.][(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,** [180.] **[section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA or section 376DB of the Indian Penal Code, the inquiry or trial shall] be completed within a period of two months from the date of filing of the chargesheet.]**

(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:**

[181.] **[** ***Provided also*** **that no adjournment shall be granted for the purpose only of enabling the accused person to showcause against the sentence proposed to be imposed on him.]**

[182.] **[** ***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.**

[s 309.1] CrPC (Amendment) Act, 2008 [*Clause (21)*].—

This clause amends section 309 of the Code relating to power to postpone or adjourn proceedings. The clause inserts a proviso to sub-section (1) in order to prevent trials in rape cases including child rape cases, from being unduly delayed by providing that the inquiry or trial in such cases shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses. This clause inserts another proviso to sub-section (2) specifying the circumstances where adjournment shall not be granted by the Court. (*Notes on Clauses*).

[s 309.2] Criminal Law (Amendment) Act, 2013.—

By the present amendment, sub-section (1) along with the proviso has been substituted by a new sub-section (1) and proviso. The new sub-section (1) makes it mandatory to hold the trial on a day-to-day basis and adjournment should be allowed only when necessitated and for reasons to be recorded. Under the new proviso trial relating to offences enumerated therein shall be completed within two months of filing of the charge-sheet.

[s 309.3] Criminal Law (Amendment) Act, 2018.—

In section 309(1) of the Code of Criminal Procedure, in the proviso, for the words, figures and letters "section 376A, section 376B, section 376C or section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible,", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA or section 376DB of the Indian Penal Code, the inquiry or trial shall" have been substituted. The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of section 309.

COMMENT

This section authorises a Magistrate, after taking cognizance of the offence or commencement of trial, for reasonable cause, to remand an accused person to jail. It relates to adjournment of proceedings in inquiries and trials and has nothing to do with the police investigation and contemplates a remand to jail and not to police custody.[183.] The detention by the police is altogether different from the custody in which an accused person is kept under remand given under this section. The detention by the police under section 167 cannot exceed in all 15 days including one or more remands.[184.] The custody under this section is quite different from the custody under section 167. The custody under this section is intended for under-trial prisoners.[185.] It is absolutely necessary that persons accused of offences should be speedily tried so that in cases where the accused persons are not released on bail, they do not have to remain in jail longer than is absolutely necessary.[186.] Where the witness was available and his examination-in-chief was over, the Supreme Court said that unless there were compelling reasons, the trial Court should not have adjourned the matter on the mere asking.[187.]

Where an accused is in judicial lock-up and the police wants him to be moved to the police custody under section 167 in connection with the investigation in another case, the Magistrate can hand over the accused to the police for purposes of investigation.[188.] An order of remand under section 309 can be passed by a Magistrate after filing a charge-sheet and before a formal order of taking cognizance is passed.[189.]

The Supreme Court has held that this section requires a Magistrate, if he chooses to adjourn a case, "to remand by warrant the accused in custody" and provides further that every order made under this section by a Court shall be in writing. Where a trying Magistrate adjourned a case by an order in writing but there was nothing in writing on the record to show that he made an order remanding the accused to custody, it was held that the detention of the accused after the order of adjournment was illegal.[190.] Illegality of the detention order does not entitle the accused to be released on bail.[191.] Where bail was sought in a murder case on the ground that remand order was invalid under section 309(2) of CrPC as reasons for adjournment were not given and also proper authorisation for detention was not made out, the Allahabad High Court refusing bail held that reasons contemplated need not be detailed one; but merely indicate as to why the case was adjourned on a particular date. It was sufficient that the Presiding Officer was on leave or he had been transferred. The Court said that the present detention was valid, and the accused could not get benefit of any technical error in the past.[192.] In a trial by the Special Judge, the Advocate for the accused applied for adjournment on the ground of illness of the Senior Counsel, application was returned by the Court. The Court also examined the witnesses and asked the Advocate to cross-examination which he was not prepared for and thereupon the Court discharged the witness. It was held that the Advocate should have been given time to prepare for cross-examination by adjourning the hearing of the case.[193.]

In *Vinod Kumar v State of Punjab*,[194.] the Supreme Court expressed deep anguish over dilatory tactics and non-usage of section 309 and held it was not appreciable to grant adjournments on non-acceptable reasons. While summarising duty of Court while conducting trial, directions were issued to Chief Justices of all High Courts in this regard.

In *Akil@Javed v State*,[195.] the Supreme Court disapproved the practice of giving long adjournments during trials. It pointed out there is dire need for the Courts dealing with cases involving serious offences to proceed with the trial on day-to-day basis in *de die in diem* until the trial is concluded as stipulated by section 309.

[s 309.4] Stay.—

Where a criminal case for cheating and forgery was going on, a civil suit was also filed concerning the same cause of action, and the criminal case was sought to be stayed, it was held that the mere pendency of civil proceedings cannot *ipso facto* block criminal proceedings and its stay cannot be justified only on this ground.[196.] Stay of criminal prosecution for forgery of Will was sought on the ground of pendency of probate proceedings. The criminal case was instituted much prior to the filing of probate proceedings. The Court considered the conduct of the accused in filing a civil case at a time when criminal proceedings had already been instituted and held that the order of refusing stay was not liable to be interfered with.[197.]

[s 309.5] "Adjourn the same on such terms as it thinks fit".—

This clearly entitles the Court to award costs to the party who has been put to unnecessary expenses by the conduct of the other side.[198.] This will be done in exceptional circumstances.[199.] The costs are to be paid by the party applying for the adjournment. A Magistrate adjourning the hearing of a case owing to an application for transfer of the case cannot award the costs of the adjournment.[200.] Where an accused applied for an adjournment because he was ill, the Magistrate having no option but to adjourn the case although he might issue a warrant of arrest against the accused, an order of costs to be paid by the accused to the complainant was not legal.[201.] *Explanation* 2 makes it beyond doubt that in appropriate cases costs to either side may be awarded.

[s 309.6] "For such time as it considers reasonable".—

This section does not provide for an indefinite adjournment of a case. An adjournment *sine die* means an indefinite adjournment. The policy of the criminal law is to bring persons accused to justice as speedily as possible so that if they are found guilty, they may be punished and if they are found innocent, they may be acquitted and discharged. If the Government desire to put in a petition or request to the Court for an adjournment, they can do so directly through the Public Prosecutor who is the proper officer to put the matter before the Court.[202.] When prosecution took an unreasonably long time to produce witnesses and to examine them, the refusal to adjourn the case by the High Court was held reasonable.[203.]

Where a Court passed an order authorising the Superintendent of the District Jail, to detain the accused till further orders, the order was held to be invalid as not being in consonance with section 309 of CrPC. It was further held that section 309 of CrPC does not permit remand to custody for an indefinite period, but it should coincide with the duration of adjournment and not beyond it. However, a Court need not record reasons for remanding the accused though it has to give reasons for adjournment. The Court also pointed out that the warrant for remand to intermediate custody should normally be drawn in the relevant proforma.[204.]

[s 309.7] "Fifteen days at a time" [*Sub-section (1), Proviso (i)*].—

Fifteen days is the longest period for which an accused person may be remanded at a time by an order of the Magistrate.[205.] Section 167 provides for 15 days in all. The remand under that section cannot be more than 15 days on the whole. Under this section, the Magistrate may remand the accused to custody for a period not exceeding 15 days at a time, and no limit is set to the number of such orders of remand. An order of remand cannot be said to be invalid merely because an accused has not been produced before the Magistrate.[206.] However, where successive orders of remand were issued by the Court without production of the accused before taking cognizance, it was held that the detained accused was entitled to grant of bail and that he could move the High Court under the CrPC or under Article 226 of the Constitution of India to secure his release.[207.] An order staying criminal prosecution for an indefinite period is not in accordance with the provisions of this section.[208.]

Remanding the accused to custody beyond the period of 15days in his absence was held to be legal.[209.]

[s 309.8] "Accused if in custody"—

In *State v Dawood Ibrahim Kaskar*,[210.] it was held that—

> There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who come to be later arrested by the police in course of such investigation. If section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri (supra) - to mean that after the Court takes cognizance of an offence it cannot exercises its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are therefore of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who come under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which has taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the limitation of Section 167.

In *CBI v Rathin Dandapat*,[211.] it was held that the expression "accused if in custody" in section 309(2) as clarified in *Dawood Ibrahim Kaskar* did not include accused who is arrested on further investigation before supplementary charge-sheet is filed.

[s 309.9] No adjournment for showing cause against punishment [*Sub-section (2), Proviso (iii)*].—

The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the Court from adjourning the matter even where the interest of justice so demands. It may not entitle an accused to an adjournment, but the Court is not prohibited from granting one in serious cases of life and death to satisfy the requirement of justice as enshrined in section 235(2) of the Code.[212.]

Conviction and sentence should normally be recorded on the same day. When a conviction under section 302 is recorded and the sentence of life imprisonment is proposed to be awarded, the Court need not hear the accused on the question of sentence. But when death sentence is proposed, the third proviso to section 309(2) would not preclude the Court from granting adjournment to enable the accused to show cause against the proposed sentence. Sessions Courts or Special Courts must direct the accused persons tried and convicted by them to be immediately taken into custody, if they are on bail, and kept in jail till the question of sentence is decided. The submission that as the sentence and conviction were recorded on the same day, the judgment of the trial Court was against the law was not accepted.[213.] The Court summed up the legal position as follows:

> ... The legal position regarding the necessity to afford opportunity for hearing to the accused on the question of sentence may be reiterated as follows:
>
> (1) When the conviction is u/s. 302 IPC (with or without the aid of s. 34 or 149 or 120B IPC) if the Sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of sentence. Section 235(2) of the Code will not be violated if the sentence of the

life imprisonment is awarded for that offence without hearing the accused on question of sentence.

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

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

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

(5) If for any reason the Court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offence the convicted person shall be committed to jail till the verdict on the sentence is pronounced. Further detention will depend upon the process of law.[214.]

[s 309.10] Fourth proviso to sub-section (2).—

This proviso in three clauses was inserted in the Code by Act 5 of 2009. The reason for introduction of this amendment was to speed up trial and avoid delay. Under clause (a) of the fourth proviso, it was laid down that no adjournment would be granted at the request of a party, except where the circumstances were beyond the control of that party. Under clause (b), it was laid down that the pleader of the party being engaged in another Court shall not be a ground for adjournment. Under clause (c), it was laid down that the Court may record the evidence of a witness even if the lawyer is not present or not ready to examine the witness. However, in a case under the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985,[215.] the Supreme Court found that even though the amended provision was brought on statute book in 2009, the notification to bring the amendment into effect had not been made. The Supreme Court observed that the fourth proviso deserved to be notified immediately.

[s 309.11] Need for day-to-day examination of witness.—

The prosecution witness who had lodged the FIR immediately after the incident was under constant threat and was being compelled not to speak the truth despite the fact that he was the brother of the deceased. Other witnesses had turned hostile. On that basis, the High Court observed that the accused party was stronger in terms of money power and muscle power. The examination-in-chief of the witness was over and thereafter at the request of the council cross-examination was postponed and held some months later. It was held that this was highly improper. The Sessions Judge ought to have followed the mandate of section 309 of completing the trial by examining the witnesses from day to day and not giving a chance to the accused to threaten or win over the witnesses so that they might not support the prosecution. Even if the request for adjournment of the counsel for the accused was accepted, the cross-examination ought not to have been deferred beyond two or three days.[216.]

[s 309.12] Priority for disposal of cases of woman in jail with kids.—

In the matter of criminal trials, the Supreme Court felt it necessary that there should be priority for disposal of cases involving women who are in custody with their kids per force of circumstances. Article 21 of the Constitution would require due care of their children and that, if a child is born in jail, his birth place should not be mentioned as jail and children above six should not be kept with mother prisoners.[217.]

179. Subs. by Act 13 of 2013, section 21, for sub-section (1) (w.r.e.f. 3-2-2013). Earlier sub-section (1) was amended by Act 5 of 2009, section 21(a) (w.e.f. 31-12-2009). Sub-section (1), before subsitution by Act 13 of 2013, stood as under:

"(1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under sections 376 to 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.".

180. Subs. by Act No. 22 of 2018, section 16, for "section 376A, section 376B, section 376C, section 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible," (w.r.e.f. 21-4-2018).

181. Ins by Act No. 45 of 1978, section 24 (w.e.f. 18-12-1978)..

182. Ins. by Act No. 5 of 2009, section 21(b) (w.e.f. 1-11-2010).

183. *Krishnaji*, (1879) 23 Bom 32; *Rama*, (1902) 4 Bom LR 878 ; *Legal Remembrancer, Bengal v Bidhindra Kumar Ray*, (1949) 2 Cal 75 .

184. *Queen-Empress v Engadu*, (1888) ILR 11 Mad 98.

185. *Re Nagendra Nath*, (1923) 51 Cal 402 ; *Babubhai Purushottamdas v State of Gujarat*, 1982 Cr LJ 284 (Guj).

186. *Hussainara Khatoon v State of Bihar*, 1979 Cr LJ 1045 : AIR 1979 SC 1360 : (1980) 1 SCC 81 .

187. *Mohd Khalid v State of WB*, (2002) 7 SCC 334 : JT 2002 (6) SC 486 : 2002 (6) Scale 238 . The Court relied on *State of UP v Shambhu Nath Singh*, AIR 2001 SC 1403 : 2001 Cr LJ 1740 : (2001) 4 SCC 667 , witnesses were postponed several times in the matter of their examination, the Supreme Court deprecated it. *NG Dastane v Shrikants Shivale*, (2001) 6 SCC 135 : AIR 2001 SC 2028 ; *Hafiz Afzal v UOI*, 2002 Cr LJ 141 (All), complaint filed, the section became applicable, trial in absentia, bailable warrants.

188. *State v Sukh Singh*, (1954) 4 Raj 413 .

189. *Rabendra Rai v State of Bihar*, 1984 Cr LJ 1412 (Pat).

190. *Ram Narayan Singh v The State of Delhi*, (1953) SCR 652 : AIR 1953 SC 277 : 1953 Cr LJ 1113 .; *State (CBI) v Dawood Ibrahim*, AIR 1997 SC 2494 : 1997 Cr LJ 2989 , the Court which takes cognizance of an offence, where the accused was arrested subsequently during investigation, can order detention in police custody in exercise of the power under section 167.

191. *Mahesh Chand v State of Rajasthan*, 1985 Cr LJ 301 (Raj).

192. *Lokendra v State of UP*, 1996 Cr LJ 67 (All).

193. *Himachal Singh v State of Madhya Pradesh*, 1990 Cr LJ 1490 (MP).

194. *Vinod Kumar v State of Punjab*, (2015) 3 SCC 220 : AIR 2015 SC 1206 : 2015 Cr LJ 1442 : 2015 (1) Scale 542 .

195. *Akil@Javed v State*, (2013) 7 SCC 125 : 2013 Cr LJ 571 : JT 2012 (12) SC 200 : 2012 (11) Scale 709 .

196. *Court on its motion v Kailash Rani*, 1993 Cr LJ 2109 (P&H).

197. *Syed Askari Hadi Ali Augustine Imam v State (Delhi Admn)*, AIR 2009 SC 3232 : (2009) 5 SCC 528 .

198. *Mathura Prasad v Basant Lal*, (1906) ILR 28 All 207; *Phandia*, (1945) Nag 669.

199. *Re Abdul Rahiman*, (1917) 42 Bom 254 : 20 Bom LR 124; *Nana Rama*, (1972) 75 Bom LR 135 .

200. *Sarabji v Erachshaw*, (1932) 34 Bom LR 1106 : 56 Bom 536.

201. *Ichab Shaik v Kshirode Kumar Ghosh*, (1945) 1 Cal 481 .

202. *Mahammad Ebrahim*, (1941) 2 Cal 281 .

203. *State (Delhi Admn) v Vishwanath Lugnani*, AIR 1981 SC 1235 : 1981 Cr LJ 745 : (1981) 3 SCC 69 .

204. *Mohd Daud v Superintendent, District Jail, Moradabad*, 1993 Cr LJ 1358 (All).

205. *Surkya*, (1868) 5 BHC (CRC) 31.

206. *M Sambasiva Rao v UOI*, AIR 1973 SC 850 : 1973 Cr LJ 663 ; *Manohari v State of Rajasthan*, 1973 Cr LJ 1231 (Raj).

207. *A Narayan Reddy v State of Andhra Pradesh*, 1992 Cr LJ 630 (AP).

208. *Bombay Municipal Corp v Suresh Gupta*, 1986 Cr LJ 213 (Bom); *RS Redkar v State of Maharashtra*, 1980 Cr LJ 254 (Bom).

209. *Rabindra Naik v State of Orissa*, 1994 Cr LJ 3521 (Ori).

210. *State v Dawood Ibrahim Kaskar* (2000) 10 SCC 438 : AIR 1997 SC 2494 : 1997 Cr LJ 2989 : JT 1997 (5) SC 651 : 1997 (4) Scale 156 .

211. *CBI v Rathin Dandapat*, (2016) 1 SCC 507 : AIR 2015 SC 3285 : 2015 Cr LJ 4488 : 2015 (9) Scale 120 .

212. *State of Maharashtra v Sukhdeo Singh*, AIR 1992 SC 2100 : 1992 Cr LJ 3454 : (1992) 3 SCC 700 .

213. *Ramdeo Chauhan v State of Assam*, AIR 2001 SC 2231 , at pp 2235–2236 : 2001 Cr LJ 2902 : (2001) 5 SCC 714 .

214. *Ibid*

215. *Thana Singh v Central Bureau of Narcotics*, 2013 Cr LJ 1262 : JT 2013 (2) SC 407 : (2013) 2 SCC 590 .

216. *Ambika Prasad v State (Delhi Admn)*, (2000) 2 SCC 646 : AIR 2000 SC 718 : 2000 Cr LJ 810 ; *Aquelo v State of Maharashtra*, 2002 Cr LJ 3007 (Bom), piecemeal examination of witnesses should be avoided. A trial once began should be conducted on day to day basis.

217. *RD Upardhaya v State of AP*, AIR 2006 SC 1946 : (2007) 15 SCC 337 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 310] Local inspection.—

(1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desires, a copy of the memorandum shall be furnished to him free of cost.

Powers of local inspection under this section can be exercised at any stage of the inquiry or trial, even before evidence is recorded. Its exercise is discretionary, the discretion depending on the facts and circumstances of each case, the only condition to be fulfilled being that the Court must be of opinion that it is necessary to view the place for the purpose of properly appreciating the evidence. However, the observations made by the Court during its inspection cannot be treated as part of evidence in the case. They can only be used to properly appreciate the evidence given at the trial.[218.]

[s 310.1] "For the purpose of properly appreciating the evidence...trial".—

Local inspection of the place of occurrence of offence, either on application of parties or *suo motu* is made only for the purpose of appreciating the evidence of the case and for no other purpose. It cannot be used for preparation of the background for appreciating the evidence of witnesses because preparation of the background is to be made by the parties themselves, and the Magistrate is not expected to supply that lacuna in evidence by local inspection. The preparation of the background to appreciate the evidence is not the same thing "as properly appreciating the evidence" contemplated by the section. If the impressions gained on local inspection of controversial matters are allowed to get in without being tested by cross-examination, there is likelihood of miscarriage of justice resulting therefrom. If local inspection is used to prepare background, it takes the place of obtaining additional information or evidence and that is not permissible.[219.]

[s 310.2] "Record a memorandum".—

Failure to make a memorandum and keep it on record of the case does not vitiate a trial or proceeding unless it has resulted in failure of justice or has caused prejudice to an accused in his defence.[220.]

218. *Abdul Karim Kasam Virani v State of Maharashtra*, (1973) 75 Bom LR 683 : 1974 Cr LJ 514 ; *Keisam Kumar Singh v State of Manipur* 1986 Cr LJ 17 : AIR 1985 SC 1664 : (1985) 3 SCC 676 ; *State of MP v Mishrilal*, 2003 Cr LJ 2312 (SC) : (2003) 9 SCC 426 , spot inspection by the trial judge clearly suggested deficiency of evidence on the point of the place of occurrence. The trial judge should, in such cases, record the memo of inspection.

219. *State of Kerala v Chandran*, 1974 Cr LJ 52 .

220. *Adam Ahmed v State*, 1970 Cr LJ 1350 : AIR 1970 Guj 185 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 311] Power to summon material witness, or examine person present.—

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned, as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

The scope of this section is very wide. It enables any Court at any stage of any inquiry, trial or other proceeding under the Code to do one of three things, (1) to summon any person as a witness; (2) to examine any person who is in attendance though not summoned; or (3) to recall and re-examine any person already examined. So far, the section is permissive. But where the evidence of any person appears to be essential to the just decision of the case, it is obligatory on the Court to summon and examine or re-call and re-examine him.[221.] The section applies to witnesses for the prosecution as also to those of the defence. It is not confined to Court witnesses.[222.] The section confers a power in absolute terms. Where the Court exercise the power under the second part of the section, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is needed by it for a just decision of the case. under section[223.] The requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.[224.]

In *Rajaram Prasad v State of Bihar*,[225.] following principles were culled—

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

(b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

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

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

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

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

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

(h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

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

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

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

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

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

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

The Supreme Court has held that the Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial.[226.]

In State *(NCT of Delhi) v Shiv Kumar Yadav*,[227.] it was held that mere change of counsel cannot be a ground to recall the witness.

The words "essential to the just decision of the case" are the key words. But the exercise of this power cannot be arbitrary. The Court should not permit the prosecution to fill-up the lacuna. It has been held that whether recall of a witness is for filling-up of a lacuna or it is for a just decision of a case depends on facts and circumstances of each case.[228.]

In the matter of summoning of material witnesses, the section creates wholly a discretionary power. The discretion thus conferred is to be exercised judiciously.[229.]

In *State of Haryana v Ram Mehar*,[230.] it was held that the Doctrine of Balance must be adhered to and the interests of victim and accused must be balanced. It was further held that the concept of Fair Trial cannot be limitlessly stretched to permit recall of witnesses endlessly on ground of magnanimity *etc*.

[s 311.1] This section and Section 165, Evidence Act.—

The power of the Court under section 165, Evidence Act, is complimentary to its power under section 311 CrPC. The discretion to examine witnesses under section 311, though very wide, the very width requires corresponding caution.[231.]

[s 311.2] "At any stage of any inquiry, trial, *etc.*"—

"The powers under section 311 can be exercised at any stage if the evidence of a witness appears to be essential to just decision of the case and it is the duty of the Court to summon or recall examining any such person."[232.]

"Trial" within the meaning of this section terminates with the pronouncement of judgment; until that stage is reached fresh evidence can be called under this section for the proper decision of the case.[233.]

[s 311.3] "Any person as a witness".—

While immunity from prosecution was granted to an accused by Narcotics Control Bureau under section 64 of the NDPS Act, 1985 an application under section 311 was filed by the prosecution before Sessions Judge for leave to examine the accused as a witness in the pending case. Rejection of the application by the Sessions Judge under section 311, which resulted in withdrawal of the immunity, granted under section 64 NDPS Act, 1985, it was held that that was not justified as Sessions Judge could not sit in appeal over decision of Narcotics Control Bureau under section 64.[234.]

The Court has the power to summon material witnesses not only in favour of the accused, witnesses favouring the prosecution can also be examined, no matter even if it amounts to filling of loopholes in the prosecution case.[235.]

In a murder case, the investigating officer recorded the statement of the person who later died. The said statement inadvertently could not be brought on record. The prosecution wanted to treat it as dying declaration and made an application for recall of the Investigating officer after one month of his re-examination. It was held that it cannot be said that it was for the purpose of filing-up lacuna. Moreover, it would cause no prejudice to the accused as he was aware of the statement. It was further held that recall of a witness once does not prevent his further recall as the power of recall does not put such limitation on the Court.[236.]

A case of bribery was instituted by the father of one Ruchi Saxena in respect of the property belonging to the said daughter Ruchi Saxena. The said daughter had nothing to do with the bribery case, either as complainant or as a witness to the trap arranged by the police. Her name did not figure as one of the witnesses to be examined by prosecution when charge-sheet was submitted. It was held by the Supreme Court that her evidence cannot be said to be essential for just decision of the case. In that view of the matter, the order summoning the said daughter as a Court witness was held to be improper and arbitrary exercise of power.[237.]

[s 311.4] Recall.—

Re-examination of prosecution witnesses cannot be permitted merely for filling up lacuna in the prosecution evidence. Mistakes or laches on the part of the prosecutor in conducting his case cannot be taken to be a lacuna in the prosecution case.[238.]

In a case of bribery, where the accused sought recall of the complainant and the shadow witness for cross-examination on the plea that their cross examination was deferred, as the defence wanted to cross-examine them after the trap laying officer was examined, it was held by the Supreme Court that the prayer for recall was liable to be accepted notwithstanding that the prayer was made years after their examination-in-chief. It was held that refusal to recall the witness would amount to condemning the accused without giving him opportunity to challenge the correctness of the prosecution version and credibility of witness.[239.]

In *Sister Mina Lalita Baruwa v State of Orissa*, it has been held by the Supreme Court that it is the duty of the Court to remove anomaly in the recording of evidence. In a case, where a mis-statement was made by the officer holding identification parade and the statement went unnoticed by the prosecution, it was held that the Court ought to have exercised power under section 311 of the Code.[240.] Explaining the proposition FMI Kalifulla J, speaking for the Bench, observed as follows:

> 21. Having referred to the above statutory provisions, we would discern that while under S. 301(2) the right of a private person to participate in the criminal proceedings has got its own limitations, in the conduct of the proceedings, the ingredients of S. 311 empowers the trial Court in order to arrive at a just decision to resort to an appropriate measure befitting the situation in the matter of examination of witnesses. Therefore, a reading of Ss. 301 and 311 together keeping in mind a situation like the one on hand, it will have to be stated that the trial Court should have examined whether invocation of S. 311 was required to arrive at a just decision.[241.]

[s 311.5] Recalling complainant for re-examination.—

An application was made for recalling and re-examining complainant. Its rejection was allowed under section 482 without hearing the accused. The application to recall the order was also rejected. The order allowing the petition under section 482 was set aside even though it is true that the High Court has no power to review or recall its orders.[242.]

[s 311.6] *Suo motu* reopening.—

Where after closure of prosecution evidence, the District & Sessions Judge *suo motu* reopened the case and directed to issue summons to Radiologist so that he may give his evidence and file the x-ray report, considering the same to be useful for deciding the case and giving reasons therefor, it could not be said that jurisdiction under section 311 was exceeded.[243.]

[s 311.7] Cross-examination.—

The prosecution as well as the defence have a full right to cross-examine a witness called by the Court.[244.] The Court cannot restrict the cross-examination to the subjects

on which it had examined the witness.[245.] When the witness was permitted to be cross examined by the Public Prosecutor, such a witness cannot be discarded altogether.[246.]

[s 311.8] Recalling order of closure of evidence.—

In a trial for murder, the prosecution evidence was ordered to be closed by Sessions Judge before examination of all the witnesses. After transfer of the case to another Sessions Jude, that order was recalled, and the APP was directed to produce the witnesses. The High Court allowed revision petition filed by the accused taking the view that a Criminal Court cannot recall its earlier order. The State filed an application under section 311 before the Sessions Judge for examining the witnesses. The application was rejected in view of the High Court's order allowing the revision petition. The Supreme Court held that the application under section 311 was wrongly rejected.[247.]

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221. *Ram Sarup Rai v Emperor*, (1901) 6 Cal WN 98; *PA Pakir Mohamed*, (1926) 4 Ran 106; *Narayan*, (1942) Mad 494; *Sarfaraz Ali*, (1941) 17 Luck 20 . **See also** *West Bengal v Tulsidas Mundhra*, (1964) 1 Cr LJ 443 (SC).

222. *Hansraj*, (1942) Nag 333.

223. *Shyama Naik v State of Orissa*, 1995 Cr LJ 3204 (Ori).

224. *Jamatraj v State of Maharashtra*, AIR 1968 SC 178 : 1968 Cr LJ 231 ; *Konta Markandeyulu v Republic of India*, 1989 Cr LJ 238 (Ori).

225. *Rajaram Prasad v State of Bihar*, (2013) 14 SCC 461 : AIR 2013 SC 3081 : 2013 Cr LJ 3777 : JT 2013 (11) SC 118 : 2013 (8) Scale 316 .

226. *Hussain Umar v Dalipsinghji*, AIR 1970 SC 45 : (1969) 3 SCC 429 . *Ram Deo Sharma v State of Bihar*, AIR 1999 SC 3524 : (1999) 7 SCC 604 , directions for speedy trial of criminal cases were given in the main judgment in *Raj Deo Sharma v State of Bihar*, AIR 1998 SC 3281 : 1998 AIR SCW 3208 : 1998 Cr LJ 4596 : (1998) 7 SCC 507 . Some clarification which became necessary about those guidelines, was provided for in the above-cited second case and the Supreme Court directed that those guidelines be implemented forthwith.

227. *State (NCT of Delhi) v Shiv Kumar Yadav*, (2016) 2 SCC 402 : AIR 2015 SC 3501 : 2015 Cr LJ 4640 : 2015 (9) Scale 649 .

228. *Mannan SK v State of West Bengal*, AIR 2014 SC 2950 : (2014) 13 SCC 59 : 2014 Cr LJ 4072 (SC).

229. *Zahira Habibullah Sheik v State of Gujarat*, AIR 2006 SC 1367 : (2006) 3 SCC 374 : 2006 Cr LJ 1697 .

230. *State of Haryana v Ram Mehar*, (2016) 8 SCC 762 : AIR 2016 SC 3942 : 2016 Cr LJ 4666 : 2016 (8) Scale 192 .

231. *Himanshu Singh Sabharwal v State of MP*, AIR 2008 SC 1943 : (2008) 3 SCC 602 .

232. *Sama Ram v State of Rajasthan*, 2002 Cr LJ 3134 (Raj).

233. *Ram Jeet v State*, (1958) 1 All 52 : AIR 1958 All 439 : 1958 Cr LJ 716 .

234. *Jasbir Singh v Vipin Kumar Jaggi*, AIR 2001 SC 2734 : (2001) 8 SCC 289 .

235. *Iddar v Aabida*, AIR 2007 SC 3029 : (2007) 11 SCC 211 : 2007 Cr LJ 4313 .

236. *Mannan Sk v State of West Bengal*, AIR 2014 SC 2950 : (2014) 13 SCC 59 : 2014 Cr LJ 4072 (SC).

237. *Vijay Kumar v State of UP*, 2012 Cr LJ 305 (SC) : (2011) 8 SCC 136 .

238. *Rajendra Prasad v Narcotic Cell*, AIR 1999 SC 2292 : 1999 Cr LJ 3529 : (1999) 6 SCC 110 ; *Hoffman Andreas v Inspector of Customs*, (2000) 10 SCC 430 : (2000) 8 JT 155 , witness ordered to be recalled setting aside the conviction in the interest of re-trial. *Udaibir v State of UP*, 2002 Cr LJ 1528 (All). Some prosecution filed applications with affidavits for permission to change their statements, an attempt was being by the defence to win them over, an application for recalling them was held to be proper. *Harshad V Shah v Sudarshanbhai R Shah*, 2002 Cr LJ 3478 (Guj), complainant already cross-examined at length, a subsequent High Court judgment could not furnish a ground for recalling the complainant. *Pepatlal Jethabhai Shah v State of Maharashtra*, 2002 Cr LJ 794 (Bom), an application for recalling all the prosecution witnesses became the accused intended to change his advocate not allowed because the intention was to abuse the process of law. *Kunwar Pal v State of UP*, 2002 Cr LJ 3647 (All), offence already compounded though not compoundable, witnesses not allowed to be recalled.

239. *P Sanjeeva Rao v State of AP*, AIR 2012 SC 2242 : (2012) 7 SCC 56 : (2012) 3 SCC (Cri) 1 .

240. *Sister Mina Lalita Baruwa v State of Orissa*, AIR 2014 SC 782 : (2013) 16 SCC 173 2014 Cr LJ 671 (SC); *Shakila Abdul Gafar Khan v Vasant Raghunath Dhoble*, AIR 2003 SC 4567 : 2003 Cr LJ 4548 — Ref.].

241. *Ibid*, para 21 at p 789 (of AIR).

242. *Iddar v Aabida*, AIR 2007 SC 3029 : (2007) 11 SCC 211 : 2007 Cr LJ 4313 .

243. *Palacharla Rama Rao v State of AP*, 2002 Cr LJ 4189 (AP).

244. *Pita v Emperor*, (1924) 47 All 147 ; *Mohendro Nath Das Gupta v Emperor*, (1902) ILR 29 Cal 387.

245. *Chintamon Singh v Emperor*. (1907) 35 Cal 243 .

246. *Narpatsingh v State of Rajasthan*, 1990 Cr LJ 2720 (Raj).

247. *Shailendra Kumar v State of Bihar*, AIR 2002 SC 270 : 2002 Cr LJ 568 : (2002) 1 CHN (Supp) 104 : (2002) 1 SCC 655 . The Court relied on *Rajendra Prasad v Narcotic Cell*, (1999) 6 SCC 110 : 1999 SCC (Cri) 1062 ; *Consideration of Selvi J Jayalalitha v State*, (2000) 9 SCC 754 : (2000) 8 JT 202 , affording one more opportunity to the appellant to examine the defence witnesses would be in the interest of justice.

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[248.][s 311A] Power of Magistrate to order person to give specimen signatures or handwriting.—

If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

***Provided* that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.]**

[s 311A.1] CrPC (Amendment) Act, 2005 [*Clause (27)*].—

The Supreme Court in *State of UP v Ram Babu Mishra*[249.] suggested that a suitable legislation be made on the analogy of section 5 of the Identification of Prisoners Act, 1980, to provide for the investiture of Magistrates with powers to issue directions to any person including an accused person to give specimen signatures and handwriting. Section 311A has accordingly been inserted in the Code. (*Notes on Clauses*).

In an extremely relevant question of law, the Supreme Court vide order dated 15 September 2016 in *State of NCT of Delhi v Mohd Yunus*[250.] referred an interesting issue to a three-Judge Bench. The issue surrounds powers of police/investigating agency to obtain specimen handwriting and signature from accused during investigation and admissibility of such evidence obtained pre 2005 amendment. The matter was ordered to be tagged along with *Ritesh Sinha v State of UP*,[251.] wherein the issue pertained to whether a voice sample could be included within the definition of "measurements" under the Identification of Prisoners Act, 1920, which was referred to a three-Judge Bench in view of divergent opinions between Justices Ranjana Prakash Desai and MY Eqbal.[252.] The issue raises questions of seminal importance of control over powers of police and relevancy and admissibility of such evidence obtained.

The full bench of the Delhi High Court in *Bhupinder Singh v State*[253.] dealt with an interesting question in a reference made to it that "Whether the sample finger prints given by the accused during investigation 4 of the Identification of Prisoners Act, 1920 without prior permission of the Magistrate 5 of the Act will be admissible or not?"—It was held that if finger prints are taken by the investigating officer directly and not through the Magistrate, it is correct in law as section 4 of Identification of Prisoners Act, 1920, provides that any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurement to be taken in the prescribed manner. In view of the independent powers conferred upon a police officer under section 4 of the Act, it was not obligatory for him to approach the Magistrate under section 5 of the Act. He would have approached the Magistrate, had the appellants refused to give Specimen Finger Print Impressions to him. Therefore, no illegality attaches to the specimen finger print impressions taken by the investigating officer.

The Court needs to appreciate that the very nature and characteristic of material such as finger prints renders it intrinsically and inherently impossible for anyone to fabricate them. If there is an attempt to fabricate finger prints, that can certainly be exposed by the accused by offering to allow his finger prints to be taken so that the same could be compared through the process of the Court. The appeal preferred to the Supreme Court registered as SLP (Crl) CRLMP No. 21053/2013 was dismissed on 25-20-2013 on ground of delay.

The full bench of the Delhi High Court in *Sapna Haldar (Shaifali Haldar) v State*[254.] dealt with an interesting question in a reference made to it on admissibility of sample handwriting or signature obtained from a person accused of having committed an offence or during investigation of a crime by the investigating officer. It was held that—

(i) Handwriting and signature are not measurements as defined under clause (a) of Section 2 of The Identification of Prisoners Act, 1920. Therefore, Section 4 and Section 5 of The Identification of Prisoners Act, 1920, will not apply to a handwriting sample or a sample signature. Thus, an investigating officer, during investigation, cannot obtain a handwriting sample or a signature sample from a person accused of having committed an offence.

(ii) Prior to June 23, 2006, when Act No.25 of 2005 was notified, inter-alia, inserting Section 311A in the Code of Criminal Procedure, 1973, even a Magistrate could not direct a person accused to give specimen signatures or handwriting samples. In cases where Magistrates have directed so, the evidence was held to be inadmissible as per the decision of the Supreme Court in Ram Babu Mishra's case (supra). According to Section 73 of the Indian Evidence Act, 1872, only the Court concerned can direct a person appearing before it to submit samples of his handwriting and/or signature for purposes of comparison.

The State of Delhi preferred an SLP registered as Criminal Appeal No. 1732/2015 against this order before the Supreme Court which has vide order dated 16-12-2015 granted leave to appeal in the matter.

Where the occurrence was of the year 1983–1986, it was held that the authority of the Executive Magistrate to take specimen signatures during the course of investigation cannot be disputed.[255.]

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248. Ins. by Act No. 25 of 2005, section 27 (w.e.f. 23-6-2006).

249. *State of UP v Ram Babu Mishra*, AIR 1980 SC 791 : (1980) 2 SCC 343 .

250. *State of NCT of Delhi v Mohd Yunus*, (Criminal Appeal No. 1318/2013).

251. *Ritesh Sinha v State of UP*, AIR 2013 SC 1132 : 2013 Cr LJ 1301 : JT 2012 (12) SC 258 : 2012 (12) Scale 10 : (2013) 2 SCC 357 .

252. *Ritesh Sinha v State of UP*, (2013) 2 SCC 357 : AIR 2013 SC 1132 : 2013 Cr LJ 1301 : JT 2012 (12) SC 258 : 2012 (12) Scale 10 .

253. *Bhupinder Singh v State*, CRL. A 1005/2008 as decided on 30 September 2011 by the Delhi High Court.

254. *Sapna Haldar (Shaifali Haldar) v State*, (2012) CRL A 804/2001.

255. *Sukh Ram v State of Himachal Pradesh*, AIR 2016 SC 3548 : 2016 Cr LJ 4146 : 2016 (7) Scale 354 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 312] Expenses of complainants and witnesses.—

Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

The Magistrate has discretion to order payment of expenses to the witnesses either by the party concerned or by the State subject to the Rules made by the State. In a Food Adulteration case instituted with the sanction of the Government by a public servant, it was held that in the absence of any rules, the Magistrate was justified in exercising his discretion to order the accused to deposit expenses of the witness, he seeks to examine.[256.]

The Supreme Court said about diet money that a proper amount must be paid immediately not only when the witnesses are actually examined but for every adjourned hearing also and they should not be allowed to be harassed by the subordinate staff of the Court.[257.]

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256. *KV Baby v Food Inspector*, 1994 Cr LJ 3421 (Ker).

257. *Swaran Singh v State of Punjab*, 2000 Cr LJ 2780 : (2000) 5 SCC 668 .

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 313] Power to examine the accused.—

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided **that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).**

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

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

[258][(5) **The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.]**

[s 313.1] CrPC (Amendment) Act, 2008 [*Clause (22)*].—

This clause amends section 313 of the Code relating to power of the Court to examine the accused. The clause inserts a new sub-section (5) to the said section so as to eliminate delay in trial, by providing that the Court may take help of Prosecutor and Defence Counsel in preparing relevant questions to be put to the accused. (*Notes on Clauses*).

COMMENT

This section empowers the Court to examine the accused after the evidence for the prosecution has been taken. The object of empowering the Court to examine the accused is to give him an opportunity of explaining any circumstances which may tend to incriminate him and thus to enable the Court, in case where the accused is

undefended, to examine the witnesses in his interest.[259.] The object of questioning an accused person by the Court is to give him an opportunity of explaining the circumstances that appear against him in the evidence. If, for example, some article is found in the accused's house which points in an emphatic manner to the accused's responsibility for the crime, he should be given an opportunity of offering an explanation of the presence of that article in his house.[260.] Only the accused person can be examined under this section.[261.]

The examination of an accused under this section is quite a different thing from taking the plea of the accused which is done at an earlier part of the proceedings. The objects of the two sections are entirely different.[262.]

The Supreme Court has held that the proposition that a pleader authorised to appear on behalf of the accused can do all acts which the accused himself can do is too wide. At the close of the prosecution evidence, the accused must be questioned and his pleader cannot be examined in his place.[263.] Where the advocate of an accused was examined under section 313 CrPC instead of the accused himself, the Supreme Court set aside the order and directed the Magistrate to proceed with the case after recording the statement of the accused personally as it could not be dispensed with in a warrant case.[264.]

Where the evidence against an accused consists of circumstantial evidence only, it is of the utmost importance that the various circumstances which clinch the issue against him should be put to him and an explanation called for from him.[265.]

The Supreme Court has held that an accused should be properly examined under this section and, if a point in the evidence is considered important against the accused and the conviction is intended to be based upon it, then it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it if he so desires. Where the appellant along with the co-accused were charged only under section 302 read with sections 34 and 394 IPC, and the facts constituting the abetment by the appellant were not put to him in his examination under section 313 CrPC the same could not be used against him.[266.] A duty is cast upon the Courts to question the accused properly and fairly so that the exact case that the accused has to meet is brought home to him in clear words and thereby an opportunity is given to him to explain any point.[267.] This is an important and salutary provision and should not be slurred over. It is not a proper compliance with this section to read out a long string of questions and answers made in the committal Court and ask the accused whether the statement is correct. A question of that kind is misleading. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him.[268.] Rolling up several distinct matters of evidence in a single question by the Sessions Judge is also irregular.[269.] However, every error or omission in complying with the section would not vitiate the trial.[270.] An admission made by the accused should be read as a whole, it should not be so dissected that one part which is inextricably connected with the other is used and the other is not taken into consideration.[271.] Broadly stated the true position is that asking a few omnibus questions for the sake of brevity is as much inconsistent with this section as asking unduly detailed and large number of questions.[272.]

The Supreme Court has also held that the duty of a Sessions Judge to examine the accused is not discharged by merely reading over the questions put to the accused in the Magistrate's Court and his answers, and by asking him whether he has to say anything about them. It is also not a sufficient compliance with the section to ask the

accused generally that, having heard the prosecution evidence, what he has to say about it. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and the questions must be fair and must be couched in a form which an ignorant or illiterate person may be able to appreciate and understand.[273.]

The Supreme Court has further held that in order that a conviction may be set aside for non-compliance with the provisions of this section, it is not sufficient for the accused merely to show that he was not fully examined as required by the section, but he must also show that such non-compliance has materially prejudiced him.[274.] If the State relies in the Supreme Court on any particular circumstance as being sufficient to sustain a conviction, it will be open to an accused to plead in answer that that particular circumstance was not put to him in his examination under this section or section 281.[275.] In a murder case, the accused was clearly questioned on the point of motive in his statement under section 313 CrPC, the Supreme Court held that it could not be said that the accused was totally unaware of the accusation with regard to the motive part, and so no prejudice had been caused to him.[276.] Where the accused was deaf and dumb, and no explanation was sought regarding the evidence of the prosecution or no interrogation as to the facts appearing against him was held, it was held that the accused was prejudiced by such failure of the Court.[277.] Even if there was any defect in the examination of the accused under CrPC, the defect amounted merely to an irregularity and was not such as to call for an interference with the orders passed by the Court below especially when no complaint on this ground was raised before the High Court.[278.]

The Supreme Court has held that prejudice must be shown by an accused before it can be held that he was entitled to acquittal over defective and perfunctory statement under section 313. Moreover, objection as to defective statement was not raised before the trial Court and most of the questions were references relatable to evidence on record. Thus, no prejudice can be assumed to have been felt by the accused.[279.]

[s 313.2] Scope.—

The Madras High Court was of opinion that the section did not apply to summons-cases though there is no objection to the Magistrate questioning the accused and in complicated cases it may be a desirable course to take.[280.] The same was the view of the Rangoon High Court.[281.] But the High Courts of Bombay,[282.] Calcutta,[283.] Allahabad,[284.] Patna[285.] and Lahore[286.] have held that the Magistrate is bound to examine the accused in a summons-case, and the omission to do so vitiates the trial. The proviso now makes it clear that the section applies to summons cases as well, the only exception being the case where personal attendance of the accused has been dispensed with.

This section is wide in its language and does not limit the power of the Court to examine the accused at any particular stage. The Court can examine him as often as it thinks it necessary to do so, to enable the accused person to explain any circumstances appearing against him in the evidence, the object of the section being to see whether the accused can give an innocent explanation of the facts spoken to against him. There is nothing in the language of the section which would prevent the Court from examining the accused even after the defence evidence has been recorded.[287.]

This section must be read subject to the provisions of section 205. Hence, where a Magistrate exercises the power given to him by section 205 of dispensing with the personal attendance of the accused and permits him to appear by his pleader, the Magistrate is not bound to question the accused personally.[288.] The Court need not record the reasons while dispensing with the examination of the accused.[289.]

In a summons case, discretion lies with the Magistrate whether to dispense with the examination of the accused under section 313. His personal appearance was dispensed with under section 205 or 317. The accused could not claim as of right that he should not be examined or that the counsel should be examined.[290.]

The section applies to a summary trial,[291.] in a summons-case[292.] or a warrant case.[293.] It is not necessary, in such a trial, for the Court to record the questions put to the accused person or his answers.[294.]

The section does not apply to proceedings under sections 125 and 126,[295.] or to additional evidence taken at the instance of the appellate Court, though the accused may be questioned in regard to such additional evidence, but if he is not, there is no legal omission.[296.]

The section applies to a trial before the Sessions Judge even when the accused has been questioned on the case generally by the committing Magistrate.[297.]

Under section 205 of the CrPC at the conclusion of the trial, the Magistrate directed the accused to appear personally before the Court for recording his statement as contemplated by section 313 of the Code. The accused requested that his statement be recorded through his counsel. The Magistrate rejected this request. The High Court refused to interfere. On appeal to the Supreme Court, it was stated by the accused that he would not raise any plea of prejudice, caused to him by non-examination at a subsequent stage of the trial. The Supreme Court set aside the order of the Magistrate.[298.]

According to the Supreme Court, the word "shall" in clause (b) in section 313(1) is to be interpreted as obligatory on the Court and that it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage, the Court should in appropriate cases adopt a measure to comply with the requirements of section 313 in a substantial manner.[299.]

Failure of an accused to mention a particular fact in his statement under this section (section 342, 1898 Code) would go to show that it was an afterthought.[300.]

[s 313.3] Role of Court.—

Under section 313 CrPC and section 165 of the Evidence Act, the trial Court has ample power and discretion to interfere and control the conduction of trial properly, effectively and in a manner as prescribed by law. While conducting the trial, the Court is not required to sit as a silent spectator or umpire but to take active part well within the boundaries of law. Where several important documents were not got proved though filed along with charge-sheet and several important documents were not filed which all could be relevant for just decision of a trial, the same could be got proved and directed to be produced by the trial Court under section 165 of the Evidence Act, 1872 and section 311 of CrPC.[301.]

[s 313.4] "Accused".—

Accused means the accused then under trial and under examination by the Court and does not include an accused over whom the Court is exercising jurisdiction in another trial.[302.]

[s 313.5] "Explain any circumstances...in the evidence against him".—

The examination of the accused is for the purpose of enabling him to explain any circumstances appearing in evidence against him.[303.] The Court has to ask only such questions as are brought on record as against the accused. The accused was charged of misappropriating public money. The plea that no question was put to the accused to give him opportunity to explain whether the money was given for his personal use, was held to be not tenable.[304.]

It is imperative on the Court to record the statement of the accused so as to give them an opportunity to explain any incriminating circumstances proved by the prosecution. If such opportunity is not afforded, such incriminating piece of evidence cannot be relied upon. The plea of improper recording of the statement was not taken up before the trial Court or High Court. It could not be used to avail any benefit to the accused when no prejudice was shown to have been caused to him.[305.]

Each separate piece of evidence in support of circumstances need not be put to him and he need not be questioned in respect of it.[306.]

No question can be put regarding a matter when there is no evidence about it.[307.] Where there are several accused, each of them must be examined.[308.] The Court in examining must avoid incriminating questions and questions in the nature of cross-examination.[309.] An accused cannot, while being examined under section 313 (old section 342) of the Code, be subjected to cross-examination and a bold assertion to explain a piece of conduct almost always fails to convince.[310.]

The statement made by an accused in his examination under section 313 CrPC cannot be put against him. Thus, in a case of murder caused by fatal injury caused by the accused, the statement of the accused under section 313 was contradictory to the prosecution's case and suggested the death due to quarrel between co-accused and a witness and the deceased. It was held by the Supreme Court that the said statement could not have been put against the accused in concluding about the presence of the witness.[311.]

The provision under section 313 is based on the fundamentals of fairness and it is mandatory. But every omission to put any incriminatory circumstance of the case to the accused, would not vitiate the trial unless it is shown that serious prejudice has been caused to the accused due to omission.[312.]

An explanation by the accused which was inconsistent with his conduct and which was palpably false was not accepted.[313.]

[s 313.6] Failure to put questions to accused concerning evidence of formal nature.—

The Supreme Court held that if the rest of the evidence is sufficient to bring to home the guilt of the accused, the lapse of putting questions about evidence of formal nature could be justifiably side-lined. Such an omission cannot vitiate the proceedings unless prejudice is caused to the accused. If the accused succeeds in showing prejudice, the appellate Court can call explanation from the counsel. The Court said in reference to the facts of the case that the Court erred is not affording an opportunity to the prosecution to make up the lapse and this resulted in miscarriage of justice.[314.]

In case of omission to put material evidence to accused in his examination under section 313, the Supreme Court held that it amounts to non-compliance of mandatory provision of section 313 by the trial Court. But the non-compliance would not entitle the accused to acquittal. The error committed by the trial Court has to be corrected or rectified in appeal.[315.] Explaining the proposition, R Banumati J, speaking for the Bench, observed as follows:

> If an objection as to S. 313, CrPC statement is taken at the earliest stage, the Court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective S. 313, CrPC statement is raised in the Appellate Court, then the difficulty arises for the prosecution as well as the accused when the trial Court is required to act in accordance with the mandatory provisions of S. 313, CrPC, failure on the part of the Trial Court to comply with the mandate of the law, in our view, cannot automatically ensure to the benefit of the accused. Any omission on the part of the Court to question the accused on any incriminating circumstance would not *ipso facto* vitiate the trial, unless some material prejudice is shown to have been caused to the accused. In so far as non-compliance of mandatory provisions of S. 313, CrPC, it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the Court, the same has to be corrected or rectified in the appeal.[316.]

[s 313.7] No punishment for refusal or false answers, Right to remain silent [*Sub-section (3)*].—

The object of examination of the accused under section 313 CrPC is to afford him an opportunity to explain the circumstances appearing against him as well as to put forward his defence. The accused has the freedom to maintain silence during his examination. But, where he makes statement supporting the prosecution's case, it can be used against him.[317.]

The right to remain silent is also important because of the possibility of the accused facing non-penal consequences which lie outside the protective spell of Article 20, because Article 21 would apply.[318.]

[s 313.8] Admission by accused of incriminating circumstances.—

Where the accused admitted the incriminating circumstances in the evidence against him, the Court said that such admission could not be ignored merely on the ground that it was made to advance the defence strategy.[319.]

Statements of the accused cannot be the sole basis of conviction. But their effect can be considered in the light of other evidence brought on record. Where the accused recorded confession and did not retract it even up to the later stage of the trial and also accepted it in his examination under section 313, the Court said that it would be fully relied upon.[320.]

Where, in his examination under section 313 of CrPC, the accused makes a false denial with respect to established facts, it was held that the statement can be used as

incriminating evidence against him.[321.]

Where in his examination under section 313 in a murder case, the accused raised the plea that he was attacked with sword when he went to save the deceased and the injuries found on the accused did not match with sword injuries, it was held by the Supreme Court that the defence raised was neither plausible nor true, but it, at least, proved his presence at the place of occurrence and corroborated the dying declaration and evidence of witness.[322.]

[s 313.9] Written statements of accused.—

The Calcutta High Court has held that written statements of the accused do not take the place of the examination of the accused contemplated in this section.[323.] The Supreme Court in *Sidheswar Ganguly v State of West Bengal*,[324.] has held that there is no provision in this Code requiring a Sessions Judge to accept a written statement filed by an accused. However, in *H Singh v State of Punjab*,[325.] the Supreme Court distinguishing *Sidheswar Ganguly's* case on the ground that the written statement in the latter case was filed at the Sessions trial, observed that in many cases the accused person would prefer to file a written statement and give a connected answer to the questions raised by the prosecution evidence. Where, besides giving written confessional statements, the accused persons admitted in their statements under section 313 CrPC, that they were responsible for the murder of General Vaidya, the trial Court was held justified in accepting and acting upon their plea of guilt and convicting them accordingly.[326.]

[s 313.10] Effect of not explaining facts within special knowledge of accused. —

The section affords the accused an opportunity of offering an explanation of incriminating circumstances appearing in the prosecution evidence against him. Though it is not necessary for the accused to explain, yet when the case rests on circumstantial evidence, the failure of the accused to offer any satisfactory explanation for his possession of the stolen property, though not an incriminating circumstance by itself, would yet enable an inference being raised against him because the fact being in the exclusive knowledge of the accused, it was for him to have offered an explanation which he failed to do.[327.]

In a case based on circumstantial evidence, failure of the accused to explain the circumstance inculpating him in his examination under section 313 of CrPC can amount to providing the missing link in the chain of circumstances.[328.]

Where the accused persons remained silent and failed to explain the circumstances in which they were travelling at odd hours (1.30 a.m.) in a lorry carrying 16 bags of poppy husk, the Court said that that was a strong circumstance which could be put against them. The Court, however, noted with regret that no question was to put to them under section 313 about the presence of the contraband in the lorry.[329.]

[s 313.11] Failure to draw accused's attention to inculpatory material.—

The provision as to examination of accused is based on fundamentals of fairness. It is mandatory. But every omission to put any incriminating circumstances to him would not vitiate the trial unless serious prejudice is shown.[330.]

[s 313.12] Permission to Counsel to answer on behalf of accused.—

The Supreme Court has held by a majority that the Court has to question the accused himself, but in exigent conditions, the Court may allow the counsel to answer questions on behalf of the accused. The accused has to make an application for this purpose with a sworn affidavit.[331.]

[s 313.13] Importance of statement of accused.—

The examination of the accused under section 313 is not a mere formality. The answers of the accused have a practical utility for criminal Courts. It affords an opportunity to the delinquent to explain incriminating circumstances against him. It also helps the Court to appreciate the evidence adduced at the trial.[332.]

Section 313 confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21. If the accused takes a defence after the prosecution evidence is closed under section 313(1)(b) the Court is duty bound under section 313(4) to consider the same. The mere use of the word "may" cannot be held to confer a discretionary power on the court to consider or not to consider such defence. Where there has been no consideration at all of the defence taken under section 313, the conviction may well stand vitiated. A solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under section 313 and to either accept or reject the same for reasons specified in writing.[333.]

[s 313.14] Statement of accused not substantive evidence.—

The statement of the accused under section 313 is recorded without administering oath.[334.] The statements of the accused under section 313 is not a substantive evidence. They are not a substitute for the evidence of the prosecution. They can be used for appreciating evidence led by the prosecution to accept or reject it. If the exculpatory part of his statement is found to be false and the prosecution evidence is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction, the inculpatory part of the statement cannot be made the sole basis of his conviction.[335.] The entire prosecution evidence need not be put to the accused.[336.]

The object of examination of the accused is to establish direct dialogue between the Court and accused. The accused can put before the Court a very important piece of evidence and thereby to give him an opportunity to explain his position. The statement of the accused thus solicited can be used in evidence to test veracity of admissions made by him. The statement in conjunction with other evidence can be used to convict the accused. But statements under the section cannot be made the sole basis of conviction.[337.]

It is obligatory on the part of the accused, while being examined under section 313 of CrPC to furnish explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation, even in a case of circumstantial evidence, in order to decide whether the chain of circumstances is complete.[338.]

In criminal trials, the accused has been given the freedom to remain silent during investigation as well as before the Court. Therefore, the accused may choose to maintain silence or even remain in complete denial when his statement under section 313 of CrPC is being recorded. However, it has been held by the Supreme Court that in the event of his remaining silent and not furnishing any explanation with regard to incriminating material against him, the Court would be entitled to draw adverse inference as may be permissible in accordance with law.[339.]

Wherein on his examination, the accused admitted his guilt, it was held by the Supreme Court that such admission of guilt in his statement cannot be made the sole basis of conviction, but such statement can be used to lend credence to the evidence of prosecution. under section[340.] Where accused persons' statements were recorded separately but in part on different dates, that was held to be a substantial compliance of section 313, CrPC.[341.]

[s 313.15] Dispensation of personal examination in summons and other cases. —

Personal appearance was dispensed with in a case where the sitting Chief Minister was the accused and permission was granted to answer the questionnaire through the Counsel. This was held to be not a proper procedure particularly when there was no exceptional exigency or circumstances necessitating tedious long journey or incurring of whopping expenditure for reaching the Court. The Court deprecated the conduct of the Public Prosecutor is not opposing such a frivolous application.[342.]

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258. Ins. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 22 (w.e.f. 31-12-2009).

259. Report of the Select Committee, (1882); *Hossein Buksh v Empress*, (1881) ILR 6 Cal 96; *Shakur*, (1944) Mad 304; *Sudhakar Saranghi v State of Orissa*, 1992 Cr LJ 1866 (Ori); *Kabul v State of Rajasthan*, 1992 Cr LJ 1491 (Raj); *Avtar Singh v State of Punjab*, (2002) 7 SCC 419 : 2002 SCC (Cri) 1769 , the object is to afford as opportunity to the accused to explain the circumstances appearing in the evidence against him. *Subhash Chand v State of Rajasthan*, (2002) 1 SCC 702 : 2002 SCC (Cri) 256 , the purpose of asking questions during examination under section 313 CrPC is to afford the accused personally an opportunity of explaining any incriminating circumstance so appearing in evidence against him. The accused may or may not avail the opportunity for offering his explanation. *Baba v State of Maharashtra*, (2002) 2 SCC 567 , the accused did not examine any defence witnesses at first opportunity. In his next questioning under section 313 before the High Court, he sought permission for examining three more witnesses. The High Court without placing any reliance on such prayer of the accused, dealt

with the issue on the basis of evidence available on record. It was held that the High Court was justified in doing so. Contention before Supreme Court that in the justice delivery system and for proper administration of justice, a further opportunity ought to be given to the accused persons to lead defence evidence before the Court and the matter ought to be adjourned on that score awaiting the evidence as may be available on record was not accepted. Acceptance of the testimony of the eye-witnesses by trial Court and the High Court finding it to be trustworthy was justified and no interference of the Supreme Court was called for.

260. *Chandrasekara Bharati Swamigal v CP Duraiswami*, (1931) Mad 659; *Maruti*, (1956) Hyd 148.; *Karunakaran v State of Kerala Karunakaran*, 1960 KLT 959 : 1960 KLJ 1033 : (1960) Ker 1202 ; *Keki Bejonji v State of Bombay*, AIR 1961 SC 967 : (1961) 2 Cr LJ 37 ; *Ashok Kumar v State of Haryana*, AIR 2010 SC 2839 : 2010 Cr LJ 4402 : (2010) 12 SCC 350 , object of the section restated and also evidentiary value of the statement. The statement can be used by the Court in so far as it corroborates the case of the prosecution, but conviction cannot be based only on such statement.

261. *Bibhuti v State of West Bengal*, AIR 1969 SC 381 : 1969 Cr LJ 654 .

262. *Rai Mohan Mandal v Narmada Dasi*, (1950) ILR 2 Cal 85.

263. *Bibhuti v State of West Bengal*, AIR 1969 SC 381 , 384 : 1969 Cr LJ 654 .

264. *Usha K Pillai v Raj K Shrinivas*, AIR 1993 SC 2090 : 1993 Cr LJ 2669 : (1993) 3 SCC 208 .

265. *Dibia*, (1954) 2 All 65 .

266. *Sunder v State of UP*, 1995 Cr LJ 3481 (All).

267. *Parichhal v State of Madhya Pradesh*, AIR 1972 SC 535 : 1972 Cr LJ 322 : (1972) 4 SCC 694 .

268. *Tara Singh v State*, (1951) SCR 729 : AIR 1951 SC 441 : 52 Cr LJ 1491.

269. *Rana Shankar Singh v State of West Bengal*, AIR 1962 SC 1239 : (1962) 2 Cr LJ 296 .

270. *Ajit Kumar Chowdhary v State of Bihar*, AIR 1972 SC 2058 : 1972 Cr LJ 1315 : (1972) 2 SCC 451 .

271. *Dadarao v The State of Maharashtra*, AIR 1974 SC 388 : (1974) 3 SCC 630 : 1974 Cr LJ 447 .

272. *Jai Dev and Hari Singh v State of Punjab*, AIR 1963 SC 612 : (1963) 1 Cr LJ 495 .

273. *Ajmer Singh v The State of Punjab*, (1953) SCR 418 : AIR 1953 SC 76 : 1953 Cr LJ 521 .

274. *Bijjoy Chand Potra v The State*, (1952) SCR 202 : AIR 1952 SC 105 : 1952 Cr LJ 644 ; *Labhchand Jain v State of Maharashtra*, AIR 1975 SC 182 : 1975 Cr LJ 246 ; *Naga v State of Karnataka*, 2003 Cr LJ 754 (Kant), even though the judgment of the Sessions Judge was vitiated for non-compliance with mandatory provisions of section 313 as well as for want of application of mind, the accused was held to be not entitled to acquittal for that reason; instead, the case required re-trial from the stage of recording of statement under section 313.

275. *Kaur Sain v State of Punjab*, AIR 1974 SC 329 , 332 : 1974 Cr LJ 358 : (1974) 3 SCC 649 .

276. *SC Bahri v State of Bihar*, AIR 1994 SC 2020 : 1994 Cr LJ 3271 : (1995) Supp 1 SCC 80.

277. *Joda Sabaran v State of Orissa*, 1982 Cr LJ 1926 (Ori).

278. *CT Muniappan v State of Madras*, AIR 1961 SC 175 : (1971) 1 Cr LJ 315 .

279. *Satyavir Singh Rathi v State through CBI*, AIR 2011 SC 1748 : (2011) 6 SCC 1 : (2011) 2 SCC (Cri) 782 .

280. *Ponnusamy v Ramasamy*, (1923) 46 Mad 758 (FB) : AIR 1931 Rangoon 244 .

281. *Emperor v Nga La Gyi*, (1931) 9 Ran 506 (FB).

282. *Emperor v Fernandez*, (1920) 45 Bom 672 : 22 Bom LR 1040; *Emperor v Gulabjan*, (1921) ILR 46 Bom 441 : 23 Bom LR 1203.

283. *Bechu Lal Kayastha v Injured Lady*, (1927) ILR 54 Cal 286 : AIR 1927 Cal 250 ; *Gulzari Lal v Emperor*, (1922) ILR 49 Cal 1075 : AIR 1923 Cal 164 .

284. *Kacho Mal v Emperor*, (1925) 27 Cr LJ 405 : AIR 1926 All 358 ; *Sia Ram v Emperor*, (1934) 57 All 666 : AIR 1935 All 217 .

285. *Gulam Rasul v King-Emperor*, (1921) 6 PLJ 174 : 2 PLT 390.

286. *Motan Mal v Muhammad Bakhsh*, (1922) 4 PLJ 230 .

287. *Rusi v Nakhyatramalini*, (1953) Cut 623 : AIR 1954 Ori 65 .

288. *Emperor v Jaffar*, (1934) 36 Bom LR 433 ; *Re CM Raghavan*, (1951) Mad 636.

289. *Udayanath Barik v State of Orissa*, 1989 Cr LJ 2216 (Ori).

290. *Sachachida Nand v Pooran Mal*, 1988 Cr LJ 511 (Raj).

291. *Mahomed Hossain v Emperor*, (1914) 41 Cal 743 ; *Karam Din v Emperor*, (1933) 15 Lah 60.

292. *Emperor v Kondiba Balaji*, (1940) 42 Bom LR 695 : AIR 1940 Bom 314 ; *Emperor v Fernandez*, (1920) 22 Bom LR 1040 , 45 Bom 672.

293. *Mahomed Hossain v Emperor, supra; Sia Ram v Emperor*, (1934) 57 All 666 .

294. *Parsotim Das*, (1927) 6 Pat 504; *Sia Ram, supra*.

295. *Re Vithaldas*, (1928) 30 Bom LR 957 : 52 Bom 768 : AIR 1928 Bom 347 ; *Mehr Khan v Bakht Bhari*, (1928) 10 Lah 406.

296. *Emperor v Narayan Keshav*, (1928) 30 Bom LR 651 : 52 Bom 699 : AIR 1928 Bom 200 ; *Saiyid Mohiuddin v King-Emperor*, (1825) ILR 4 Pat 488 : AIR 1925 Pat 414 .

297. *Emperor v Raju Ahilaji*, (1907) 9 Bom LR 730 .

298. *Chandu Lal v Puran Mal*, 1989 Cr LJ 296 : AIR 1988 SC 2163 : (1988) Supp SCC 570 .

299. *State of Punjab v Hari Singh*, AIR 2009 SC 1966 : (2009) 4 SCC 200 .

300. *Bali Ram Prasad v State of Mysore*, AIR 1973 SC 506 : 1973 Cr LJ 3 : (1972) 3 SCC 681 .

301. *Raju v State of MP*, 2002 Cr LJ 2367 (MP).

302. *Emperor v Karamalli Gulamalli*, (1938) 40 Bom LR 1092 : (1939) Bom 42 : AIR 1938 Bom 481 .

303. *S Keslal v State of WB*, 1988 Cr LJ NOC 48 (Cal). *Keshavamurthy v State*, 2002 Cr LJ 103 (Kant), the Magistrate should enable the accused to personally explain each of those circumstances which figure in the evidence against him. *Dakshinamoorthy v UT Pondicherry*, 2002 Cr LJ 2359 (Mad), the accused has to personally make the statement. The Court should put aside the counsel, witnesses, and representatives. *Baleshewar Mahto v State of Bihar*, 2002 Cr LJ 2275 (Jhar), the accused acknowledged all the statements and allegations and negatively denied them. Requirements satisfied. *Pintu v State of UP*, 2002 Cr LJ 2241 (All), the question whether the accused wanted to produce evidence in defence should not be put to him while recording statement under section 313; *Fredrick George v State of UP*, 2002 Cr LJ 4600 (HP), whole material put to accused and opportunity to explain given, not necessary to put to him every piece of evidence. *Anasuyamma v State of Karnataka*, 2002 Cr LJ 4401 (Kant), questions framed in a series and the answer of the accused to each of them taken down, proper procedure. *Jhumka Sao v State of Bihar*, 2002 Cr LJ 4230 (Jhar), the question relating to elimination of the eye-witness not put to the accused serious lapse. *State of Maharashtra v Shivaji Anandrao Chede*, 2002 Cr LJ 4198 (Bom), acceptance of answers of the accused to some of the questions and rejection in respect of others, erroneous.

304. *State of HP v Karamveer*, AIR 2006 SC 2211 : (2006) 5 SCC 381 : 2006 Cr LJ 2917 .

305. *Parsuram Pandey v State of Bihar*, AIR 2004 SC 5068 : (2004) 13 SCC 189 : 2004 Cr LJ 4978 .

306. *Bakhshish Singh Dhaliwal v State of Punjab*, AIR 1967 SC 752 : 1967 Cr LJ 656 .

307. *RK Dalmia v Delhi Administration*, AIR 1962 SC 1821 : (1962) 2 Cr LJ 805 .

308. *Mussammat Ghasiti v The Crown*, (1925) 6 Lah 554.

309. *Emperor v Alimuddin Naskar*, (1925) 52 Cal 522 ; *Faqir Singh v Crown*, (1928) 10 Lah 223; *Jhabwala v Emperor*, (1933) ILR 55 All 1040 : AIR 1933 All 690 .

310. *Shri Ram v The State of Uttar Pradesh*, AIR 1975 SC 175 at p 178 : 1975 Cr LJ 240 .

311. *Balaji Gunthu Dhule v State of Maharastra*, AIR 2013 SC 264 : (2012) 1 SCC 685 .

312. *Paramjeet Singh v State of Uttarakhand*, AIR 2011 SC 200 : (2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98 .

313. *Surendra Chauhan v State of MP*, AIR 2000 SC 1436 : 2000 Cr LJ 1789 : (2000) 4 SCC 110 ; *Ashok Kumar v State of Haryana*, 2000 Cr LJ 3186 : (2000) 2 SCC 592 , the statement of the accused that nothing had happened at the sight of search and seizure and that everything was done at the police station was not accepted because he had not raised this matter in his statement under section 313 and there was also the statement of the investigating officer that he was caught red-handed while he was coming out of a bus with a bag in his hand.

314. *State of Punjab v Naib Din*, (2001) 8 SCC 578 : 2002 SCC (Cri) 33 .

315. *Nar Singh v State of Haryana*, AIR 2015 SC 310 : 2014 (12) Scale 622 : (2015) 1 SCC 496 .

316. *Ibid*, para 16 at p 316 (of AIR).

317. *Ramnaresh v State of Chhattisgarh*, AIR 2012 SC 1357 : (2012) 4 SCC 257 : (2012) 2 SCC (Cri) 382 .

318. *Selvi v State of Karnataka*, AIR 2010 SC 1974 : (2010) 7 SCC 263 .

319. *State of UP v Lakshmi*, AIR 1998 SC 1007 : 1998 Cr LJ 1411 : (1998) 2 SCC 338 ; *Brijlala Prasad v State of Bihar*, AIR 1998 SC 2443 : 1998 Cr LJ 3611 : (1998) 5 SCC 699 , police accused of opening fire, the policeman said that he did so in self-defence, his exculpatory statement turned out to be false, the other part of the statement became relevant as an admission, the same was held to be not relevant against the other co-accused policemen. *State of Bihar v Anirudh Thakur*, AIR 1998 SC 921 : 1998 Cr LJ 1201 : (1998) 9 SCC 616 , another case in which exculpatory part was rejected but inculpatory part of the admission was accepted.

320. *Bishnu Prasad Sinha v State of Assam*, AIR 2007 SC 848 : (2007) 11 SCC 467 : 2007 Cr LJ 1145 .

321. *Munna Kumar Upadhyaya v State of Andhra Pradesh*, AIR 2012 SC 2470 : (2012) 6 SCC 174 : (2012) 3 SCC (Cri) 42 .

322. *Bable v State of Chhattisgarh*, AIR 2012 SC 2621 : (2012) 11 SCC 181 .

323. *Amrita Lal Hazra v Emperor*, (1915) ILR 42 Cal 957; *Bhagwandas*, (1942) Kar 112 .

324. *Sidheswar Ganguly v State of West Bengal*, (1958) SCR 749 : AIR 1958 SC 143 : 1958 Cr LJ 273 ; *Rantu Bodra v State of Bihar*, (1999) SCC Cri 1319 , ghastly crime, the matter deserved to be remitted for re-trial of the accused more properly. But, because of the long lapse of time, more than 15 years, the accused remaining in jail for more than 4 years, resort to that Court would not be justified. *State v Nalini*, AIR 1999 SC 2640 : 1999 Cr LJ 3124 : (1999) 5 SCC 253 , improper examination of the accused, such allegation has to be considered from the angel whether any prejudice was caused to the accused. Any error could be corrected by the reference Court by again examining the accused. *Janak Yadav v State of Bihar*, (1999) 9 SCC 125 : 1999 SCC (Cri) 558 , the question of prejudice to the accused is relevant when there is defective examination and not when there has been no examination at all. *Shobhit Chamar v State of Bihar*, (1998) 3 SCC 455 : AIR 1998 SC 1693 , challenge to conviction on account of non-compliance of section 313 presented for the first time before the Supreme Court not allowed. No prejudice was shown to have been caused to the accused. *Kalpnath Rai v State*, (1997) 8 SCC 732 : AIR 1998 SC 201 : 1998 Cr LJ 369 : JT 1997 (9) SC 18 : 1997 (6) Scale 689 , certain letters were supposed to have been written by the accused from jail to the Court during his trial period. Such letters were not put in evidence through any procedure known to law. It was held by the Supreme Court that the Court was not justified in putting such letters before the accused during his examination.

Lakshinamoorthy v Union Territory of Pondicherry, 2002 Cr LJ 2359 (Mad), questionnaire need not supplied to the accused in advance.

325. *H Singh v State of Punjab*, AIR 1966 SC 97 : 1966 Cr LJ 82 .

326. *State of Maharashtra v Sukhdeo Singh*, AIR 1992 SC 2100 : 1992 Cr LJ 3454 .

327. *Ganesh Lal v State of Rajasthan*, (2002) 1 SCC 731 : 2002 SCC (Cri) 247 : 2002 Cr LJ 967 . *Mani Kumar Thapa v State of Sikkim*, (2002) 7 SCC 157 : AIR 2002 SC 2920 , the accused failed to explain the circumstances established by the prosecution against him, the Court said that it would form an additional link in the chain of circumstances.

328. *Jagroop Singh v State of Punjab*, AIR 2012 SC 2600 : (2012) 11 SCC 768 .

329. *Avtar Singh v State of Punjab*, (2002) 7 SCC 419 : 2002 SCC (Cri) 1769 .

330. *Paramjeet Singh v State of Uttarakhand*, AIR 2011 SC 200 : (2010) 10 SCC 439 : 2011 Cr LJ 663 .

331. *Basavaraj R Patil v State of Karnataka*, (2000) 8 SCC 740 : 2000 Cr LJ 4604 . SETHI J dissented and said: "When the Parliament has consciously incorporated the mandatory provision for examination of accused personally, interpreting it so as to admit an exception of allowing counsel in accused's place to answer questions would amount to judicial legislation which is not permissible. But objection regarding non-compliance with the mandate of section 313 can be raised only by the accused and not by the complainant or the prosecution. The Court had exempted the accused persons form personal appearance because they were in USA and, therefore, their counsel was allowed to answer question on their behalf." *Basavaraj R Patil v State of Karnataka*, (2000) 8 SCC 740 : 2000 Cr LJ 4604 . SETHI J dissented and said: "When the Parliament has consciously incorporated the mandatory provision for examination of accused personally, interpreting it so as to admit an exception of allowing counsel in accused's place to answer questions would amount to judicial legislation which is not permissible. But objection regarding non-compliance with the mandate of section 313 can be raised only by the accused and not by the complainant or the prosecution. The Court had exempted the accused persons form personal appearance because they were in USA and, therefore, their counsel was allowed to answer question on their behalf."

332. *Rattan Singh v State of HP*, AIR 1997 SC 768 : 1997 Cr LJ 833 : (1997) 4 SCC 161 .

333. *Reena Hazarika v State of Assam*, AIR 2018 SC 5361 : 2018 (14) Scale 509 : LNIND 2018 SC 558 .

334. *Dehal Singh v State of HP*, AIR 2010 SC 3594 : (2010) 9 SCC 85 : 2010 Cr LJ 4715 . See also *Reena Hazarika v State of Assam*, AIR 2018 SC 5361 .

335. *Mohan Singh v Prem Singh*, 2003 Cr LJ 11 (SC) : (2002) 10 SCC 236 .

336. *Sidharth Vashisht v State (NCT of Delhi)*, AIR 2010 SC 2352 : (2010) SCC 1 : (2010) 2 Crimes 154 .

337. *Santan Naskar v State of WB*, AIR 2010 SC 3570 : (2010) 8 SCC 249 : 2010 Cr LJ 3871 .

338. *Munish Mubar v State of Haryana*, AIR 2013 SC 912 : (2012) 10 SCC 464 .

339. *Phula Singh v State of Himachal Pradesh*, AIR 2014 SC 1256 : (2014) 4 SCC 9 ; *Munish Mubar v State of Haryana, State of Chhattisgarh*, AIR 2013 SC 912 : (2012) 4 SCC 257 —Rel. on.

340. *Ashok Debbarama v State of Tripura*, (2014) 4 SCC 747 : 2014 Cr LJ 1830 (SC).

341. *Kishore Bhadke v State of Maharashtra*, AIR 2017 SC 279 .

342. *K Anbazhagan v Superintendent of Police*, AIR 2004 SC 524 : (2004) 3 SCC 767 : 2004 Cr LJ 583 .

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 314] Oral arguments and memorandum of arguments.—

(1) **Any party to a proceeding may, as soon as may be, after the close of his evidence, address concise oral arguments, and may, before he concludes the oral arguments, if any, submit a memorandum to the Court setting forth concisely and under distinct headings, the arguments in support of his case and every such memorandum shall form part of the record.**

(2) **A copy of every such memorandum shall be simultaneously furnished to the opposite party.**

(3) **No adjournment of the proceedings shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.**

(4) **The Court may, if it is of opinion that the oral arguments are not concise or relevant, regulate such arguments.**

This is a new section. It enables the parties to a proceeding to address oral arguments and also entitles them to submit in writing a memorandum to the Court setting forth, in brief, arguments in support of their case, which would form part of the record. It also empowers the Court to regulate irrelevant and unnecessarily elaborate arguments.

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 315] Accused person to be competent witness.—

(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

***Provided* that—**

(a) he shall not be called as a witness except on his own request in writing;

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D or Chapter X, may offer himself as a witness in such proceedings:

***Provided* that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry.**

This section lays down that an accused person is a competent witness for the defence and like any other witness he is entitled to give evidence on oath in disproof of the case laid against him by prosecution. It further provides that the Court cannot draw any adverse inference from his non-examination as a witness.[343.] But if an accused voluntarily examines himself as a defence witness, the prosecution is entitled to further examine him and such evidence can be used against co-accused.

No adverse inference can be drawn against an accused person who does not enter the witness box. It is basic criminal jurisprudence that an accused person cannot be compelled to be a witness. No adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box [344.]

An accused appeared as a witness. The Supreme Court said that he could not be denied the opportunity of producing documents on which he wanted to rely. He was not to be disallowed only because he did not do so before his evidence was recorded. The matter was remitted to the trial Court to enable the Court to permit him to produce the documents.[345.]

343. *State of Maharashtra v RB Chowdhari*, AIR 1968 SC 110 : 1968 Cr LJ 95 ; *Baidyanath Prasad Shrivastava v State of Bihar*, AIR 1968 SC 1393 : 1968 Cr LJ 1650 .

344. *Kashiram v State of MP*, AIR 2001 SC 2902 , at p 2910 : (2002) 1 SCC 71 .

345. *Gajendra Singh v State of Rajasthan*, (1998) 8 SCC 612 : (1999) 1 CCR 141 (SC).

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 316] No influence to be used to induce disclosure.—

Except as provided in sections 306 and 307, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 317] Provision for inquiries and trial being held in the absence of accused in certain cases.—

(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

This section provides for inquiries and trials being held in the absence of the accused person in certain cases. It has been held by the Kerala High Court that in all trivial and technical cases not involving moral turpitude, where the accused are ladies, old and sickly persons, factory workers, labourers, busy business people and industrialists, the Courts should invariably exempt such persons from personal attendance.[346.] This section empowers the Magistrate, at any stage of inquiry or trial for reasons to be recorded, to exempt attendance of the accused. There is not any impediment in the power of the Magistrate to consider the application of accused for their exemption from personal appearance.[347.]

[s 317.1] Exemption from personal attendance where accused represented by pleader [*Subsection (1)*].—

It is only if the Judge or Magistrate is satisfied that (1) the personal attendance of the accused before him is not necessary in the interests of justice or (2) the accused persistently disturbs the proceedings, then where he is represented by a pleader his personal attendance may be dispensed with. If it appears to the Court that personal attendance could result in enormous hardship and cost to the accused, the Court may dispense with his personal attendance either throughout or at any particular stage of the trial, after taking an undertaking from him that he would not dispute his identity as the particular accused in the case and that a counsel on his behalf would be present in Court and he would have no objection in the taking of evidence in his absence. The main concern of the Court is administration of criminal justice and for that purpose, the Court proceedings should register progress. Discretion to dispense with the personal attendance should be exercised in rare cases due to distance or any physical disability or some other good reason. Where the counsel does not appear or cooperate, resort can be had to sections 205(2) and 317(1).[348.]

Where the managers, partners and directors of a distillery company were accused of discharging polluted effluents into the river Gomti in Lucknow and they were alleged to be responsible for the actions of the company, it was held that if any of them applied for dispensing with personal appearance, the trial Court could exempt him, subject to the conditions deemed fit by the Court. Such conditions may include that the absent accused be represented by counsel in the Court; he should not dispute his identity as the particular accused; he should present himself when his presence was imperative.[349.]

[s 317.2] Procedure where accused not represented—[*Sub-section (2)*].—

It provides for the case of an accused who is not represented by a pleader, or whose continued personal attendance may be necessary. It permits the Court in such a case either to adjourn the trial of all the accused or to order a particular accused to be tried separately.

Under both the sub-sections, reasons should be recorded.

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346. *Helen Rubber Industries v State of Kerala*, 1973 Cr LJ 262 (Ker) : 1972 KLT 794 .

347. *Rameshwar Yadav v State of Bihar*, AIR 2018 SC 1435 : (2018) 4 SCC 608 : LNIND 2018 SC 90 .

348. *Bhaskar Industries Ltd v Bhiwani Denim & Apparels Ltd*, (2001) 7 SCC 401 : 2001 SC (Cri) 1254; *Bhudeb Chandra Karmakar v State of WB*, (2001) 9 SCC 226 , a complaint under section 498A IPC was filed before a Chief Judicial Magistrate who lacked jurisdiction and the Supreme Court had directed that it ought to be transferred to the appropriate Court, a Bench of the Supreme Court held that it was not necessary for the Supreme Court to decide the application of the accused for exemption from personal appearance in the Court.

349. Environment (Protection) Act, 1986, section 16. The prosecution was under the Board Environment (Protection) Act, 1986, section 16. *UP Pollution Control Board v Mohan Meakins Ltd*, (2000) 3 SCC 745 : AIR 2000 SC 1456 : 2000 Cr LJ 1799 : 2000 All LJ 872.

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 318] Procedure where accused does not understand proceedings.—

If the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

This section is intended to provide for cases in which the accused is deaf and dumb and cannot be made to understand the proceedings or from ignorance of the language of the country and the want of an interpreter is unable to understand or make himself understood. Where the accused is of unsound mind, the Court must proceed under Chapter XXV.[350.] If the accused is able to understand the proceedings, though he is deaf and dumb, the provisions of this section do not apply.[351.] When an accused is deaf and dumb, the Court may proceed with the inquiry or trial, but it should first inquire into the antecedents of the accused and should also make an endeavour to find out as to how his friends and close relatives are accustomed to communicate with him in ordinary affairs and record its own conclusions, if necessary by taking evidence.[352.]

The Code does not give any guidance as to what should be done in cases in which a person accused of a serious offence is unable to understand the nature of the proceedings against him. No doubt very wide powers have been given to the High Court to deal with the matter as it thinks proper. In some reported cases, following the practice in England, such cases have been reported to the State Government for suitable orders.[353.]

[s 318.1] "Cannot be made to understand".—

Prior to making a reference it is obligatory on the Court to make necessary inquiries and endeavour to find out if the accused can be made to understand the proceedings and come to a definite conclusion.[354.]

[s 318.2] "The Court may proceed with the inquiry or trial".—

The Court must proceed to the end of the trial and then report the result to the High Court if a conviction follows. A **Magistrate** cannot make a report in the midst of a trial.[355.]

[s 318.3] "The proceedings shall be forwarded to the High Court with a report...and the High Court shall pass thereon such order as it thinks fit".—

The Magistrate cannot pass any sentence although he convicts the accused. He must submit the proceedings to the High Court. But there must be a finding by the

Magistrate that *prima facie* an offence has been committed and the accused cannot be made to understand the proceedings. The High Court may pass such order as it thinks fit. It may convict or discharge the accused, or direct a re-trial, or keep him in jail.[356.] Where there are two accused and one of them though not insane is not able to understand the proceedings, the Magistrate should not refer the proceedings of both to the High Court. The High Court has no jurisdiction to pass any order with regard to the accused who is able to understand the proceedings.[357.] The order under section 319 ought to be passed at the earliest and at the proper stage and within a reasonable period and not at the time of pronouncing the judgment. Where the Court had consumed a period of 17 years, the order was set aside.[358.]

The term evidence as used in section 319 does not necessarily mean any such evidence as constitutes legal and admissible evidence at the trial. It includes the evidence collected during the investigation, the documents relied upon by the prosecution for the purpose of proving the guilt of the accused.[359.]

Statements of a witness can be termed as evidence under section 319.[360.]

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350. *Empress v Husen*, (1881) 5 Bom 262.
351. *Alla Dia v Emperor*, (1928) 10 Lah 566; *Isso*, (1943) Kar 326 : AIR 1929 Lah 840 .
352. *State v Radhamal*, (1960) 62 Bom LR 468 .
353. *Gajodhar*, (1954) 52 All LJ 313.
354. *Re Beda*, 1970 Cr LJ 60 , 62 : AIR 1970 Ori 3 .
355. *Deaf and Dumb Man*, (1902) 4 Bom LR 825 ; *Shantaram Dattatraye Somankar v State of Karnataka*, 2003 Cr LJ 1775 (Kant), in a murder case, one of the accused persons was deaf, and this was found by the trial Court at the stage of recording of the evidence. Referred to the High Court, which had wide powers to ensure a fair trial of the accused, if it decided to proceed against him.
356. *Queen-Empress v Somir Bowra*, (1899) ILR 27 Cal 368, 370; *Isso*, (1943) Kar 326 .
357. *Emperor v Trimbak Herlekar*, (1938) 40 Bom LR 495 .
358. *Gopal Krishna v State of Bihar*, 1987 Cr LJ 9 (Pat).
359. *Arun Dube v State of Madhya Pradesh*, 1991 Cr LJ 840 (MP).
360. *Ram Niwas v State of Uttar Pradesh*, 1990 Cr LJ 460 (All).

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 319] Power to proceed against other persons appearing to be guilty of offence.—

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then—

- **(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;**
- **(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.**

The provision of this section empowers the Court to proceed against any person not shown or mentioned as accused if it appears from evidence that such person has committed an offence for which he could be tried together with the main accused against whom an inquiry or trial is being held. It authorises the Court to issue a warrant of arrest or summons against such person if he is not attending the Court; and, if he is so attending, to detain such person for the purpose of inquiring into or trial of the offence which he appears to have committed. The proceedings against such person shall be commenced *de novo*, and the witness must be reheard. Otherwise, the case proceeds as if such person had been an accused when the Court took cognizance of the offence upon which inquiry or trial was commenced. Section 319 is not sole repository power of the Sessions Court to summon an additional accused. It is the duty of the Court to punish the real culprit. There is no reason why such power should be exercised at the late stage of the evidence contemplated by section 319. The power to summon material witnesses can be exercised by the Court at any stage of inquiry.[361.] The power under section 319 CrPC is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant.[362.]

An order under the section cannot be passed only because the first informant or one of the witnesses seeks to implicate other persons. The Court has to assign sufficient and

cogent reasons for exercising the power.[363.] The object underlying section 319 is expeditious and simultaneous disposal of the case against all the accused persons.[364.]

The term "evidence" as used in section 319 does not mean evidence which has been tested by cross-examination. The statement of a prosecution witness recorded by the Court can be a *prima facie* material to enable the Court to decide whether a person not arraigned before it is involved in the crime or not. The section does not contemplate a cross-examination of the witness prior to adding another person to the list of accused persons. The Court issued this caution note that the power under the section is to be sparingly used. But the power should be exercised where the prosecutrix named three persons who were involved in the serious crime, they should be added.[365.]

Where during the trial of a murder case, the complicity of few more persons was revealed, and warrants for their arrest were issued for trying them along with the other accused, it was held that section 319 CrPC gives ample powers to the Court at any stage of any inquiry or trial of the offence to take cognizance and add any person not being an accused before him and try him along with others.[366.]

The power of the Court under the section is circumscribed by limitations.[367.] The fact that police chose not to send up a suspect to face trial does not affect power of trial court under section 319 of CrPC.[368.]

[s 319.1] "Any person".—

A person may be witness in the case or not. Where the Magistrate had declined to issue the process under section 202 against a person and his order was confirmed by the High Court, it was held that the jurisdiction of the Court under section 319 to implead that person if all the conditions prescribed thereunder are satisfied remains unaffected.[369.] If the prosecution at any stage can produce evidence which satisfies the Court that a person should have been made an accused, the Court can take cognizance and try him along with other accused even if proceedings against him had been quashed by the High Court earlier.[370.] Where names of persons were mentioned in the statements made under section 161 of the Code and yet they had not been charge-sheeted, the Court can implead such persons on an application by the approver after taking evidence of one eye-witness.[371.]

Where before recording any evidence in a murder case, a Sessions Judge summoned two persons as the accused under section 319 of CrPC as they were not committed for trial, the Supreme Court held that section 319 of CrPC could not be invoked where the trial has not begun and no evidence has been recorded but declined to interfere as the power to summon a person, whose involvement in the commission of the crime *prima facie* appears from the record, does exist with the Sessions Judge under section 193 of CrPC, which was exercised under a wrong provision of law.[372.]

The Supreme Court has held that the addition of another person as an accused in addition to one facing committal proceedings is not in the power of a Magistrate to order.[373.] The High Court held it to be improper that section 319 should have been invoked for addition of other persons as accused who were named in the FIR but were not charge-sheeted. The Supreme Court set aside the High Court order, it being against the provisions of section 319.[374.] Section 319 comes into play in the course of any inquiry into or trial of an offence. But where the Magistrate was neither holding any inquiry as contemplated under section 2(g) nor had the trial started and was exercising his jurisdiction under section 190 by taking cognizance of an offence and issuing process. It was held that there was no bar under section 190 to the effect that once the process was issued against some accused, on the next date, the Magistrate could not

issue process to some other person against whom there was some material on record, but his name was not included as an accused in the charge-sheet.[375.]

The Supreme Court observed that although the power under the section should be sparingly exercised, but where a prosecution witness names certain persons, as being involved in the serious crime, their addition as accused in the exercise of the power under the section would not be unwarranted.[376.]

The evidence on record should indicate a reasonable prospect of convictions of such other persons as are to be added. Mere suspicion of involvement in the offence would not be enough.[377.]

The provisions of section 319 have to be read in consonance with the provisions of section 398. Once a person is found to have been the accused in the case, he goes out of the reach of section 319.[378.]

Where a few persons were summoned under section 319 of CrPC as accused by the Sessions Court, though not committed for trial under section 209of CrPC before recording of evidence, the order was set aside but the case was sent back for considering the summoning of new persons as accused afresh under section 193 of CrPC, under which the Sessions Court has ample powers to summon any person whose complicity in the matter appears from the record of the case before the beginning of the trial.[379.] In a prosecution under the Prevention of Food Adulteration Act, 1954 [now replaced by the Food Safety and Standard Act, 2006 (34 of 2006)], the question was of impleadment of the manufacturer, distributor or dealer. The Supreme Court said that it was permissible only after evidence was adduced at the trial. The impleadment of the firm from whom the article was purchased by the accused at the stage of his appearance before the Court was held to be premature.[380.]

It has been held by the Supreme Court that since after filing of the charge-sheet, the Court reaches the stage of inquiry and as soon as the Court frames the charges, the trial commences, and therefore, the power under section 319(1) of CrPC can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of sections 207/208 of CrPC, committal *etc.*, which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the pure sense for it only requires an application of mind rather than a judicial application of mind.[381.]

The power to add new accused under section 319 can be exercised where the evidence is much stronger than showing mere probability of complicity of the new accused. This means that the degree of satisfaction of the Court necessary for exercise of power under section 319 is much higher than mere *prima facie* case.[382.]

In this case, the Supreme Court had referred the matter to a larger bench however recalled and modified that order later but the trial against the appellant continued till quashed by the Supreme Court later.[383.]

[s 319.2] Likelihood of conviction.—

In the exercise of discretion for summoning additional accused, the Court must arrive at its satisfaction that there existed possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at upon completion of cross-examination of witnesses. No exception should be taken to such procedure, not at all at the instance of a witness when the State is not an aggrieved party. An order

passed at the instance of a witness at the stage of examination under section 161 was held to be improper.[384.]

[s 319.3] *De novo* trial.—

Where it appears from the evidence submitted in the course of an inquiry or trial that a person, not before it as an accused, had committed the offence, the Court may proceed against him for the offence. The Court has to consider the question whether he should be tried alongwith the accused already arraigned. There has to be a *de novo* trial against him. That is the safeguard provided to him. *De novo* trial is mandatory because witnesses would have to be examined a fresh. The purpose of the provision would not be served just only by giving the new accused the opportunity to cross-examine the witnesses.[385.]

[s 319.4] Adding accused for different offence.—

A person can be added as an accused invoking the provisions under section 319 of the Code not only for the same offence but also for even a different offence. It is necessary that the offence shall be such as in respect of which both the accused could be tried together.[386.]

Person whose name does not appear in the FIR or in the charge-sheet, or whose name appears in the column 2 of the charge-sheet, can still be summoned. It has been held by the Supreme Court that persons discharged can also be summoned but after taking recourse to sections 300(5) and 398. It has also been held that inquiry as contemplated by sections 300(5) and 398 can be an inquiry under section 319 of the Code.[387.] BS Chauhan J, speaking for the Five-Judge Constitution Bench, observed as follows:

> 107. Power under S. 398, CrPC is in the nature of revisional power which can be exercised only by the High Court or the Sessions judge, as the case may be. According to S. 300(5), CrPC, a person discharge under S. 258, Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to the first-mentioned Court is subordinate. Further, S. 398, Cr.P.C. provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make an inquiry into the case against any person who has already been discharged.
>
> 108. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharge, is asked to again face trial if some evidence appears against him. As held earlier, S. 319, CrPC can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by S. 300(5), Cr.P.C. and S. 398, Cr.P.C. cannot be an inquiry under S. 319, Cr.P.C. Accordingly, a person discharge can also be arraigned again as an accused but only after an inquiry as contemplated by Ss. 300(5) and 398, Cr.P.C.[388.]

[s 319.5] For securing presence of newly added accused—Issuance of non-bailable warrant of arrest.—

It has been held by the Supreme Court that where power under section 319 has been exercised and new accused persons have been added in a case, issuance of non-bailable warrant of arrest at the first instance to secure their presence should be avoided. The Supreme Court has laid down guidelines enumerating the circumstances under which non-bailable warrant should be issued. Non-bailable warrant should be issued when summons or bailable warrants would be unlikely to have the desired result. This could be when firstly, it is reasonable to believe that the person will not

voluntarily appear in Court; secondly, that the police is unable to find the person to serve him with a summon and thirdly, if it is considered that the person could harm someone if not placed in custody immediately.[389.]

[s 319.6] Sending to judicial custody.—

Once a person has been arraigned as accused under section 319, he stands on the same footing as the other accused against whom police has filed charge-sheet and, therefore, on his appearance, it is obligatory of the Court to send him to judicial custody.[390.]

[s 319.7] Evidence.—

Order based on mere examination in chief of the witness is not illegal.[391.]

However, a Five-Judge Constitution Bench has clarified the matter that exercise of power to add new accused can only be on the basis of the material collected in inquiry by Court or Magistrate acting as Court.[392.] Explaining the proposition, BS Chauhan J, speaking for the Constitution Bench, observed as follows:

> 14. It is at this stage the comparison of the words used under S. 319, CrPC has to be understood distinctively from the word used under S. 2(g) defining an inquiry other than the trial by a magistrate or a Court. Here the legislature has used two words, namely the Magistrate or Court, whereas under S. 319, CrPC, as indicated above, only the word 'Court' has been recited. This has been done by the legislature to emphasise that the power under S. 319, Cr.P.C. is exercisable only by the Court and not by any officer not acting as a Court. Thus, the Magistrate not functioning or exercising powers as a Court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a Court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under S. 319, Cr.P.C., it is only a Court of session or a Court of Magistrate performing the duties as a Court under the Cr.P.C. that can utilise the material before it for the purpose of the said section.[393.]

It has been held by the Supreme Court that the word "evidence" in section 319 of CrPC means only such evidence as is made before the Court, in relation to statements, and as produced before the Court, in relation to documents. It is only such evidence that can be taken in to account by the Magistrate or the Court to decide whether power under section 319of CrPC is to be exercised or not on the basis of material collected during investigation. It has also been held that material collected during inquiry, though not evidence in the strict term, can be used as *prima facie* satisfaction for exercise of power under section 319. Thus, the word "evidence" in section 319 has to be understood broadly.[394.]

It has been held by a Constitution Bench of the Supreme Court that the power to arraign new accused under section 319 is exercisable on the basis of evidence recorded in the examination-in-chief. The Court need not wait till the said evidence is tested by cross-examination provided the Court is satisfied about the complicity of the accused to be added. The satisfaction of the Court necessary for exercising power under section 319 must be more than *prima facie* satisfaction.[395.]

As such the issue was referred to a larger Bench. Thus, it has been held by a Five-Judge Constitution Bench that exercise of power to arraign new accused in a case is permissible on evidence recorded in the examination-in-chief and the Court need not wait till the said evidence is tested by cross-examination, provided on the basis of the said material the Court is satisfied about the complicity of accused to be added.[396.]

Explaining the Proposition, BS Chauhan, J, speaking for the Five-Judge Constitution Bench, observed as follows:

> 84. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under S. 319, CrPC, the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross-examine the witness(s) prior to passing of an order under S. 319, CrPC, as such a procedure is not contemplated by the CrPC. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(s) is obliterating the role of person already facing trial. More so, S. 299, CrPC enables the Court to record evidence in absence of the accused in the circumstances mentioned therein.
>
> 85. Thus, in view of the above, we hold that power under S. 319, CrPC can be exercised at the stage of completion of examination-in-chief and Court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the Court which can be gathered from the reasons recorded by the Court in respect of complicity of some other person(s), not facing the trial in the offence.[397.]

In a criminal appeal arising out of the SLP (Cri) No. 9184 of 2008, the Supreme Court has held that for exercise of power to add new accused under section 319, evidence much stronger than showing mere probability of complicity is necessary. The degree of satisfaction necessary for exercise of power under section 319 is much higher than mere *prima facie* case.[398.]

[s 319.8] Where sanction necessary.—

A sanction for prosecution was obtained against one public servant. It was held that summoning of another public servant as an accused was not permissible because under section 19 of the Prevention of Corruption Act, 1988, sanction for prosecution is granted with respect to a specific accused.[399.]

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361. *Mahendra Kumar v State of Madhya Pradesh*, 1987 Cr LJ 1450 (MP). *Shashikant Singh v Tarkeshwar Singh*, 2002 Cr LJ 2806 : AIR 2002 SC 2031 : (2002) 5 SCC 738 , the provision mandates *de novo* trial of the newly added person. Even if trial in respect of a person who was before the Court had concluded, the trial of the newly added person would not become without jurisdiction. While fresh trial of the newly added person is mandatory, the provision that he "could be tried together with the accused" is directory.

362. *Labhuji Amratji Thakor v State of Gujarat*, AIR 2019 SC 734 .

363. *Sarabjit Singh v State of Punjab*, AIR 2009 SC 2792 : (2009) 16 SCC 46 : 2009 Cr LJ 3978 .

364. *Manjit Pal Singh v State of Punjab*, AIR 2009 SC 483 : (2009) 16 SCC 785 . The question whether accusation can be made after examination-in-chief or only after cross-examination was referred to larger Bench.

365. *Rakesh v State of Haryana*, AIR 2001 SC 2521 at pp 2523–2524 : 2001 Cr LJ 319 .

366. *Dulichand v State of Rajasthan*, 1993 Cr LJ 827 (Raj).

367. *KM Mathew v KA Abraham*, AIR 2002 SC 2989 : (2002) 3 Ker LT 282 : (2002) 6 SCC 670 . *Kishori Singh v State of Bihar*, 2001 Cr LJ 123 , Magistrate cannot issue process against those

persons who may have been named in the FIR but not charge-sheeted under section 173.

368. *Hardei v State of Uttar Pradesh*, AIR 2016 SC 1615 : 2016 Cr LJ 2255 : 2016 (3) Scale 511 .

369. *SS Khanna v Chief Secretary, Patna*, 1983 Cr LJ 1044 : 1983 SCR (2) 724 : (1983) 3 SCC 42 .

370. *Municipal Corp of Delhi v Ram Kishen Rohatgi*, 1983 Cr LJ 159 : AIR 1983 SC 67 : (1983) 1 SCC 1 .

371. *Sri Mahant Amar Nath v State of Haryana*, 1983 Cr LJ 433 : AIR 1983 SC 288 : (1983) 1 SCC 391 ; *Mahafan v State of Uttar Pradesh*, 1988 Cr LJ 1467 (All).

372. *Kishun Singh v State of Bihar*, AIR 1993 SCW 771 : 1993 Cr LJ 1700 : (1993) 2 SCC 16 .

373. *Raj Kishore Prasad v State of Bihar*, 1996 Cr LJ 2523 : AIR 1996 SC 1931 , reversing the decision of the Patna High Court and describing the decision in *State of UP v Lakshmi*, AIR 1983 SC 439 : (1983) 2 SCC 372 as *per incuriam*.

374. *Rukhsana Khatoon v Sakhawat Hussain*, AIR 2002 SC 2342 : (2002) 10 SCC 661 .

375. *SWIL Ltd v State of Delhi*, (2001) 6 SCC 670 : 2001 SCC (Cri) 1205 ; *Munna Singh v State of Bihar*, 2002 Cr LJ 3109 (Pat), a person against whom process is not issued by the police comes within the expression "any person not being the accused".

376. *Rakesh v State of Haryana*, AIR 2001 SC 2521 : (2001) 6 SCC 248 .

377. *Michael Machado v CBI*, AIR 2000 SC 1127 : 2000 Cr LJ 1706 : (2000) 3 SCC 262 , out of 49 witnesses examined by the Magistrate only 3 made a reference to the involvement of the appellant, that was held to be not sufficient to bring him into the prosecution. *Tek Narayan Prasad Yadav v State of Bihar*, 1999 SCC Cri 356 , the Sessions Court is competent to issue process against a person who has not been charge-sheeted under section 193. This power can be exercised even when the trial has already commenced, and some evidence has been recorded. *Amar Nath v State of Haryana*, 2003 Cr LJ 2003 (P&H), the power can be exercised even after the trial has concluded. *Jarnail Singh v State of Haryana*, 2003 Cr LJ 2307 (SC): AIR 200 3 SC 4081 : JT 2003 (3) SC 590 : 2003 (3) Scale 685 : (2003) 9 SCC 328 , the provision applicable even to a person who is already an accused in some other case but in respect of the same occurrence.

378. *Sohan Lal v State of Rajasthan*, 1990 Cr LJ 2302 (Raj): AIR 1990 SC 2158 : JT 1990 (3) SC 599 : 1990 (2) Scale 307 : (1990) 4 SCC 580 .

379. *Abdul Karim Khan v State of MP*, 1995 Cr LJ 3420 (MP).

380. *Omprakash Shivprakash v KI Kuriakose*, AIR 1999 SC 3870 : 2000 Cr LJ 26 : (1999) 8 SCC 1 ; *Ranjit Singh v State of Punjab*, AIR 1998 SC 3148 : (1998) 7 SCC 149 , the Sessions Court does not have the power to summon additional accused under section 193. The material placed before the committal Court during inquires or trial not regarded as evidence. For the purposes of section 319, evidence means evidence produced before the trial Court where the offence is triable by the Sessions Court. The power of the Sessions Court to array a new person or persons as accused under section 319 could not be invoked prior to the stage of collection of evidence. Till the stage of section 230 is reached, the Session Court can deal only with accused referred to section 309. But the Court acting under section 319 need not wait till the entire evidence has been collected. *Kavis Kumar v State of Punjab*, 2003 Cr LJ 2456 (P&H), the order summoning the petitioner as an accused without recording evidence at the trial was held to be not proper. *State of Bihar v Chandra Bhanu Som*, 2003 Cr LJ 2793 (Jhar), no *prima facie* case of conspiracy was made out against the accused, an order rejecting summoning him was held to be proper; *Kailash v State of Rajasthan*, AIR 2008 SC 1564 : (2008) 14 SCC 51 : 2008 Cr LJ 1914 , the Court has to be circumspect while exercising this power. The appellant had to be added but it could not be done because none of the witnesses at the investigation stage stated that he had an axe in his hand. In their evidence in the Court, they said that he inflicted the axe below. He was ordered to be added. Conclusion of the trial was no reason by itself to refuse it.

381. *Hardeep Singh v State of Punjab*, AIR 2014 SC 1400 : 2014 Cr LJ 1118 (SC) : (2014) 3 SCC 92 (Five-Judge Constitution Bench).

382. *Babubhai Bhimabhai Bokhiria v State of Gujarat*, AIR 2014 SC 2228 : (2014) 5 SCC 568 .

383. *Babubhai Bhimabhai Bokhiria v State of Gujarat*, (2013) 9 SCC 500 : AIR 2013 SC 3648 : 2013 Cr LJ 1547 : 2013 (2) Scale 42 .

384. *Mohd Shafi v Mohd. Rafiq*, AIR 2007 SC 1899 : (2007) 14 SCC 544 : 2007 Cr LJ 3198 .

385. *Sashikant Singh v Tarkeshwar Singh*, AIR 2002 SC 2031 : 2002 Cr LJ 2806 : (2002) 5 SCC 738 .

386. *Gangadharanandagiri Swamiji v State of AP*, 2002 Cr LJ 3446 (AP).

387. *Hardeep Singh v State of Punjab*, AIR 2014 SC 1400 : (2014) 3 SCC 92 . See also *Rajesh v State of Haryana*, AIR 2019 SC 2168 ; *Periyasami v S Nallasamy*, AIR 2019 SC 1426 .

388. *Ibid, para* 107 and 108 at pp 1428–1429 (of AIR).

389. *Vikas v State of Rajasthan*, (2014) 3 SCC 321 : 2014 Cr LJ 183 (SC).

390. *Vedi Ram v State of UP*, 2003 Cr LJ 1084 (All).

391. *Margoobul Hasan v State of Uttar Pradesh*, 1988 Cr LJ 1467 (All).

392. *Hardeep Singh v State of Punjab*, AIR 2014 SC 1400 : (2014) 3 SCC 92 : 2014 Cr LJ 1118 (SC) (Five-Judge Constitution Bench). See also *Deepu v State of Madhya Pradesh*, AIR 2019 SC 265 ; *Dev Wati v State of Haryana*, AIR 2019 SC 641 .

393. *Ibid, para* 14 at pp 1127–1128 (of the CrLJ).

394. *Ibid*

395. *Ibid*

396. *Ibid*. *Mohd Shafi v Mohd Rafiq*, AIR 2007 SC 1899 : 2007 Cr LJ 3198 : JT 2007 (5) SC 562 : 2007 (5) Scale 611 : (2007) 14 SCC 544 **overruled**.

397. *Ibid, para* 84, 85 at p 1424 (of AIR).

398. *Babubhai Bhimabhai Bokhiria v State of Gujarat*, (2014) 5 SCC 568 : 2014 Cr LJ 2290 (SC).

399. *Dilavar Singh v Parvinder Singh*, AIR 2006 SC 389 : (2005) 12 SCC 709 : 2006 Cr LJ 145 .

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 320] Compounding of offences.—

(1) **The offences punishable under the sections of the Indian Penal Code, specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table :—**

400. **[TABLE**

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Uttering words, *etc.*, with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded
Voluntarily causing hurt	323	The person to whom the hurt is caused
Voluntarily causing hurt on provocation	334	Ditto
Voluntarily causing grievous hurt on grave and sudden provocation	335	The person to whom the hurt is caused
Wrongfully restraining or confining any person	341, 342	The person restrained or confined
Wrongfully confining a person for three days or more	343	The person confined
Wrongfully confining a person for ten days or more	344	Ditto
Wrongfully confining a person in secret	346	Ditto
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used
Theft	379	The owner of the property stolen
Dishonest misappropriation of property	403	The owner of the property misappropriated
Criminal breach of trust by a carrier, wharfinger, *etc.*	407	The owner of the property in respect of which the breach of trust has been committed
Dishonestly receiving stolen property knowing it to be stolen	411	The owner of the property stolen.

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Assisting in the concealment or disposal of stolen property, knowing it to be stolen.	414	Ditto
Cheating	417	The person cheated.
Cheating by personation	419	Ditto
Fraudulent removal or concealment of property, *etc.*, to prevent distribution among creditors	421	The creditors who are affected thereby
Fraudulently preventing from being made available for his creditors a debt or demand due to the offender	422	Ditto
Fraudulent execution of deed of transfer containing false statement of consideration	423	The person affected thereby
Fraudulent removal or concealment of property	424	Ditto
Mischief, when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused
Mischief by killing or maiming animal	428	The owner of the animal
Mischief by killing or maiming cattle, *etc.*	429	The owner of the cattle or animal
Mischief by injury to works of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to private person	430	The person to whom the loss or damage is caused
Criminal trespass	447	The person in possession of the property trespassed upon
House-trespass	448	Ditto
House-trespass to commit an offence (other than theft) punishable with imprisonment	451	The person in possession of the house trespassed upon
Using a false trade or property mark	482	The person to whom loss or injury is caused by such use
Counterfeiting a trade or property mark used by another	483	Ditto

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Knowingly selling or exposing or possessing for sale or for manufacturing purpose, goods marked with a counterfeit property mark.	486	Ditto
Criminal breach of contract of service	491	The person with whom the offender has contracted
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman	498	The husband of the woman and the woman
Defamation, except such cases as are specified against section 500 of the Indian Penal Code (45 of 1860) in column 1 of the Table under subsection (2)	500	The person defamed
Printing or engraving matter, knowing it to be defamatory	501	Ditto
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	Ditto
Insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation	506	The person intimidated
Inducing person to believe himself an object of divine displeasure	508	The person induced]

(2) The offences punishable under the sections of the Indian Penal Code, specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:—

401. [TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Causing miscarriage	312	The woman to whom miscarriage is caused
Voluntarily causing grievous hurt	325	The person to whom hurt is caused

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	338	Ditto
Assault or criminal force in attempting wrongfully to confine a person	357	The person assaulted or to whom the force was used
Theft, by clerk or servant of property in possession of master	381	The owner of the property stolen
Criminal breach of trust	406	The owner of the property in respect of which breach of trust has been committed
Criminal breach of trust by a clerk or servant	408	The owner of the property in respect of which the breach of trust has been committed
Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect	418	The person cheated
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security	420	The person cheated
Marrying again during the lifetime of a husband or wife	494	The husband or wife of the person so marrying
Defamation against the President or the Vice-President or the Governor of a State or the Administrator of a Union territory or a Minister in respect of his public functions when instituted upon a complaint made by the Public Prosecutor	500	The person defamed

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	The woman whom it was intended to insult or whose privacy was intruded upon]

[402][(3) When an offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) or where the accused is liable under section 34 or 149 of the Indian Penal Code (45 of 1860) may be compounded in like manner.]

(4) (a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908, of such person may, with the consent of the Court, compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision under section 401 may allow any person to compound any offence which such person is competent to compound under this section.

(7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this section.

[s 320.1] State Amendments

Andhra Pradesh.—In its application to the State of Andhra Pradesh, in section 320, in sub-section (2), the Table and in the column thereof; after item,—

"1	2	3

"1	2	3
"Marrying again during the lifetime of a husband or wife.	494	The husband or wife of the person so marrying"
insert the following item and entries relating thereto, namely:— "Husband or relative or husband of a woman subjecting her to cruelty.	498A	The women subjected to cruelty: Provided that a minimum period of three months shall elapse from the date of request or application for compromise before a Court and the Court can accept a request for compounding an offence under section 498A of the Indian Penal Code, 1860, provided none of the parties withdraw the case in the intervening period."

—Andhra Pradesh Act 11 of 2003, section 2 (w.e.f. 1-8-2003).

Madhya Pradesh.—In its application to the State of Madhya Pradesh, in the Table below sub-section (2) of section 320—

(i) in column first, second and third, before section 324 and entries relating thereto, insert the following sections and entries relating thereto, namely:—

"1	2	3
Rioting	147	The person against whom the force or violence is used at the time of committing an offence: Provided that the accused is not charged with other offence which is not compoundable.
Rioting armed with deadly weapon	148	The person against whom the force or violence is used at the time of committing an offence: Provided that the accused is not charged with other offence which is not compoundable.
Obscene acts or use of obscene words	294	The person against whom obscene acts were done or obscene words were used.";

(ii) in column first, second and third, after section 500 and entries relating thereto, insert the following section and entries relating thereto, namely:—

"1	2	3
Criminal intimidation if threat to cause death or grievous hurt, etc.	*Part II of section 506*	*The person against whom the offence of criminal intimidation was committed."*

—Madhya Pradesh Act 17 of 1999, section 3 (w.e.f. 21-5-1999)

[s 320.2] CrPC (Amendment) Act, 2005 [*Clause (28)*].—

Sub-clause (a) seeks to amend the Table appended to sub-section (2) of section 320 of the Code so as to make the offence under section 324 of the IPC, a non-compoundable offence.

Sub-clause (c) seeks to amend the said Table so as to enhance the value of the property mentioned in respect of sections 379, 381, 406, 407, 408, 411 and 414 of the IPC to Rs 2,000 instead of Rs 250 since the value of money has gone down considerably. (*Notes on Clauses).*

COMMENT

Offences that may lawfully be compounded are those that are mentioned in this section. Only such offences are compoundable as are included in the two tables provided under section 320. Offences punishable under sections 279 and 304A of IPC do not figure in such tables. They are therefore not compoundable.[403.] Offences other than those mentioned cannot be compounded.[404.] Offences punishable under laws other than the Penal Code are not compoundable.

The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution, and this section provides that if the offence be compoundable, composition shall have the effect of an acquittal.[405.] Only the person named in the third column can legally compound an offence under this section.[406.]

Where the accused alleges that an offence is compounded, the onus is on him to show that there was a composition valid in law.

A compromise of a compoundable case deprives the Magistrate of his jurisdiction to try it. The compromise is complete as soon as it is made and has the effect of an acquittal even if one of the parties subsequently resiles from it. If it is proved that the parties signed the document of compromise and understood its contents, it is incompetent for either to withdraw from it.[407.] When acquittal is based on the compounding of an offence, and such compounding is invalid as being not permissible by section 320, the acquittal is liable to be set aside.[408.]

The Supreme Court has held that the power vested in High Courts under section 482 is not limited to quashing proceedings within ambit and scope of section 320 and it can also be based on settlements between private parties or compromise between offender and victim.[409.]

[s 320.3] Persons who can compound [*Sub-section (1)*].—

No permission of the Court is necessary for compounding the offences mentioned in this sub-section. Under this sub-section, as soon as the parties have arrived at a compromise, the Magistrate has nothing more to do except to record a judgment of acquittal. And if one of the parties subsequently resiles from the composition, it is competent to the Court to take evidence as to the *factum* of the composition and to give effect to it, if it is found to have been entered into.[410.] Where the parties to a compoundable offence compound it and produce a writing signed by them before the Court, the Court is bound to act upon it and is not at liberty to call upon the parties to prove that the case has been compounded.[411.] Unless a compromise duly verified by the parties is brought on record, it is not noticeable by the Court.[412.]

It is incompetent for any person, once having entered into a valid composition, to withdraw from it. A breach of the terms of the composition agreement may give rise to other remedies, but there can be no withdrawal.[413.]

[s 320.4] Offences compoundable with Court permission [*Sub-section (2)*].—

In cases governed by this sub-section, the Magistrate has to perform the judicial act of deciding whether, in the interest of justice, the parties should be allowed to compromise and, unless and until the Court has given its sanction, the so-called compromise arrived at between the parties outside the Court is of no legal effect and cannot be taken cognizance of by any court dealing with the offence.[414.] Such a compromise is ineffective and does not deprive the Court of its jurisdiction to try the case.[415.]

[s 320.5] Compounding on behalf of incompetent person [*Sub-section (4)*].—

This sub-section permits composition of offences falling both under sub-section (1) and sub-section (2) by competent persons in cases of minors, lunatics or idiots with the Court's permission. Similarly, legal representatives are permitted to make composition in case of death of the person mentioned in col. 3 with the permission of the Court.

[s 320.6] Compounding at committal or appellate stage [*Sub-section (5)*].—

An offence which is compoundable may, with the leave of the Court in which it is pending for trial or on appeal, be compounded. When an appeal or revision is pending, the appellate Court alone can allow the offence to be compounded. In an appeal against conviction under section 307 IPC, parties prayed for permission to compound the matter, the High Court refused as section 307 of IPC is not a compoundable offence.[416.]

The application for compounding was accompanied by affidavits of both parties filed before the Court. The parties gave an undertaking that no further disputes of any sort would be raised by either of them in respect of the matter concerned. The amount payable under the settlement to the respondent had already been deposited in the Court. Permission was granted for compounding.[417.]

[s 320.7] Compounding with permission of Court exercising power of review [*Sub-section (6)*].—

The High Court may allow the parties to a criminal case to compromise their disputes, even when such compromise is effected after the date of the final disposal of the case by the inferior court competent to try it. It is not competent for the High Court to allow a compromise to be recorded unless the aggrieved person is actually before the High Court and has expressly recorded his consent to a compromise being recorded. The High Court will not ordinarily allow the compromise of an offence to be recorded under this sub-section unless some attempt towards compounding the offence was made before the trial Court passed orders in the case.[418.]

[s 320.8] No compounding where enhanced punishment because of previous offences [*Sub-section (7)*].—

This sub-section prohibits compounding in cases where, on account of a previous conviction, the accused is liable to an enhanced punishment or to a punishment of a different kind.

[s 320.9] Compounding to have effect of acquittal [*Sub-section (8)*].—

If an offence has been committed against two different persons, the accused cannot be acquitted if he compounds with only one of them.[419.]

[s 320.10] Consent for compounding.—

Where the consent given by the victimised wife appeared to be free and genuine. The compromise filed by the parties also seemed to be reasonable and in the interest of the wife. The wife being an educated person, it was held that it was a fit case for grant of permission for compounding of the offence of bigamy.[420.]

[s 320.11] Other offences not compoundable [*Sub-section (9)*].—

The Orissa High Court[421.] refused to allow a compromise in a case under section 307 of IPC, a non-compoundable offence, holding that the High Court does not become empowered to permit compounding of a non-compoundable offence simply because the Supreme Court allowed compounding of an offence under section 307 of IPC, in *Rajendra Singh v Delhi Administration*.[422.] In *Mohar Singh v State of Rajasthan*,[423.] it was again reiterated that an offence punishable under section 307 of IPC is non-compoundable.

The question as to when quashing of the proceedings of out of Court settlement of non-compoundable offences dehors section 320 can be passed in exercise of powers under section 482 CrPC has been answered in *Gian Singh v State of Punjab*[424.] as—

> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide

plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power *viz*;"

(i) to secure the ends of justice or,

(ii) to prevent abuse of the process of any Court.

In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, *etc.* cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, *etc*; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, *etc.* or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

It was been held by the Supreme Court that offence which is not compoundable under section 320 of CrPC cannot be allowed to be compounded even if there is settlement between the complainant and the accused. However, settlement arrived at between the parties can be taken into consideration for determining the quantum of sentence. Therefore, in a case, where the incident had taken place in 1994 and the parties were related to each other and the accused having served substantial part of the sentence, the Supreme Court reduced the sentence to period already undergone.[425.]

[s 320.12] Offence under Negotiable Instruments Act.—

The Supreme Court is empowered to pass appropriate orders in line with section 320 in an application under section 147 of NI Act.[426.]

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400. Subs. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 23, for the Table (w.e.f. 31-12-2009).

401. Subs. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 23, for the Table (w.e.f. 31-12-2009).

402. Subs. by the CrPC (Amendment) Act, 2008 (5 of 2009), section 23, for sub-section (3) (w.e.f. 31-12-2009), prior to its substitution, sub-section (3) stood as under: "When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) or where the accused is liable under section 34 or 149 of the Indian Penal Code (45 of 1860) may be compounded in like manner."

403. *Manish Jalan v State of Karnataka*, AIR 2008 SC 3074 : (2008) 8 SCC 225 .

404. *Sholapur Mun Corp v Ramkrishna*, (1968) 71 Bom LR 481 , at p 483 : 1970 Cr LJ 1330 : (1969) Mah LJ 859 : AIR 1970 Bom 333 ; *Gurcharan Singh Bhawnani v State*, 2002 Cr LJ 744 (Del), the provision is exhaustive and also mandatory in nature.

405. *Murray v The Queen-Empress*, (1893) 21 Cal 103 , 112; *J John*, (1922) 45 All 145 .

406. *Emperor v Dajuba*, (1927) 29 Bom LR 718 : 51 Bom 512.

407. *Re v Father Godfrey Meeus v Simon Dular*, (1950) ILR Nag 434.

408. *Sk Saifuddin Mondal v. State*, 1983 CrLJ 109 .

409. *J Ramesh Kamath v Mohana Kurup*, (2016) 12 SCC 179 .

410. *Naurang Rai v Kidar Nath*, (1928) ILR 9 Lah 400 : AIR 1928 Lah 232 ; *Mahomed Kanni Rowther v Pattani Inayathalla Sahib*, (1916) ILR 39 Mad 946 : AIR 1916 Mad 854 ; *Murray v The Queen-Empress*, (1893) 21 Cal 103 , 112.

411. *Emperor v Gana Krishna Walunj*, (1914) 16 Bom LR 939 : AIR 1914 Bom 258 .

412. *Rameshwar Prasad v UP*, 1984 Cr LJ 996 (All).

413. *Jhangtoo Barai v Emperor*, (1929) ILR 52 All 254 : AIR 1930 All 409 .

414. *Naurang Rai v Kidar Nath*, (1928) 9 Lah 400; *Kumaraswami Chetty v Kuppuswami Chetty*, (1918) 41 Mad 685.

415. *Harswarup Chaubey v Emperor*, (1940) Nag 195 : AIR 1938 Nag 37 .

416. *Madan Suleman v State of Maharashtra*, 1995 Cr LJ 1419 (Bom).

417. *K Kandasamy v KP MVP Chandrasekaran*, AIR 2005 SC 2485 : (2005) 4 SCC 349 : 2005 Cr LJ 2597 .

418. *Babur Ali Sardar v Kalachand Bepari*, (1939) 1 Cal 567 .

419. *Khilwansingh*, (1937) Nag 286.

420. *Parameswari v Vennila*, (2000) 10 SCC 348 : 2000 SCC (Cr) 1381; *Mohd Rafi v State of UP*, (1998) SCC Cri 891 : 1998 2 Recent Cr 455 (1), the settled the dispute willingly and voluntarily with the intervention of neighbours and relatives. Compounding permitted in the interest of good relations.

421. *Golak Chandra Nayak v State of Orissa*, 1993 Cr LJ 274 (Ori).

422. *Rajendra Singh v Delhi Administration*, AIR 1980 SC 1200 : (1981) SCC (Cri) 277 .

423. *Mohar Singh v State of Rajasthan*, (2015) 11 SCC 226 .

424. *Gian Singh v State of Punjab*, (2012) 10 SCC 303 : (2013) 1 SCC (Cri) 160 .

425. *Gulab Das v State of MP*, AIR 2012 SC 888 : (2011) 10 SCC 765 : (2012) 1 SCC (Cri).

426. *KM Ibrahim v KP Mohammed*, AIR 2010 SC 276 : (2010) 1 SCC 798 : 2010 Cr LJ 525 ; *Damodhar S Prabhu v Sayed Babalal H*, AIR 2010 SC 1907 : (2010) 5 SCC 663 : 2010 Cr LJ 2860 , compounding is not to be governed by section 320 in view of the non-obstante clause in section 147, NI Act. *Sudheer Kumar v Manakkandi M Kumhiraman*, AIR 2008 NOC 105 (Ker), the non-obstante clause in section 147 does not completely exclude the application of CrPC to compounding under the NI Act. The procedure under section 320 should be followed in carrying out the compounding.

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 321] Withdrawal from prosecution.—

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and, upon such withdrawal,

- **(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;**
- **(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:**

***Provided* that where such offence—**

- **(i) was against any law relating to a matter to which the executive power of the Union extends, or**
- **(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or**
- **(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or**
- **(iv) was committed by a person in the service of the Central Government while acting or purporting to act in discharge of his official duty,**

and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.

[s 321.1] State Amendment

Uttar Pradesh.— *Following amendments were made by UP Act 18 of 1991,section 3 (w.e.f. 16-2-1991).*

In Section 321 after the words "in charge of a case may" the words "on the written permission of the State Government to that effect (which shall be filed in Court)", shall be inserted.

This section enables the Public Prosecutor or the Assistant Public Prosecutor to withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried. For doing so, consent of the Court is necessary. The proviso lays down that consent of the Central Government has to be obtained before a Public Prosecutor or Assistant Public Prosecutor moves the Court

for withdrawal of the case, whenever the offence falls within the categories mentioned in sub-clauses (i) to (iv) of the proviso.

This section is not applicable to security proceedings. It applies only where the proceedings would end in an acquittal or discharge of the accused. A proceeding under section 107 does not terminate in either of these ways.[427.]

The Supreme Court answered three important questions in *VLS Finance Ltd v SP Gupta*[428.]—(i) whether the Assistant Public Prosecutor is entitled under law to file an application for withdrawal of the application preferred under section 321 of the CrPC and not to press an application for withdrawal, (ii) whether the Magistrate is disabled in law or lacks jurisdiction to allow the prosecution from preferring the application for withdrawal, (iii) whether the accused has any say at that stage of the proceeding. It was held that if the Public Prosecutor intends to withdraw or not press the application, he is entitled to do so. The court cannot say that the Public Prosecutor has no legal authority to file the application or not pressing for the application earlier. The accused has no role and, therefore, the High Court cannot quash the orders permitting the prosecution to withdraw the application and granting such liberty to the accused persons.

[s 321.2] Scope.—

The Supreme Court has held that the power contained in this section gives a general executive direction to withdraw from the prosecution subject to the consent of the Court. The section indicates neither the reasons which should weigh with the Public Prosecutor or the Assistant Public Prosecutor to move the Court nor the grounds on which the Court will grant or refuse permission; but the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice. The consideration weighing with the prosecuting authority may be either that it will not be able to produce sufficient evidence to sustain the charge or subsequent information before it will falsify the prosecution evidence or other similar circumstance. It is difficult to predicate all factors, as they are dependent entirely on the facts and circumstances of each case. Nonetheless, it is a duty of the Court to see that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law directs the Public Prosecutor or Assistant Public Prosecutor to withdraw from the prosecution.[429.]

Where the Public Prosecutor and afterwards the Magistrate surrendered their discretion, they were held not to have applied their mind.[430.]

The Supreme Court held that the Public Prosecutor was bound to receive instructions from the Government and such instructions would not amount to an extraneous influence.[431.] Where the trial Courts permitted withdrawal of prosecutions in few cases on the applications of the Public Prosecutor, at the instance of the then Government of Tamil Nadu, but when another political party came to power, the Public Prosecutor was directed to get the withdrawal cancelled and prosecution restored, it was held that the State which moved for withdrawal of the prosecution, could not seek to set aside the order granting withdrawal, as it would lead to uncertainty as to the finality of the proceedings.[432.]

[s 321.3] "Public Prosecutor or Assistant Public Prosecutor".—

It is only the Public Prosecutor or the Assistant Public Prosecutor who is in charge of a particular case and is actually conducting prosecution, that can file an application under this section seeking permission to withdraw from the prosecution.[433.] The Public Prosecutor cannot act on the dictate of the State Government. He has to act objectively, being an officer of the Court. The Courts are also free to assess whether *prima facie* case is made out or not.[434.]

The Public Prosecutor or the Assistant Public Prosecutor can withdraw prosecution against one or all accused if there be many or can withdraw some of the charges against any or all of the accused. If withdrawal takes place before the charges are framed, the accused can only be discharged, but the accused would be entitled to acquittal, if the prosecution is withdrawn after the framing of the charge.

[s 321.4] "Tried".—

The word "tried" is not used in a limited sense and the section is wide enough to cover every kind of inquiry and trial, and applicable to all cases which are capable of terminating either in a discharge or in an acquittal according to the stage at which the application for withdrawal is made.[435.]

[s 321.5] Reason for order.—

The Supreme Court has now decided that a reasoned order need not be given by the Magistrate. The law, therefore, is now settled.[436.]

Permission for withdrawal can be granted only in the interest of justice and for valid reasons. It may thus be granted in a case which is likely to end in acquittal and continuance of the case is only causing severe harassment to the accused, or to bring about harmony between the parties. Discretion should not be exercised to stifle prosecution at the instance of aggrieved parties. Even where the Government directs Public Prosecutor to withdraw prosecution, the Court remains under its duty to consider all the relevant circumstances and find out whether withdrawal would advance the cause of justice. The permission in this case was granted on the ground that the case had been pending for a long time and the accused was not a habitual offender. No inquiry was made to find out why the case remained pending. The prosecution evidence was about to be over at any point of time. Permission to withdraw was held to be not proper.[437.]

[s 321.6] Discharged accused, competent witness.—

A Court may consent to the Public Prosecutor withdrawing from the prosecution of any person under clause (a) of this section for the purpose of obtaining that person's evidence as a witness. Where section 306 is available, it is better to tender a conditional pardon under that section than consenting to the withdrawal of the case before the charge is framed.[438.]

[s 321.7] Duty of Government in deciding matter of withdrawal [*Proviso (b)(iv)*].—

The decision of the Central Government to instruct the Public Prosecutor to file a petition for withdrawal should be based upon some genuine source of information. The Government must have reasons for its decision and must apply its mind before instructing the Public Prosecutor. In this case, the Government had taken its decision on the basis of the letter of the Director and Inspector General of Police. He is a responsible and senior police official. The Court, therefore, said that this was a sufficient ground for justification of the Government decision. The contents of such letter need not be disclosed in the Court.[439.]

[s 321.8] Notice to complainant not necessary.—

The section does not contemplate any notice to the complainant for withdrawing the prosecution. The complainant can challenge the Government decision by showing any non-compliance with the requirements of the section.[440.]

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427. *Re Muthia Moopan*, (1913) ILR 36 Mad 315, 317; *The King v Ba Khin*, (1940) Ran 226 : AIR 1940 Rangoon 189 .

428. *VLS Finance Ltd v SP Gupta*, (2016) 3 SCC 736 : AIR 2016 SC 721 : 2016 Cr LJ 1296 : 2016 (2) Scale 164 .

429. *MNS Nair v PV Balakrishnan*, AIR 1972 SC 496 : (1972) 1 SCC 318 . *RM Tewari v State (NCT of Delhi)*, AIR 1996 SC 2047 : 1996 Cr LJ 2872 : (1996) 2 SCC 610 , withdrawal of prosecution under TADA Act, 1987 (now repealed) cannot be mechanically allowed on the basis of recommendation of a review committee. The public prosecutor must satisfy himself that the case in question was fit for withdrawal.

430. *Balwant Singh v State of Bihar*, (1977) 4 SCC 448 : AIR 1977 SC 2265 : 1977 Cr LJ 1935 ; *Orissa v Chandrika Mohapatra*, AIR 1977 SC 903 : 1977 Cr LJ 773 .

431. *Sheonandan Paswan v State of Bihar*, AIR 1983 SC 194 : (1983) 1 SCC 438 ; **See** *Sathe, Administrative Law*, pp 283–84 (1984).

432. *State v L Ganesan*, 1995 Cr LJ 3849 (Mad).

433. *State of Punjab v Surjit Singh*, AIR 1967 SC 1214 : 1967 Cr LJ 1084 .

434. *SK Shukla v State of UP*, AIR 2006 SC 413 : (2006) 1 SCC 314 : 2006 Cr LJ 148 .

435. *The State of Bihar v Ram Naresh Pandey*, (1957) SCR 279 : AIR 1957 SC 389 : 1957 Cr LJ 567 .

436. *SN Paswan v State of Bihar*, 1987 Cr LJ 793 (Pat): AIR 1987 SC 877 : JT 1986 (1) SC 832 : 1986 (2) Scale 1099 : (1987) 1 SCC 288 .

437. *Rahul Agarwal v Rakesh Jain*, AIR 2005 SC 910 : (2005) 2 SCC 377 : 2005 Cr LJ 963 .

438. *Hari Har Singha v Emperor*, (1937) 1 Cal 711 (FB); *Queen-Empress v Hussein Haji*, (1900) 25 Bom 422 : 2 Bom LR 1095.

439. *KVV Krishna Rao v State of AP*, 2003 Cr LJ 2894 (AP).

440. *Ibid*

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 322] Procedure in cases which Magistrate cannot dispose of.—

(1) If, in the course of any inquiry into an offence or a trial before a Magistrate in any district, the evidence appears to him to warrant a presumption—

(a) that he has no jurisdiction to try the case or commit it for trial, or

(b) that the case is one which should be tried or committed for trial by some other Magistrate in the district, or

(c) that the case should be tried by the Chief Judicial Magistrate,

he shall stay the proceedings and submit the case, with a brief report explaining its nature, to the Chief Judicial Magistrate or to such other Magistrate, having jurisdiction, as the Chief Judicial Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

The section applies only when the Magistrate is of opinion that the offence committed is one which he is not competent to try or is otherwise incompetent to deal with it. The section comprehends also cases of absence of local or territorial jurisdiction.[441.]

The superior Magistrate to whom the case is submitted may (1) either try the case himself, or (2) refer it to any subordinate Magistrate having jurisdiction, or (3) commit the accused for trial. The Madras High Court has held that if a Magistrate to whom a case is submitted u/sub-s. (1) is of opinion that the evidence disclosed an offence properly triable by the Magistrate who submitted the case, he has jurisdiction u/sub-s. (2) to refer the case back to the Magistrate who originally submitted the case.[442.] The Bombay High Court has dissented from this view and held that the superior Magistrate cannot revise the view of the subordinate Magistrate, and refer the case back to the very Magistrate who has reported the case to him. The phrase "to any Magistrate subordinate to him having jurisdiction" is intended to mean "a subordinate Magistrate other than the Magistrate who made the reference or report and competent to deal with the case as submitted."[443.]

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441. *Mohammad Abbas Ali v Indra Prakash*, AIR 1965 Cal 626 : 1965 Cr LJ 740 .

442. *Polur Reddi v Muniswami Reddi*, (1930) 54 Mad 16 (FB) **overruling**, *Kottur Hampanna*, (1922) 45 Mad 846 : AIR 1923 Mad 51 : (1922) ILR 65 Mad 846.

443. *Haidarsha Lalsha v Dhondu Abaji*, (1941) 44 Bom LR 53 : (1942) Bom 198.

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[s 323] Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.—

If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall, commit it to that Court under the provisions hereinbefore contained [444.][and thereupon the provisions of Chapter XVIII shall apply to the commitment so made].

This section applies when after commencement of inquiry or trial, the Magistrate finds that the case should be committed. The expression "under the provisions hereinbefore contained" refers to the provisions contained in Chapter XVI.

Power under this section must be exercised before signing a judgment because section 300(1) of the Code bars trial of the person again, not only for the same offence but also for any other offence based on same facts.[445.]

Where a Magistrate thinks from the first that a case ought to be tried by a Court of Session, the procedure laid down in Chapter XVI of the Code is *prima facie* obligatory on him.[446.] Magistrates must act promptly and expeditiously in the matter of commitment proceedings. Thus, when the Magistrate did not commit the case to the Sessions Court for a period of nine months though the case had been taken by him on several dates, the accused was held entitled to be released on bail.[447.]

It is not open to a Magistrate to decline to commit a case to the Court of Session on the ground that there is congestion of work in the latter Court. The Magistrate has to bear in mind not only the fact whether he could pass an adequate sentence but has also to pay regard to the gravity of the offence, and the public importance of the case. Where the editor of a widely circulated daily newspaper was charged with the offence of sedition, the High Court directed the Chief Presidency Magistrate to commit the case to the Court of Session.[448.]Commitment may be made after framing a charge.[449.]

Where the cases and counter-cases relating to the same incident were committed to the Sessions Court and one of those cases involved an offence not exclusively triable by the Sessions Court, it was held that it was not mandatory for the Sessions Court to transfer such a case to the Chief Judicial Magistrate. The judge could himself try the case.[450.]

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444. Ins. by Act No. 45 of 1978, section 26 (w.e.f. 18-12-1978).

445. *Thakur Ram v The State of Bihar*, AIR 1966 SC 911 : 1966 Cr LJ 700 .

446. *Channing Arnold*, (1912) 6 LBR 129.

447. *Sita Ram v State of Uttar Pradesh*, 1987 Cr LJ 645 (All).

448. *Emperor v Krishnaji Khadilkar*, (1929) 31 Bom LR 602 : 53 Bom 611 : AIR 1929 Bom 313 .

449. *King-Emperor v Ishahat*, (1925) ILR 3 Ran 42; *Crown Prosecutor v Bhagavathi*, (1918) 42 Mad 83; *Kamalashankar B Dave v State of Gujarat*, (1963) 1 Cr LJ 525 : AIR 1963 Guj 312 .

450. *Sudhir v State of MP*, AIR 2001 SC 826 : (2001) 2 SCC 688 . *Ramakanta Patra v State of Orissa*, 2003 Cr LJ NOC 152 (Ori) : (2002) 1 Ori LR 481 , the Magistrate can in exercise of the power under the section can commit a counter case which is triable by him to the sessions where the other case is pending.

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[s 324] Trial of persons previously convicted of offences against coinage, stamp-law or property.—

(1) Where a person, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code (45 of 1860), with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, and the Magistrate before whom the case is pending is satisfied that there is ground for presuming that such person has committed the offence, he shall be sent for trial to the Chief Judicial Magistrate or committed to the Court of Session, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted.

(2) When any person is sent for trial to the Chief Judicial Magistrate or committed to the Court of Session under sub-section (1) any other person accused jointly with him in the same inquiry or trial shall be similarly sent or committed, unless the Magistrate discharges such other person under section 239 or section 245, as the case may be.

This section deals with the trial of accused persons who have been previously convicted of offences against coinage and stamp-law (Chapter XII of the Penal Code) or against property (Chapter XVII of the Penal Code). If there has been a previous conviction of an offence under those Chapters, the Magistrate is bound to commit unless he can adequately punish the accused. He must, therefore, as a preliminary matter determine before framing a charge whether there has been a previous conviction and whether he has power to pass an adequately severe sentence. If he thinks he has not such power, he should frame a charge and commit the accused.[451.]

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451. *Re K Sellandi*, (1915) ILR 38 Mad 552 : AIR 1914 Mad 149 (2).

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CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 325] Procedure when Magistrate can not pass sentence sufficiently severe.—

(1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

(2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under sub-section (1), in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.

(3) The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

This section contemplates that when a Magistrate having jurisdiction over the offence under trial finds the accused guilty of that offence but considers that he is not competent to pass punishment of an appropriate description or sufficiently severe to meet the ends of justice, he should submit the entire proceedings for the orders of the Chief Judicial Magistrate to whom he may be subordinate. Along with the proceedings of the subordinate Magistrate, the accused must be forwarded to be dealt with finally by the superior Magistrate.

[s 325.1] "To the Chief Judicial Magistrate to whom he is subordinate."—

The special powers to deal with proceedings under this section are conferred upon the Chief Judicial Magistrate to whom the referring Magistrate is subordinate and upon no other Magistrate.[452.]

[s 325.2] Procedure where punishment beyond Magistrate's competence [*Sub-section (1)*].—

If the Magistrate considers the accused to be guilty and to deserve a greater penalty than he himself can impose, he should send the case to a superior Court for imposing a fitting sentence. He should forward the case without any record of conviction.[453.] If,

however, he records a conviction in such a case, it may be treated as a surplusage and a legal nullity and need not be formally quashed.[454.]

[s 325.3] Power of Chief Judicial Magistrate whom matter referred [*Sub-section (3)*].—

The superior Magistrate to whom the proceedings have been submitted has a discretion to reopen the trial held by the subordinate Magistrate, or he can on those proceedings pass such judgment, sentence or order in the case as he thinks fit, and as is in accordance with law. He must dispose of the case himself.[455.] He cannot return the proceedings to the referring Magistrate on the ground that in his opinion that Magistrate is competent to pass an adequate or proper sentence.[456.] He may commit the case to the Court of Session.[457.] The Calcutta High Court is of the opinion that the Magistrate to whom the case is referred may send it back to the subordinate Magistrate with a direction to commit it to the Court of Session.[458.]

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452. *Emperor v Vinayak Narayan*, (1914) 38 Bom 719 : 16 Bom LR 598 : AIR 1914 Bom 217 .

453. *Prayag Gope*, (1924) ILR 3 Pat 1013 : AIR 1924 Pat 764 ; *Mahmudi Sheikh v Aji Sheikh*, (1894) ILR 21 Cal 622.

454. *Emperor v Narayan Dhaku*, (1928) 30 Bom LR 620 : 52 Bom 456 : AIR 1928 Bom 240 .

455. *The Queen v Velayudam*, (1881) 4 Mad 233; *Bapuda*, (1887) Unrep CRC 350, Cr R No. 40 of 1887; *Ponnusamy Nadan*, (1913) ILR 36 Mad 470.

456. *Queen-Empress v Viranna*, (1886) 9 Mad 684; *Havia Tellapa*, (1886) 10 Bom 196.

457. *Re Chinnimarigadu*, (1876) 1 Mad 289 (FB); *Abdulla*, (1880) 4 Bom 240 (FB); *Abdul Wahab v Chandia*, (1886) 13 Cal 305 ; *Emperor v Thakur Dayal*, (1904) ILR 26 All 344.

458. *Queen-Empress v Chandu Gowala*, (1887) ILR 14 Cal 355.

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[s 326] Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.—

(1) Whenever any [459.][Judge or Magistrate], after having heard and recorded the whole or any part of the evidence in an enquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another [460.][Judge or Magistrate] who has and who exercises such jurisdiction, the [461.][Judge or Magistrate] so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:

Provided **that if the succeeding [462.][Judge or Magistrate] is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.**

(2) When a case is transferred under the provisions of this Code [463.][from one Judge to another Judge or from one Magistrate to another Magistrate], the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325.

[s 326.1] State Amendments

Rajasthan.— *The following amendments were made by Rajasthan Act 10 of 1977, section 3 (w.e.f. 3-9-1977).*

S 326,—

(a) in sub-section (1), for the word "Magistrate" wherever it occurs, substitute the words "Judge or Magistrate";

(b) in sub-section (2), before the words "from one Magistrate to another Magistrate", insert the words "from one Judge to another Judge or".

Uttar Pradesh.— *The following amendments were made by UP Act 16 of 1976, section 8 (w.e.f. 1-5-1976).*

S 326.—In its application to the State of Uttar Pradesh—

In section 326,—

(a) in sub-section (1), for the words " Magistrate," wherever occurring, substitute the words "Judge or Magistrate";

(b) in sub-section (2), before the words "from one Magistrate to another Magistrate", insert the words "from one Judge to another Judge or".

This section refers to inquiry or trial partly held by a Magistrate who has vacated his office and is succeeded by another Magistrate.[464.] The section provides that a Magistrate may pronounce judgment on evidence partly recorded by his predecessor and partly by himself, or on the evidence evidence recorded by his predecessor and frame a charge without re-examining the witnesses already examined.[465.] Where a Magistrate acts on the evidence previously recorded by him it cannot be said that he is acting on the evidence recorded by another Magistrate.[466.]

[s 326.2] Requirements of application of section.—

For the application of section 326 of the Code, three postulates must be concatenated together. First, a Judge should have recorded the evidence in the case either in part or in whole. Next, the Judge should have ceased to exercise jurisdiction in that case, and the third, another Judge should have succeeded him, and such successor Judge must have jurisdiction to try the offences concerned. If the above conditions are complied with, the successor Judge stands empowered to act on the evidence already recorded in the case.

The legislative intention is clear from a reading of the section. The words "succeeded by another Judge" must get a wide amplitude. It is for this purpose that section 326(2) is incorporated bringing even cases transferred from one Judge to another, within the scope of the section. The words "such jurisdiction" in section 326(1) are not intended to narrow down the ambit of the provision to Judges who could have exercised exactly the same jurisdiction which his predecessor Judge exercised. It is enough that the successor Judge has jurisdiction to try the offences sought to be proved against the accused.[467.]

[s 326.3] Sub-section (3)—Applicability to summary trial.—

The Supreme Court held that sub-section (3) of section 326 does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor. Therefore, except in regard to those cases which fall within the ambit of section 326, the Magistrate cannot proceed with the trial on the evidence recorded by his predecessor. He has to try the case *de novo*.[468.]

459. Subs. by Act 45 of 1978, section 27(i), for "Magistrate" (w.e.f. 18-12-1978)

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463. Subs. by Act 45 of 1978, section 27(ii), for "from one Magistrate to another Magistrate" (w.e.f. 18-12-1978).

Bhaskar v State, AIR 1999 SC 3539 : 1999 Cr LJ 4556 : (1999) 9 SCC 551 , the archaic concept was that the very same judicial personage who heard and recorded the evidence must decide the case. But over the years, it was revealed in practice that fossilisation of the said concept, instead of fostering the administration of criminal justice, was doing the reverse. Hence, the legislature wanted to discontinue the aforesaid antediluvian practice and decided to afford option to the successor judicial officer. The legislature conferred such option only on the Magistrates at the first instance and as the new experiment showed positive results towards of fostering the cause of criminal justice, the Law Commission recommended that such option should advisedly be extended to Judges of all other trial Courts also. The said recommendation was later accepted by the Government and was finally approved by Parliament through section 27 of Act 45 of 1978.

In this case, TADA cases, on the repeal of the Act, were transferred to another Court and the Supreme Court said that this would cause no injustice to the accused as he can invoke the powers envisaged in the proviso to section 326 (1) CrPC *Sushil Sharma v State*, 2002 Cr LJ 418 (Delhi), the accused should not be allowed to have the impression that the trial against him is not being conducted in a fair manner.

464. *Queen-Empress v Radhe*, (1890) ILR 12 All 66.

465. *Lakshmi Reddy v Muni Reddy*, (1930) 54 Mad 512.

466. *Durga Prasad*, (1952) Nag 376.

467. *Bhaskar v State*, AIR 1999 SC 3539 : 1999 Cr LJ 4556 : (1999) 9 SCC 551 ; *Sushil Sharma v State*, 2002 Cr LJ 418 (Del), the section is primarily aimed at avoiding delay in the disposal of a criminal case if for one reason on the other the judge or the Magistrate who had recorded evidence and heard arguments becomes unavailable.

468. *Nitinbhai Saevatilal Shah v Manu bhai Manjibhai Panchal*, AIR 2011 SC 3076 : (2011) 9 SCC 638 : (2011) 3 SCC (Cri) 788 .

The Code of Criminal Procedure, 1973

CHAPTER XXIV GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

[s 327] Court to be open.—

[469][(1)] **The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:**

***Provided* that the Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.**

[470][(2) **Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under** [471] **[section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860)] shall be conducted *in camera* :**

***Provided* that the Presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court:]**

[472] **[*Provided further* that in *camera* trial shall be conducted as far as practicable by a woman Judge or Magistrate.]**

[473][(3) **Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court.]**

[474] **[*Provided* that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties.]**

[s 327.1] Criminal Law (Amendment) Act, 2013.—

By the present amendment, the scope of sub-section (2) of section 327 has been enlarged. In the provision regarding in camera trial in case of rape and other offences under section 376 and 376A to 376D, the offence under section 376E has also been added to make its scope wider.

[s 327.2] Criminal Law (Amendment) Act, 2018.—

Section 327 of the Code has been recently amended *vide* the Criminal Law (Amendment) Act, 2018. The change has been made so as to bring the newly inserted

sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of the section.

COMMENT

The place in which a trial shall be held shall be deemed to be an open Court to which the public may have access subject to the orders of the trial Magistrate in a particular case that the public or a particular person shall not have access thereto.[475.] This section empowers a Magistrate to exclude the public generally or any particular person from the courtroom. The Court has to exercise its discretion in proceedings in such matters as ought to be conducted in privacy. The power of the Court to hold certain trials *in camera* is inevitably associated with the administration of justice itself. Similar provisions are also found in section 53 of the Indian Divorce Act, 1869, section 14 of the Indian Official Secrets Act, 1923, section 22(1) of the Hindu Marriage Act, 1955, *etc.*[476.] It was held by the Supreme Court that the language of section 327 itself indicates that even if a trial is held in a private house or inside a jail or anywhere it becomes a venue of trial of a criminal case. It is then to be in Law an open place and anyone who wants to attend the trial can do so with the restrictions contemplated as regards the number of persons that could be contained in the premises where the Court sits. Merely because it is shifted from the ordinary place where the Sessions Court sits to the *Tihar Jail* it does not become a trial not open to public.[477.]

In *ND Jayaprakash v UOI*,[478.] directions were issued to ensure peaceful and proper conduct of proceedings where the accused was a student leader namely Kanhaiya Kumar accused of sedition as extra ordinary situation has arisen concerning safety of the arrested student leader and entry to the courtroom was restricted by the Supreme Court in a writ petition.

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469. Section 327 renumbered as sub-section (1) thereof by Act No. 43 of 1983, section 4 (w.e.f. 25-12-1983).

470. Ins. by Act No. 43 of 1983, section 4 (w.e.f. 25-12-1983).

471. Subs. by Act 22 of 2018, sec. 17, for "section 376A, section 376B, section 376C, section 376D" (w.r.e.f. 21-4-2018). Earlier the words "section 376D or section 376E of the Indian Penal Code (45 of 1860) were substituted by Act 13 of 2013, sec. 22, for "or section 376D of the Indian Penal Code (45 of 1860)" (w.r.ef. 3-2-2013).

472. Ins. by Act No. 5 of 2009, section 24(a) (w.e.f. 31-12-2009).

473. Ins. by Act 43 of 1983, sec. 4 (w.e.f. 25-12-1983).

474. Ins. by Act No. 5 of 2009, section 24(b) (w.e.f. 31-12-2009).

475. *The King v U Khemein*, (1940) Ran 122 : AIR 1940 Rangoon 72 ; *TR. Ganesan*, (1951) Mad 246.

476. *Naresh Shridhar v State of Maharashtra*, AIR 1967 SC 1 .

477. *Kehar Singh v The State (Delhi Admn)*, 1989 Cr LJ 1 : AIR 1988 SC 1883 .

478. *ND Jayaprakash v UOI*, (2016) 4 SCC 741 : 2016 (2) Scale 468 .

The Code of Criminal Procedure, 1973

CHAPTER XXV PROVISIONS AS TO ACCUSED PERSONS OF UNSOUND MIND

This Chapter deals with accused who are lunatics. Section 84 of the Indian Penal Code deals with an accused who is a lunatic at the time of the commission of the offence (sections 333-335 and 336). If an accused is a lunatic at the time of inquiry or trial and therefore incapable of making his defence, the Magistrate (section 328) in the former case, and the Magistrate or the Court of Session (section 329) in the latter, shall ascertain on evidence if the accused is a lunatic. If he is so found, then the Magistrate or the Court, even if the case is not bailable, may release him on an assurance being given that he will be cared for. If such assurance is not forthcoming, or if he cannot be enlarged on bail, he is detained in safe custody (section 330). The Magistrate or Court may resume inquiry or trial against the accused at any time (section 331). If the accused is still insane, he can again be dealt with under section 330 (section 332). If, however, the accused appears to be of sound mind at the inquiry or trial, but was a lunatic when he committed the offence, the inquiry or trial must be completed (section 333). If he is found to have committed the offence, a finding is recorded accordingly, but the accused is acquitted (section 334). In that event, he is detained in safe custody and his case is reported to the State Government (section 335). Wherever a person detained under section 330 is found to be capable of making his defence, he is tried as provided in section 332 (section 337). A person detained under section 330 or section 335 may, when there is no danger of his doing injury to himself or to others, be either discharged (section 338) or he may be made over to the care of a relation or friend (section 339).

[s 328] Procedure in case of accused being lunatic.—

(1) When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.

[1] **[(1A) If the civil surgeon finds the accused to be of unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation:**

Provided **that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of—**

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college;]

(2) Pending such examination and inquiry, the Magistrate may deal with such

person in accordance with the provisions of section 330.

[2] **[(3) If such Magistrate is informed that the person referred to in sub-section (1A) is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate shall record a finding to that effect, and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if he finds that no prima facie case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with him in the manner provided under Section 330:**

Provided **that if the Magistrate finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused, and order the accused to be dealt with as provided under Section 330.**

(4) If such Magistrate is informed that the person referred to in sub-section (1A) is a person with mental retardation, the Magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence, and if the accused is found so incapable, the Magistrate shall order closure of the inquiry and deal with the accused in the manner provided under Section 330.]

[s 328.1] CrPC (Amendment) Act, 2008 [*Clauses (25) and (26)*].—

Clauses 25 and 26 amend sections 328 and 329 which relate to procedure of inquiry and trial in case of persons of unsound mind. The amended sections now provide that if the Magistrate finds that the accused is incapable of making his defence due to unsoundness of mind, to refer such a person for appropriate medical treatment in accordance with section 330 CrPC *(Notes on Clauses)*.

COMMENT

Section 328(1) provides that when a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall himself inquire into the fact of unsoundness of mind and on being so satisfied shall cause such person to be examined by the civil surgeon or such other medical officer as the State Government may direct. The magistrate shall then examine such surgeon or other medical officer as a witness and reduce such examination to writing.

The CrPC (Amendment) Act, 2008, has inserted sub-section (1A) after sub-section (1), and for the existing sub-section (3), new sub-sections (3) and (4) have been substituted. The newly amended section lays down a detailed procedure to be followed by the Magistrate where the person against whom an inquiry is held is believed to be of unsound mind.

This section may be compared with section 318. The former applies to insane persons and the latter to persons, who are not insane but who cannot be made to understand proceedings, eg, those who are deaf and dumb.[3]

[s 328.2] "Reason to believe".—

The words "reason to believe" mean a belief which a reasonable person would entertain on facts before him.[4.]

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1. Ins. by Act 5 of 2009, section 25(a) (w.e.f. 31-12-2009).
2. Subs. by Act 5 of 2009, section 25(b), for sub-section (3) (w.e.f. 31-12-2009). Sub-section (3), before substitution, stood as under:

"(3) If such Magistrate is of opinion that the person referred to in sub-section (1) is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.".

3. *Empress v Husen*, (1881) 5 Bom 262.
4. *Jai Shankar v State of Himachal Pradesh*, AIR 1972 SC 2267 : 1972 Cr LJ 1526 : (1973) 3 SCC 83 .

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[s 329] Procedure in case of person of unsound mind tried before Court.—

(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

[5][**(1A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:**

Provided **that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of—**

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.]

[6][**(2) If such Magistrate or Court is informed that the person referred to in sub-**

section (1A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under Section 330:

Provided **that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.**

(3) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with section 330.]

Where an accused is found to be insane, the Court has not only to put questions to him but should try the fact of unsoundness of mind by examining the Civil Surgeon or some other medical officer.[7.] Plea of insanity must first be determined by recording the medical evidence. The trial of an offence without determining the insanity of the accused is violative of the mandatory provisions of section 329.[8.]

The word "Court" includes the Magistrate also.

It has been held by the Supreme Court that if on examination of an accused, it does not appear to the Sessions Judge that the accused is insane, then he need not hold an inquiry into the matter of his insanity. But if he has any serious doubts in the matter, he should hold a further inquiry.[9.]

It has been held by the Supreme Court in a recent judgment that a plea of insanity is available to an accused even after "trial" in Sessions Court is over. The Supreme Court held that the relevant provisions, if properly construed, mean that the "trial" could only conclude on the final disposal of the reference by the High Court and not with termination of proceedings in the Court of Session. This case, known as *Raghava Raman's* case, caused a lot of sensation in Bombay at one time.[10.]

The CrPC (Amendment) Act, 2008, has inserted a new sub-section (1A) after sub-section (1), and for the existing sub-section (2), new sub-sections (2) and (3) have been substituted. The amended section lays down a detailed procedure to be followed by a Magistrate or Court of Session where the person against whom a trial is held is believed to be of unsound mind.

5. Ins. by the Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009), section 26(a) (w.e.f. 31-12-2009).

6. Subs. by the Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009), section 26(b), for sub-section (2) (w.e.f. 31-12-2009). Sub-section (2), before substitution, stood as under:

"(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Magistrate or Court.".

7. *Queen v Hira Punja*, (1863) 1 BHCR 33; *Chetu*, (1953) 32 Pat 50.

8. *Gurjit Singh v State of Punjab*, 1986 Cr LJ 1505 (Punj).

9. *Shivaswamy v State of Mysore*, AIR 1971 SC 1638 : 1971 Cr LJ 1193 : (1971) 3 SCC 220 : (1971) SCC (Cri) 434 ; *Ganesh Shrawan v State*, (1969) 71 Bom LR 643 : (1971) 3 SCC 220 .

10. *State of Maharashtra v Sindhi*, (1975) 1 SCC 647 : AIR 1975 SC 1665 : 1975 Cr LJ 1475 .

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[11.][s 330] Release of person of unsound mind pending investigation or trial.—

(1) Whenever a person if found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be shall, whether the case is one in which bail may be taken or not, order release of such person on bail:

Provided **that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.**

(2) If the case is one in which, in the opinion of the Magistrate or Court, as the case may be, bail cannot be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State Government:

Provided **that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Mental Health Act, 1987 (14 of 1987).**

(3) Whenever a person is found under section 328 or section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation,

the Magistrate or Court, as the case may be, shall keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the release of the accused can be ordered:

***Provided* that—**

(a) if on the basis of medical opinion or opinion of a specialist, the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under section 328 or section 329, such release may be ordered, if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person;

(b) if the Magistrate or Court, as the case may be, is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training.]

[s 330.1] CrPC (Amendment) Act 2008 [*Clause (27)*].—

Clause 27 substitutes section 330 which provides for medical treatment of an accused person of unsound mind pending the trial. It also provides that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Mental Health Act, 1987 *(Notes on Clauses).*

COMMENT

In a very old case under the old Code, it was held that the authority of a Magistrate, to act under sub-section (1) ceases when the lunatic is handed over to the care of the State Government. If the relative, of such a lunatic, desires to have the custody of the lunatic, he should apply, not to the Magistrate, but to the Government.[12.]

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11. Subs. by the Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009), section 27, for section 330 (w.e.f. 31-12-2009). Section 330, before substitution, stood as under:

"Section 330. Release of lunatic pending investigation or trial.—(1) Whenever a person is found, under section 328 or section 329, to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the

accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the State Government :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912)."

12. *The Empress v Joy Hari Kor*, (1877) 2 Cal 356 .

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[s 331] Resumption of inquiry or trial.—

(1) Whenever an inquiry or a trial is postponed under section 328 or section 329, the Magistrate or Court, as the case may be, may at any time after the person concerned has ceased to be of unsound mind, resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 330, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

The powers of the Court to interfere at the stage of investigation by the police are limited and the same should not overlap the other excepting for limited purposes. While an undue and prolonged delay in investigation will be a ground in favour of the defence prayer for bail, if it appears that there has been no unnecessary delay or dilatory investigation, interference with investigation by grant of bail at the stage would not be justified.[13.]

13. *Anthony Allen Fletcher v State*, 1975 Cr LJ 304 , 309 (Cal-DB).

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[s 332] Procedure on accused appearing before Magistrate or Court.—

(1) **If, when the accused appears or is again brought before the Magistrate or Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.**

(2) **If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall act according to the provisions of section 328 or section 329, as the case may be, and if the accused is found to be of unsound mind and consequently incapable of making his defence, shall deal with such accused in accordance with the provisions of section 330.**

The word "considers" appearing in this section axiomatically implies that the Court should not only examine the medical certificate and also the Doctor if necessary, but also should consider other factors and the accused should also be examined and only after due application of mind should come to the conclusion that the accused is capable of making his defence.[14.] The Magistrate or the Court should not mechanically act only on the report of the Medical Officer as a gospel truth.[15.]

14. *State of Manipur v Saikhom Ramo Singh*, 2004 (2) Crimes 385 (389) (Gauh—DB).

15. *State of Manipur v Saikhom Ramo Singh*, 2004 (2) Crimes 385 (389) (Gauh—DB) (Conviction under section 302, IPC set aside, case remanded for *de novo* trial).

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[s 333] When accused appears to have been of sound mind.—

When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act, which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be tried by the Court of Session, commit him for trial before the Court of Session.

It is to be noted that section 333 has no application where the accused appears to be insane at the time of an inquiry or trial. In such cases, the procedure laid down under sections 328-329 has to be adopted.

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[s 334] Judgment of acquittal on ground of unsoundness of mind.—

Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Section 333 read with this section provides that a Magistrate shall acquit the accused when he is satisfied from the evidence given before him that the accused was at the time of the commission of the crime, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that it was wrong or contrary to law. It is not necessary to establish by medical evidence the insanity of the accused at the time the crime was committed. It is only in proceedings where an inquiry is made as to whether the accused is of unsound mind at the time of the trial and, therefore, incapable of making his defence, that the law makes it requisite for the accused to be examined by a medical officer.[16.] Where the accused assaulted his wife and children and set fire to a house, but the plea of insanity was neither taken by the accused nor the prosecution referred to it, the trial Judge may resolve the issue all by himself, but he must have a set of facts produced in evidence by a competent medical person. In the absence of such evidence, the Judge cannot acquit the accused on grounds of insanity on his own.[17.]

16. *King v Kala Nyo*, (1941) Ran 544 : AIR 1941 Rangoon 352 .
17. *State of Karnataka v Jatli*, 1992 Cr LJ 3835 (Kant).

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[s 335] Person acquitted on such ground to be detained in safe custody.—

(1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence,—

(a) order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit; or

(b) order such person to be delivered to any relative or friend of such person.

(2) No order for the detention of the accused in a lunatic asylum shall be made under clause (a) of sub-section (1) otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

(3) No order for the delivery of the accused to a relative or friend shall be made under clause (b) of sub-section (1), except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and

places, as the State Government may direct.

(4) The Magistrate or Court shall report to the State Government the action taken under sub-section (1).

The Court, in case where it finds that an offence has been committed by a lunatic, must confine itself to making an order that he should be kept in safe custody in such place and manner as the Court thinks fit. It is then for the Government to decide under their own powers the future fate of the person concerned.[18] Clause (b) of sub-section (1) provides that such person may also be delivered to the custody of any of his friends or relatives and sub-sections (3) and (4) lay down the procedure to be followed by the Magistrate. It is for the friend or relative of the accused to make an application to the Magistrate or Court and then only the Magistrate or Court can take appropriate steps in that behalf.

[s 335.1] "Detained in safe custody".—

This does not mean detained in the custody of friends or relatives,[19] but the relatives may apply under sub-section (3) for his custody, and the Court or the Magistrate may under clause (b) of sub-section (1) grant such application. Where an accused is acquitted of the charge of murder on the ground of the unsoundness of mind, he must be detained under section 335 either in safe custody or in the charge of his relatives as provided by clause (a) or (b) of section 335.[20]

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18. *Emperor v Imam Hasan*, (1923) 25 Bom LR 286 : AIR 1923 Bom 261 ; *Emperor v Somya Hirya*, (1918) 20 Bom LR 629 : 43 Bom 134; *Provincial Govt, Central Provinces and Berar v Krishna*, (1945) Nag 551.
19. *Legal Remembrancer v Srish Chandra Roy*, (1928) 56 Cal 208 .
20. *Kuttappan v State of Kerala*, 1986 Cr LJ 271 (Ker).

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[s 336] Power of State Government to empower officer-in-charge to discharge. —

The State Government may empower the officer in-charge of the jail in which a person is confined under the provisions of section 330 or section 335 to discharge all or any of the functions of the Inspector-General of Prisons under section 337 or section 338.

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[s 337] Procedure where lunatic prisoner is reported capable of making his defence.—

If such person is detained under the provisions of sub-section (2) of section 330, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of section 332; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

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[s 338] Procedure where lunatic detained is declared fit to be released.—

(1) **If such person is detained under the provisions of sub-section (2) of section 330, or section 335, and such Inspector-General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the State Government may thereupon order him to be released, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.**

(2) **Such Commission shall make a formal inquiry into the state of mind of such person, take such evidence as is necessary, and shall report to the State Government, which may order his release or detention as it thinks fit.**

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[s 339] Delivery of lunatic to care of relative or friend.—

(1) Whenever any relative or friend of any person detained under the provisions of section 330 or section 335 desires that he shall be delivered to his care and custody, the State Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such State Government, that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct;

(c) in the case of a person detained under sub-section (2) of section 330, be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence, the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in clause (b) of sub-section (1), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production the Magistrate or Court shall

proceed in accordance with the provisions of section 332, and the certificate of the inspecting officer shall be receivable as evidence.

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CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 340] Procedure in cases mentioned in section 195.—

(1) When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,—

- **(a) record a finding to that effect;**
- **(b) make a complaint thereof in writing;**
- **(c) send it to a Magistrate of the first class having jurisdiction;**
- **(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and**
- **(e) bind over any person to appear and give evidence before such Magistrate.**

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed,—

- **(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;**
- [1] **[(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.]**

(4) In this section, "Court" has the same meaning as in section 195.

This section provides the procedure for offences enumerated in section 195(1)(b). That section is one of the exceptions to the general rule that any person can lodge complaint of an offence. When an offence is committed in relation to a public servant [section 195(1)(a)], the sanction of the public servant should first be obtained. When

the offence is in relation to a Court [section 195(1)(b)], the sanction of the Court should be obtained first.

"The sanction should be granted only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. To start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very end."[2.] A petition was filed by the wife complaining that the husband had made false denial about the factum of the second marriage and the matter be inquired into under section 193 of Indian Penal Code (IPC). The husband contended that the finding recorded by the lower Court that the allegation about the second marriage being not truthful, a complaint be filed against the wife. Held, the Court cannot, in such contentious issues, enter into facts and become a complainant at the request of the husband. Proceeding was not maintainable.[3.] Where proceedings were initiated for giving false evidence against an attesting witness of recovery-memo because his evidence was not in consonance with the recital on the memo, the Kerala High Court held that proceedings could not be taken against him because it could not be said that what he said was untrue. It needed more material to prosecute him for perjury.[4.]

A Civil Court has jurisdiction to make a complaint as regards an abetment of any offence referred to in section 195(1)(b). In view of clause (iii) of sub-section (1)(b) of section 195, the Magistrate who hears a complaint made of an offence under section 195(1)(b) can convict the accused of abetment of the offence if he holds on the evidence before him that the accused was not a principal but an abettor.[5.]

Any Civil, Revenue or Criminal Court can proceed under this section and hold preliminary inquiry. It should then record a finding, should itself make a complaint in writing, and forward it to the first-class Magistrate having jurisdiction. No prosecution should be ordered unless there is a reasonable probability of conviction,[6.] though the authority taking action should not decide the question of guilt or innocence. Great care and caution are required before the criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which a prosecution is directed.[7.]

The Court should make a complaint and cannot directly order prosecution. The complaint must set forth the offence, the precise facts on which it is based, and the evidence available for proving it.[8.] In a civil suit, a lady allegedly impersonating the complainant filed a written statement admitting the claim of the plaintiff and gave a statement in the Court to that effect. The complainant lodged First Information Report (FIR) against the petitioner under sections 205, 209, 420, 467, 468, 471, 506 and 120B of IPC. The High Court quashed the FIR and connected proceedings holding that no Court would take cognizance of these offences except on the complaint in writing of the Civil Court as provided in sections 195 and 340 of CrPC.[9.]

[s 340.1] "When, upon an application made to it in this behalf or otherwise" [*Section 340(1)*].—

The Court can act on application made to it or *suo motu*. It may be moved by a person who is not party to the proceedings in relation to which the offence is committed.[10.]

In a case of perjury, the High Court initiated *suo motu* action. An appeal or revision against it by the State was held to not maintainable.[11.]

[s 340.2] "Court".—

The term "Court" indicates that there must be power to record evidence, and to come to a judicial determination on the evidence so recorded.[12.] It means not the Court which took cognizance and issued process but the Court which tried and disposed of the original case.[13.] The power is given to the Court, not to the individual Magistrate. It includes the successor of the Magistrate.[14.] It also includes the High Court[15.]; or the Mamlatdar's Court under the Mamlatdar's Court Act[16.]; or the Income-tax Collector[17.]; or a Court in which a deposit is made under section 83 of the Transfer of Property Act[18.]; but it does not include a District Registrar[19.] or the Settlement Officer under EP Holding (Consolidation and Prevention of Fragmentation) Act, 1948.[20.] The word "Court" is now defined in section 195(3) [see sub-section (4)].

An arbitrator cannot be termed as a Court within the meaning of this section and section 195. The question of applicability of section 340 to arbitral proceedings does not arise.[21.]

[s 340.3] "It is expedient in the interest of justice that an inquiry should be made".—

These words, it will be noted, are the key-note to the section. To prosecute people, because they give evidence which is contradictory, merely on the basis of that contradiction, is a very doubtful procedure.[22.] Before a Court can start the machinery contemplated by this provision of law against a private individual, he must be clearly told that his prosecution is in the interest of justice. Till this condition is fulfilled, there can be no foundation for a proceeding of this character.[23.]

The Supreme Court[24.] has held that there are two pre conditions for initiating proceedings under section 340 of CrPC—(i) materials produced before the Court must make out a *prima facie* case for a complaint for the purpose of inquiry into an offence referred to in clause (b)(i) of sub-section (1) of section 195 of CrPC and (ii) it is expedient in the interests of justice that an inquiry should be made into the alleged offence. The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under sections 199 and 200 of the Indian Penal Code (45 of 1860) (hereinafter referred to as "the IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the Court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred in section 340(1) of the CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. The Court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case. In the process of formation of opinion by the Court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a *prima facie* satisfaction of the offence which appears to have been committed. It is open to the Court to hold a preliminary inquiry though it is not mandatory. In case, the Court is otherwise in a position to form such an opinion, that it appears to the Court that an offence as referred to under section 340 of the CrPC has been committed, the Court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course.

[s 340.4] Preliminary inquiry—Right of participation.—

The Court is not bound to make a preliminary inquiry, but, if it decides to do so, it should make a finding as to whether on facts it is expedient in the interest of justice that the offence should be further probed. The purpose is not to find out whether a person is guilty or not but is only to decide whether it is expedient in the interest of justice to inquire into the offence.[25.] The Court said in this case:

> The Court at the stage envisaged in s. 340 is not deciding the guilt or innocence of the party against whom proceedings are to be taken before the Magistrate. At that stage the Court only considers whether it is expedient in the interest of justice that an inquiry should be held into any offence affecting administration of justice. The presence of the would-be accused is not necessary for the Court to decide the question of expediency in the interest of justice. The persons against whom proceedings were instituted had no right to participate in the preliminary inquiry.

[s 340.5] "Proceeding in that Court".—

The term "proceeding" includes an execution proceeding.[26.] The Court referred to is the Court which takes proceedings under this section. The offence should be committed before that Court.[27.] In the case of a High Court, action can be taken by any Judge of the High Court whether the matter out of which the action arose was heard by him or some other Judge of the Court.[28.] An offence cannot be said to have been committed in relation to a judicial proceeding unless it has entered as a component into that proceeding, or unless in some manner it has affected that proceeding or been designed to affect it or come to light in the course of it. An offence committed after the close of the proceeding is wholly outside the scope of the provision and the circumstance that the document was still in the custody of the Court does not make the offence one committed in relation to the proceeding which had previously terminated. Forgery of an endorsement of payment on a mortgage bond, committed after the termination of the proceeding in which the bond was produced, but while the document was amongst the Court records cannot be said to have been committed "in or in relation to the proceeding" within the meaning of this section and the Court which disposed of the proceeding has no jurisdiction to take action under it in respect of that offence.[29.]

The High Court of Bombay[30.] and the former High Court of Nagpur[31.] have held that this section does not inhibit the Courts from making a complaint in respect of any of the offences specified in section 195(1)(b)(ii) against persons not parties to a proceeding before it, in which or in relation to which the offence was committed. The High Courts of Allahabad,[32.] Calcutta,[33.] Madras,[34.] Patna[35.] and Rangoon,[36.] and the former Chief Court of Sind,[37.] have held to the contrary.

[s 340.6] "Preliminary inquiry".—

It means only such inquiry as may be necessary.[38.] It is because a complaint is made by a responsible judicial officer after preliminary inquiry that the Court to which the complaint is made proceeds to deal with the case as if the case were instituted on a police report (see section 343).

[s 340.7] "Record a finding to that effect".—

The Court should record a finding that it is expedient in the interests of justice that an inquiry should be made.[39.]

[s 340.8] "Complaint".—

It means a regular complaint.[40.] It should assign the particular false statements alleged to constitute the offence under section 193 IPC[41.] and should also specify the witnesses to prove the complaint and whether the person complained against knew that the evidence he was using as genuine was false.[42.] When an offence of perjury is committed before one Judge of a Court of Session, a complaint by any other Judge of that court is a valid complaint.[43.] A successor in office of a Magistrate can file a complaint under this section in respect of an offence under section 195 IPC, committed before his predecessor.[44.]

[s 340.9] Complaint against false affidavit and false evidence [*Sub-section (1) (b)*].—

There are two conditions subject to which a complaint can be filed against a person who has given false affidavit or false evidence in a proceeding before a Court. Firstly, the person has given a false affidavit in a proceeding before the Court and, secondly, in the opinion of the Court, it is expedient in the interest of justice to make an inquiry against such a person in relation to the offence committed by him.

[s 340.10] Complaint by stranger.—

A complaint in respect of offences affecting administration of justice can be lodged even by a stranger to the proceedings. The complaint in this case was against a Public Prosecutor who was conducting a bomb blast case. The complainant was not interested in the outcome of the prosecution and confined himself to alleging that the conduct of the Prosecutor in making contradictory submissions would attract the provisions of sections 192, 196 and 227. The complaint was held to be tenable.[45.]

[s 340.11] Procedure [*Sections 195 and 340*].—

Section 195 lays down a rule to be followed by the Court which is to take cognizance of an offence specified therein, but contains no direction for the guidance of the Court which desires to initiate a prosecution in respect of an offence alleged to have been committed in, or in relation to, a proceeding in the latter Court.[46.] For that purpose, we must turn to section 340, which requires the Court desiring to put the law in motion to prefer a complaint either *suo motu* or on an application made to it in that behalf, but does not make it incumbent upon the Court to make a preliminary inquiry in every case before starting prosecution. To justify the Court in initiating prosecution, it is necessary only to hold that it is expedient in the interests of justice that an inquiry should be made into an offence referred to in section 195.[47.] A false statement included in a FIR given under section 154 cannot be the basis of prosecution under section 340.[48.] The Supreme Court refused to interfere in a case where the High Court had directed that the accused be prosecuted under section 340. The Court, however, observed that the trial Court should proceed according to law unfettered by the observations of the High

Court.[49.] Where a company had filed fabricated documents in the Court. The Bombay High Court held that, for filing complaint against a person, guilty of an offence in relation to administration of justice, issue of a notice to the person against whom complaint is going to be filed is not necessary and there is no violation of Principles of Natural Justice. Detailed inquiry at this stage is not necessary. A complaint can be filed against a person, who could not be identified at the earlier stage. The Court directed filing of a complaint against the company.[50.]

A forged document was produced before the Government and not before the Court. Initiation of proceedings by the Court under section 340 was held to be without jurisdiction.[51.] In the matter of offences under the Land Acquisition Act, an inquiry was conducted by the District Judge. This was held to be impermissible. The land acquisition Judge is not subordinate to the District Judge, but to the High Court.[52.]

[s 340.12] Higher Court to exercise power in case of default [*Sub-section (2)*].—

It applies only to cases where the subordinate Court has neither made a complaint *suo motu* nor rejected an application by a party for making such a complaint.[53.] Where on a complaint of using and swearing a false affidavit, a Court made an *ex parte* order due to non-appearance of the opposite party, it was held that the proceedings were of civil nature and by virtue of O IX, rule 13 of the Code of Civil Procedure, an application for rehearing would be maintainable.[54.]

[s 340.13] Fabrication in statements under section 161.—

A notice was issued to certain police officers under this section for prosecution under sections 194-195 IPC for fabricating record and putting up a false case. The Sessions Judge found that they had fabricated the record based on statements recorded under section 161 during an investigation. The Supreme Court dismissed the case saying that statements recorded under section 161 were not evidence and hence there was no fabrication of evidence. Issuance of notice under section 340 was not proper.[55.]

[s 340.14] Expert.—

In *Prem Sagar Manocha v State (NCT of Delhi)*,[56.] it was held that merely because an expert has tendered an opinion while also furnishing the basis of the opinion and that too without being conclusive and definite, it cannot be said that he has committed perjury so as to help somebody and mere rejection of the expert evidence by itself may not also warrant initiation of proceedings under section 340 CrPC and quashed the proceedings under section 340 CrPC.

[s 340.15] Amendment needed to eliminate perjury [*Sub-section (3)*].—

"Perjury has also become a way of life in the law courts. A trial Judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even to file a complaint against him. He is required to sign the complaint himself which deters him from doing so. Perhaps law needs amendment to

clause (*b*) of section 340(3) of the Code in this respect. To get rid of the evil of perjury, the Court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code".[57.]

[s 340.16] Power of Supreme Court.—

In reference to the offence of fabricating false records before the Court, it has been held that the Supreme Court could not itself assume criminal jurisdiction and convict the accused without trial. The statutory procedure provided in sections 195 and 340 would have to be followed.[58.]

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1. Subs. by Act 2 of 2006, sec. 6, for clause (b) (w.e.f. 16-4-2006). Clause (b), before substitution, stood as under:

"(b) in any other case, by the presiding officer of the Court."

2. Per DUA J in *Chajoo Ram v Radhey Shyam*, AIR 1971 SC 1367 , 1371 : 1971 Cr LJ 1096 : (1971) 1 SCC 774 : (1971) SCC (Cri) 331 .
3. *Jaswinder Singh v Paramjit Kaur*, 1986 Cr LJ 1398 (P&H).
4. *Kuriakose v State of Kerala*, 1995 Cr LJ 1751 (Ker).
5. *Tan Ba Cheng v Registrar, Original Side, High Court*, (1940) Ran 12 : AIR 1940 Rangoon 104 .
6. *Ramautar v Rajendra*, (1961) 2 Cr LJ 139 .
7. *Jadu Nandan Singh v Emperor*, (1910) ILR 37 Cal 250.
8. *Ram Prasad v King-Emperor*, (1927) 49 All 752 , 753.
9. *Sardul Singh v State of Haryana*, 1992 Cr LJ 354 (P&H).
10. *Harekrishna Parida v King-Emperor*, (1929) ILR 8 Pat 736; *Bhagwandas Narandas v Patel & Co*, (1939) 42 Bom LR 231 : AIR 1940 Bom 131 .
11. *K Sudhakarn v State of Kerala*, AIR 2009 SC 1898 : (2009) 4 SCC 168 : 2009 Cr LJ 1757 : 2009 (2) Scale 239 .
12. *Hanumantha Rao v Avasarala Achanna*, (1916) 39 Mad 414, 418.
13. *Tarakeshwar Mukhopadhya v Emperor*, (1925) 53 Cal 488 .
14. *Ranga Ayyar*, (1905) 29 Mad 331; *Bahadur v Eradatullah Mallick*, (1910) ILR 37 Cal 642 FB; *Re, Nawal Singh*, (1912) ILR 34 All 393; *Emperor v Baldeo Prasad*, (1924) ILR 46 All 851 : AIR 1924 All 770 ; *Khan Muhammad v Crown*, (1922) 4 Lah 58; *Behram*, (1925) 7 Lah 108; *Maung Shwe Phe v Ma Me Hmoke*, (1924) 3 Ran 48; *Ratti Ram v State*, AIR 1960 Pat 206 : 1960 Cr LJ 631 .
15. *Bai Kasturbai v Vanmalidas*, (1925) 49 Bom 710 : 27 Bom LR 616 : AIR 1925 Bom 436 .
16. *Emperor v Bhavdu*, (1912) 15 Bom LR 53 .
17. *Re Punamchand Maneklal*, (1914) 38 Bom 642 : 16 Bom LR 446 FB; *Re, Nataraj Iyer*, (1912) 36 Mad 72.
18. *Chamari Singh v Public Prosecutor of Gaya*, (1924) 4 Pat 24 : AIR 1925 Pat 330 .
19. *Re Manku Bala*, (1914) 16 Bom LR 946 : AIR 1914 Bom 202 (1).

20. *Ram Sarup v The State*, (1965) 2 Cr LJ 669 : AIR 1965 P&H 454 .
21. *Manohar Lal v Vinesh Anand*, AIR 2001 SC 1820 : 2001 Cr LJ 2044 : (2001) 5 SCC 407 .
22. *Keramat Ali v Emperor*, (1928) ILR 55 Cal 1312 : AIR 1928 Cal 862 ; *Nawabali Khan v Chandrakanta Banerji*, (1931) ILR 58 Cal 965 : AIR 1931 Cal 760 .
23. *Liaqat Husain v Vinay Prakash*, (1946) All 62 . See also *Sasikala Pushpa v State of Tamil Nadu*, AIR 2019 SC 2280 .
24. *Amarsang Nathaji v Hardik Harshadbhai Patel*; Civil Appeal No. 11120/2016 as decided on 23 November 2016 by the Supreme Court.
25. *Pritish v State of Maharashtra*, AIR 2002 SC 236 : 2002 Cr LJ 548 : (2002) 1 SCC 253 : 2001 (8) Scale 235 . To the same affect, *MS. Sheriff v State of Madras*, AIR 1954 SC 397 : 1954 Cr LJ 1019 . *Devinder Mohan Zakhani v Amritsar Improvement Trust*, 2002 Cr LJ 4485 (P&H), in the course of preliminary inquiry, the accused is not allowed to produce evidence in defence. *K Rajagopala Roa v P Radhakrishna Murthy*, 2002 Cr LJ 3405 (AP) where an offence coming under section 195 is committed in a proceeding in a Court, the Court is entitled to hold an inquiry irrespective of the nature of the proceeding.
26. *Bahadur v Eradatullah Mallick*, (1910) ILR 37 Cal 642 (FB).
27. *Mathuradas*, (1898) 16 All 80 ; *Queen-Empress v Subbaraya Pillai*, (1895) 18 Mad 487.
28. *Bai Kasturbai v Vanmalidas*, ILR (1925) 49 Bom 710 : 1925 27 Bom LR 616 .
29. *Subbarayudu v Gopayya*, (1931) 55 Mad 531; *Mayapur Sree Chaitanya Math v Sachidananda Brahmachari*, 1984 Cr LJ 1692 (Cal).
30. *Emperor v Balgaunda Ramgaunda Patil*, (1930) 33 Bom LR 296 : 55 Bom 461.
31. *Abdul Rahim Khan v Pusiabai*, (1940) Nag 652.
32. *Emperor v Kushal Pal Singh*, (1931) ILR 53 All 804 FB : AIR 1931 All 443 .
33. *Prabhatranjan Barat v Umashankar Chatterji*, (1930) 58 Cal 727 .
34. *Tulsi Ammal v Danalakshmi Ammal*, (1933) 57 Mad 682.
35. *Mathur v Pitambar*, (1944–45) 24 Pat 174, dissenting from *Rajkumar Singh v Emperor*, (1916) 1 PLJ 298 : 18 Cr LJ 135.
36. *CT Guruswamy v DKS Ebrahim*, (1924) 2 Ran 374; *Maung Shwe Phe v Ma Me Hmoke*, (1924) 3 Ran 48; *Syed Khan*, (1925) 3 Ran 303.
37. *Gobindram*, (1942) Kar 12 .
38. *Waman Dinkar v Emperor*, (1918) 43 Bom 300, 306 : 20 Bom LR 998.
39. *Re Chilukuri Ramayya*, (1932) ILR 56 Mad 157 : AIR 1933 Mad 67 ; *Brij Mohanlal v Sohanrang*, (1963) 1 Cr LJ 713 .
40. *Durjodhan Bhat*, (1925) ILR 52 Cal 666 : AIR 1925 Cal 1226 .
41. *Kalisadhan Addya v Nani Lal Hazra*, (1924) 52 Cal 478 .
42. *Kalyanji v Ram Deen Lala*, (1924) 48 Mad 395.
43. *Superintendent and Remembrancer of Legal Affairs, Bengal v Ijjatulla Paikar*, (1930) 58 Cal 1117 .
44. *Ajaib Singh v Joginder Singh*, (1969) 1 SCR 145 : AIR 1968 SC 1422 : 1969 Cr LJ 4 .
45. *N Natrajan v BK Subba Rao*, AIR 2003 SC 541 : (2003) 2 SCC 76 : 2002 (9) Scale 16 .
46. *Sachida Nand Singh v State of Bihar*, AIR 1998 SC 1121 : 1998 Cr LJ 1565 : (1998) 2 SCC 493 : 1998 (1) Scale 307 , offences specified in section 195, procedure prescribed by this section.
47. Per Shadi Lal CJ, in *Pir Qadir Bakhsh Shah v Emperor*, (1924) 6 Lah 34, 39.
48. *Vittappan v State of Kerala*, 1987 Cr LJ 1994 (Ker).
49. *Jayaram Paddickal v Eachanawarriyar*, AIR 1981 SC 161 : 1979 CLR (SC) 377(1) : (1979) 4 SCC 803(2). *Mohd Zahid v Govt of NCT Delhi*, AIR 1998 SC 2023 : 1998 Cr LJ 2908 : 1998 (3) Scale 459 : (1998) 5 SCC 419 , there were false entries in a case diary, police people made

alterations in the entries of the case diary for cooking up false story against the accused. Show cause notice issued to such police people for the offence. *N Natarajan v BK Subbarao*, AIR 2003 SC 541 : 2003 Cr LJ 820 : 2002(9) Scale 16 : (2003) 2 SCC 76 , the offence of fabricating evidence, the public prosecutor made contradictory statements at a subsequent stage because he felt that his earlier statement was likely to defeat the cause of his client, did not amount to fabricating evidence under section 195.

50. *Godrej & Boyce Manufacturing Co Pvt Ltd v UOI*, 1992 Cr LJ 3752 (Bom) : 1991 (4) Bom CR 451 : 1992 Cr LJ 3752 .

51. *Rugmini Ammal v V Narayana Reddiar*, AIR 2008 SC 895 : (2007) 12 SCC 611 : 2008 Cr LJ 1405 : 2007(14) Scale 413 .

52. *State of AP v V Sarma Rao*, AIR 2007 SC 137 : (2007) 2 SCC 159 : 2007 Cr LJ 289 : 2006 (11) Scale 401 : (2007) 2 SCC 159 .

53. *Moideen Rowthen v Miyassa Pulavar*, (1927) 51 Mad 777.

54. *Nadia Zila Parishad v Santimay Biswas*, 1980 Cr LJ 531 (Cal).

55. *Omkar Namdeo Jadhao v Addl Sessions Judge*, AIR 1997 SC 331 : 1997 Cr LJ 526 : (1996) 7 SCC 498 : 1996 (1) Scale 252 .

56. *Prem Sagar Manocha v State (NCT of Delhi)*, (2016) 4 SCC 571 : AIR 2016 SC 290 : 2016 (1) Scale 220 : (2016) 4 SCC 571 .

57. *Swaran Singh v State of Punjab*, AIR 2000 SC 2017 : (2000) 5 SCC 668 : 2000 Cr LJ 2780 : 2000 (4) Scale 153 : (2000) 5 SCC 668 .

58. *MS Ahlawa v State of Haryana*, AIR 2000 SC 168 : (2000) 1 SCC 278 : 2000 Cr LJ 388 : 1999 (6) Scale 648 : (2000) 1 SCC 278 .

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CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 341] Appeal.—

(1) Any person on whose application any Court other than a High Court has refused to make a complaint under sub-section (1) or sub-section (2) of section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint, or, as the case may be, making of the complaint which such former Court might have made under section 340, and if it makes such complaint, the provisions of that section shall apply accordingly.

(2) An order under this section, and subject to any such order, an order under section 340, shall be final, and shall not be subject to revision.

Where the first Court either makes a complaint or refuses to make a complaint under the preceding section, the appellate Court may withdraw the complaint or may itself make a complaint. No second appeal lies to the High Court against an order passed on appeal under this section.[59.] The order is made final under sub-section (2), thus setting at rest all old controversies of whether the provisions of this Code or of the Civil Procedure Code will apply when the original order is made by a Civil Court further evidence. The High Courts of Allahabad,[60.] Lahore,[61.] Nagpur[62.] and Rangoon[63.] hold that the High Court has no such power. The Madras[64.] and the Patna[65.] High Courts hold that it has such power.

An appeal under this section from an order passed under section 340 of the Code by a Civil Court must be deemed to be a criminal appeal, and the provisions of this Code, so far as they are applicable to appeals, apply to such an appeal.[66.] An appeal under section 341 of the Code can be filed provided the contingencies prescribed therein are present. The first category covers appeal by a person, who had made an application in a Court other than High Court, praying for a complaint under sub-sections (1) and (2) of section 340 which has been refused. The other category covers an appeal by a person against whom such a complaint has been made by such Court. In either event, the person concerned has the option of filing an appeal to the Court to which such former Court is subordinate within the meaning of subs. (4) of section 195 of the Code.[67.]

[s 341.1] Starting point of limitation.—

For the purpose of an appeal under this section under Article 154 or 155 of the Indian Limitation Act, 1908 (now Article 115 of the Act of 1963), limitation runs from the date on which the complaint is signed and not from the date on which the complaint is received by the Magistrate, who is to take action on it.[68.] See also, the provisions relating to limitation under Chapter XXXVI.

The Patna High Court is of the view that a distinction must be made between the order of the Court directing the filing of the complaint and the subsequent action of the Court in filing complaint. It is only after the filing of the complaint that the right of appeal can be exercised under this section.[69.] The Rajasthan High Court is also of the same view.[70.]

[s 341.2] Death of appellant.—

If the appellant dies pending an appeal, the right of appeal does not survive, and the appeal abates.[71.] Appeals under this section are subject to all the provisions applicable to criminal appeals as laid down in section 382 and the following section.[72.]

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59. *Somabhai Vallavbhai v Aditbhai Parshottam*, (1924) 48 Bom 401 : 26 Bom LR 289; *Ahamadar Rahman v Dwip Chand Chowdhury*, (1927) 55 Cal 765 ; *Moideen Rowthen v Miyassa Pulavar*, (1927) 51 Mad 777; *Bismillah Khan v S Shakir Ali*, (1928) 4 Luck 155 : AIR 1928 Oudh 494 ; *Kesharinandan Ramani v King-Emperor*, (1937) 17 Pat 9 (FB).
60. *Emperor v Manni Lal*, (1937) All 517 : AIR 1937 All 305 ; *Ramzani v State*, AIR 1960 All 350 : 1960 Cr LJ 774 .
61. *Dhanpat Rai v Balak Ram*, (1932) ILR 13 Lah 342 (FB) : AIR 1931 Lah 761 .
62. *Rambilas v Jai Kisan*, (1942) Nag 388 : AIR 1941 Nag 155 .
63. *Babu Ramniranjan v Muk Nath Singh*, AIR 1942 Rangoon 64 .
64. *Janardhan Rao v Lakshmi Narasamma*, (1933) 57 Mad 177 (FB).
65. *Kunjo Chaudhary v King-Emperor*, (1937) 16 Pat 650.
66. *DN Singh v State*, (1953) 32 Pat 574 FB; *Ramchandra Soti v State of Uttar Pradesh*, AIR 1963 All 352 : 1963 Cr LJ 113 .
67. *Prahallad Mallik v State of Orissa*, 1992 Cr LJ 1432 (Ori).
68. *Naraindas v Emperor*, AIR 1943 Sindh 157 ; *Chhajoo v Radhey Shyam*, AIR 1968 All 296 (FB) : 1968 Cr LJ 1218 .
69. *Rampati v Jadunathan*, AIR 1968 Pat 100 (FB) : 1968 Cr LJ 355 .
70. *Bahadurmal v The State*, AIR 1965 Raj 224 : 1965 Cr LJ 801 .
71. *Nihal Ahmad v Ramji Das*, (1924) 47 All 359 .
72. *Muhammad Bayetulla v Emperor*, (1930) 58 Cal 402 .

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CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 342] Power to order costs.—

Any Court dealing with an application made to it for filing a complaint under section 340 or an appeal under section 341, shall have power to make such order as to costs as may be just.

Where the materials are uncomplicated and not confusing and had been sufficiently and satisfactorily explained in regard to quality and quantum, the Magistrate can straight way proceed as in a case instituted on police report. The Magistrate may adopt the other course also, which is clear by the term "as far as may be" used in the section. So, the Magistrate may adopt a complaint procedure also.[73.]

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73. *Godrej & Boyce Manufacturing Co Pvt Ltd v UOI*, 1992 Cr LJ 3752 (Bom).

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CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 343] Procedure of Magistrate taking cognizance.—

(1) A Magistrate to whom a complaint is made under section 340 or section 341 shall, notwithstanding anything contained in Chapter XV, proceed, as far as may be, to deal with the case as if it were instituted on a police report.

(2) Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage, adjourn the hearing of the case until such appeal is decided.

This section lays down the manner in which the complaints made under section 340 or section 341 are to be dealt with and states that such complaints should as far as may be dealt with as if the same were instituted on a police report under Chapter XIX of the Code.

[s 343.1] Adjournment till decision of appeal [*Sub-section (2)*].—

This sub-section contemplates that the proceedings out of which an inquiry has started should come to a close. Where an appeal is preferred, it is advisable to await the result of the appeal. No proceedings can be taken against a witness during the pendency of the case.[74.]

[s 343.2] Stay of proceedings.—

As a rule, criminal proceedings should not go on during the pendency of a civil litigation regarding the same subject-matter.[75.] It is not desirable ordinarily, when parties to the proceedings are substantially same and the prosecution before a Magistrate is but a private prosecution and issues in the two Courts are substantially identical, that both the cases can go on at one and the same time.[76.] But this is not an invariable rule.[77.]

[s 343.3] Complaint.—

A complaint for taking action under this section need not necessarily be made by party to the proceedings in which false documents are used. Even a stranger to the proceedings can apply.[78.] Where a Court once refused to take action on the application of a party, there is nothing to prevent it from moving under this section.[79.]

Under section 343 of the CrPC, the Magistrate has to deal with the complaint referred to in section 340 of the CrPC as if it was instituted on a police report. Therefore, on the

offences referred to under section 195(1)(b)(i) of the CrPC, all falling within the purview of warrant case, the Magistrate has to follow the procedure for trial of warrant cases under Chapter XIX, Part A comprising of sections 238 to 243 of the CrPC It is only in view of such seriousness of the matter, section 340 of the CrPC has provided for a meticulous procedure regarding initiation of the inquiry.[80.]

The magistrate, on receiving a complaint has to proceed under sections 238 to 243. There is no statutory requirement of affording an opportunity of hearing to the person against whom the Court might file a complaint before the Magistrate for initiating the prosecution proceedings.[81.]

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74. *Emperor v Rustomji*, (1902) 4 Bom LR 778 .

75. *Re, Shri Nana Maharaj*, (1892) 16 Bom 729; *Jogiah v Emperor*, (1908) ILR 31 Mad 510.

76. *Raj Kumari Debi v Bama Sundari Debi*, (1896) 23 Cal 610 ; *Dwarka Nath Rai Chowdhry v Emperor*, (1904) ILR 31 Cal 858, 861.

77. *Re Devji Valad Bhavani*, (1893) 18 Bom 581; *Re Keshav Narayan*, (1912) 14 Bom LR 968 ; *Dwarka Nath Rai Chowdhry v Emperor*, (1904) ILR 31 Cal 858, 861.

78. *Purnachandra Datta v Dhalu*, (1930) 58 Cal 374 .

79. *Harekrishna Parida v King-Emperor*, (1929) 8 Pat 736 : AIR 1929 Pat 242 .

80. *Amarsang Nathaji v Hardik Harshadbhai Patel*, AIR 2016 SC 5384 : 2017 Cr LJ 758 : 2016 (12) Scale 269 : (2017) 1 SCC 113 .

81. *Pritish v State of Maharashtra*, AIR 2002 SC 236 : 2002 Cr LJ 548 : (2002) 1 SCC 253 .

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CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 344] Summary procedure for trial for giving false evidence.—

(1) If, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may, after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender, summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under section 340 for the offence, where it does not choose to proceed under this section.

(4) Where, after any action is initiated under sub-section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgment or order in which the opinion referred to in that sub-section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings of the trial shall abide by the results of the appeal or application for revision.

Under this section, the Court of Session or a Magistrate of the first class is empowered to try cases of perjury committed before them and punish the offenders summarily. The conditions precedent for the exercise of this power are (1) the expression of opinion by the Court at the time of delivering judgment or final order that the witness appearing before it has knowingly or wilfully given false evidence or has fabricated false evidence with the intention that such evidence should be used in such proceedings; and (2) that the Court is satisfied that it is necessary and expedient and in the interest of justice to try him summarily for such offence.[82.] No complaint need be filed. The expression of such opinion only at the time of the delivery of any judgment or final order in the case and not earlier ensures smooth progress of the inquiry or trial. Before trying the offender, the Court must give him reasonable opportunity of showing cause why he should not be punished for such an offence. The order of conviction and

sentence passed under sub-section (1) is specifically made appealable under section 351 of the Code in order to guard against arbitrary action by the Court.

The offence for which a person can be summarily tried under section 344 CrPC is not the offence under section 193 IPC. However, in order to make a person liable for perjury, it is necessary that he should have made a statement on oath regarding the facts on which his statement was based and then deny these facts on oath on a subsequent occasion. If both the statements are opposed to each other and cannot be reconciled, then the person may be liable to be proceeded against for perjury under section 344 CrPC or section 193 IPC.[83.]

[s 344.1] Magistrate's order for issue of notices.—

A magistrate acquitted the accused and issued an order that notices be sent to the Assistant Sub-Inspector and head constable to show cause as to why proceedings be not initiated against them under sections 191, 192 and 193 IPC. No such notices were issued. An application was filed before the Magistrate about his order. Quashing of the process by the Sessions Judge and the High Court was held to be not proper.[84.]

[s 344.2] Sub-section (3).—

This section makes it clear that the power of the Court to make a complaint under section 340 is not to be affected even if the Court does not choose to take action under this section. The trial Court could take action summarily under section 344 and punish the perjurer then and there or it could hold an inquiry under section 340(1) and decide whether a complaint should be filed.[85.]

[s 344.3] Sub-section (4).—

It gives the Court power to stop further proceedings of the trial if it is brought to its notice that an appeal or a revision application has been preferred against the judgment or order in the main proceedings. It would also follow that pending the disposal of the appeal or revision, the sentence imposed under sub-section (1), if any, should not be executed, otherwise great injustice may be caused to the witness if ultimately the appeal or revision succeeds.

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82. *Dwarka Prasad v State of Madhya Pradesh*, 1992 Cr LJ 2227 (MP).
83. *Ismail Khan v State of Karnataka*, 1992 Cr LJ 3566 (Kant).
84. *Gurnam Singh v State of Punjab*, (2000) 10 SCC 359 : (2000) 7 JT 302 .
85. *Balshiram Awate v State of Maharashtra*, 1978 Cr LJ 821 (Bom).

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 345] Procedure in certain cases of contempt.—

(1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and may, at any time before the rising of the Court on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

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

(3) If the offence is under section 228 of the Indian Penal Code (45 of 1860), the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

This section enables a Court to preserve its decorum and maintain its dignity. It provides a summary remedy to deal with certain kinds of contempt. It gives a special power to a Court to deal with a case of insult offered to the Court in its presence.

The Court is not bound to hear any evidence. It can rely on its own opinion of what happened, and can detain the offender in custody, take cognizance of the offence, and sentence him. All this, however, must be done before the rising of the Court, i.e., on the same day. It is not permissible to the Court to hear evidence and postpone sentence until a later date.[86.] A reasonable opportunity to show cause why he should not be punished should be given to the accused.

Five classes of contempt are dealt with in the section:

(1) intentional omission to produce a document by a person legally bound to produce it (section 175, IPC); (2) refusal to take oath when duly required to take one (section 178, *ibid*); (3) refusal to answer questions by one who is legally bound to state the truth (section 179, *ibid*); (4) refusal to sign a statement made to a public servant when legally required to do so (section 180, *ibid*); and (5) intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding (section 228, *ibid*). The Court may instantly detain the offender in custody and may take cognizance of the offence on the same day before the rising of the Court. The offender is liable to pay a fine of Rs 200 or in case of non-payment to suffer simple imprisonment for one month.

[s 345.1] Scope.—

It will be noticed that only contempt's committed in the view or in the presence of the Court come within the purview of this section. Contempt's aimed at the Court otherwise are now dealt with by the Contempt of Courts Act (XXXII of 1952). Prior to the passing of the Contempt of Courts Act, 1971, the High Courts possessed the same powers as are possessed by the English Superior Courts under the Common law to punish summarily all contempt's committed in reference to it.[87.]

[s 345.2] "Take cognizance".—

These words merely indicate that a civil or a revenue Court has been given additional *ad hoc* powers and not that it loses its identity as a civil or a revenue Court.[88.]

[s 345.3] Facts to be Recorded—Show also nature and stage of proceeding [*Sub-sections (2) and (3)*].—

The remedy improvised by the section being summary, it is provided for the safety of the accused that the record should be in detail. It is necessary that it should show (1) the facts; (2) the statement of the offender; and (3) the finding and sentence. If the offence is one under section 228 of the Penal Code, then the record must further show, (4) the nature and stage of the proceeding interrupted, and (5) the nature of the interruption or insult.

The provisions of this section are mandatory and must be strictly complied with.[89.]

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86. *Emperor v Shankar Krishnaji Gavankar*, (1942) 44 Bom LR 439 : AIR 1942 Bom 206 .

87. *Surendra Nath Banerjee v The Chief Justice and Judges of the High Court*, (1883) ILR 10 PC 109 : 10 IA 171; *Venkat Rao*, (1911) 21 Mad LJ 832 FB; *Re GW Claridge*, (1912) 14 Bom LR 231 ; *Re MK Gandhi*, (1920) 22 Bom LR 368 (FB); *Emperor v Balkrishna Govind*, (1921) 46 Bom 592 : 24 Bom LR 16; *Re Satyabodha*, (1922) 24 Bom LR 928 : 47 Bom 76 : AIR 1922 Bom 426 .

88. *YP Verma*, (1946) Nag 780.

89. *Capt Gurbaksh Singh v State*, AIR 1960 Punj 211 : 1960 Cr LJ 511 .

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 346] Procedure where Court considers that case should not be dealt with under section 345.—

(1) If the Court in any case considers that a person accused of any of the offences referred to in section 345 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under section 345, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such person before such Magistrate, or if sufficient security is not given shall forward such person in custody to such Magistrate.

(2) The Magistrate to whom any case is forwarded under this section shall proceed to deal with, as far as may be, as if it were instituted on a police report.

Where the Court considers that an offence described in section 345 need not be tried summarily by it or requires a heavier sentence, it can, after recording (1) the facts, and (2) the statement of the accused, forward him to a Magistrate for trial in the ordinary way, as if it were instituted on a police report.

The Magistrate is not bound to follow the special procedure provided in section 345.[90.]

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90. *Bipin Chandra Pal*, (1907) 35 Cal 161 .

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 347] When Registrar or Sub-Registrar to be deemed a Civil Court.—

When the State Government so directs, any Registrar or any Sub-Registrar appointed under the [91] [***] Registration Act, 1908 (16 of 1908), shall be deemed to be a Civil Court within the meaning of sections 345 and 346.

91. The word "Indian" omitted by Act 56 of 1974, section 3 and Second Schedule (w.e.f. 20-12-1974).

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 348] Discharge of offender on submission of apology.—

When any Court has under section 345 adjudged an offender to punishment, or has under section 346 forwarded him to a Magistrate for trial, for refusing or omitting to do anything which he was lawfully required to do or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

The offence described in section 345 is curable on satisfactory apology made to the Court, even after the procedure laid down in section 345 or section 346 has been followed.

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 349] Imprisonment or committal of person refusing to answer or produce document.—

If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such question as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not, after a reasonable opportunity has been given to him so to do, offer any reasonable excuse for such refusal such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment or by warrant under the hand of the Presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal he may be dealt with according to the provisions of section 345 or section 346.

This section is a special provision regarding the witness refusing to answer the questions as required under section 179 of the IPC. It is proper to employ section 349 before taking action under section 345.[92.]

> Before s. 349 Cr.P.C. can be pressed into service, the Court must be satisfied that: (a) the witness is called to produce a document or thing before a criminal court; (b) the witness refuses to produce the document or thing in his possession or power which the Court requires him to produce; and (c) despite reasonable opportunity, the witness fails to offer any reasonable excuse for such refusal. Only after these conditions are satisfied, the court, after recording reasons, may sentence a witness for a term not exceeding seven days simple imprisonment, unless in the meantime, the witness produces the document or thing. And in the event of his persisting in his refusal, the Court is empowered to initiate action for contempt against such person, as per the procedure laid down in section 345 Cr.P.C. Thus, section 349 presupposes that the document is in the power and possession of the witness, who is required to produce the same. In the absence of a material on record that the witness is in possession of the document and that he has deliberately not producing the same, action under section 349 Cr.P.C. cannot be initiated. This being a penal provision has to be given a strict interpretation.[93.]

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92. *Kuber Nayak v State*, AIR 1962 Cal 195 .

93. *Mithan Lal v State*, 2002 Cr LJ 3422 (Del).

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 350] Summary procedure for punishment for non-attendance by a witness in obedience to summons.—

(1) If any witness being summoned to appear before a Criminal Court legally bound to appear at a certain place and time in obedience to the summons and without just excuse neglects or refuses to attend at that place or time or departs from the place where he has to attend before the time at which it is lawful for him to depart, and the Court before which the witness is to appear is satisfied that it is expedient in the interests of justice that such a witness should be tried summarily, the Court may take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under this section, sentence him to fine not exceeding one hundred rupees.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

Under this section, if a witness who is summoned fails to appear without just excuse, the Court may try him summarily, after hearing his defence, and sentence him to fine not exceeding Rs 100. The Court is to follow the procedure prescribed for summary trials. The Orissa High Court quashed the proceedings under section 350 CrPC against a witness, who could not appear on the date fixed, despite sufficient service, and he explained that his absence was due to official duties, and also he expressed his regrets.[94.]

The maximum punishment for a non-attending witness is a fine of Rs 100 and nothing more. The order of the Magistrate in refusing to cancel the non-bailable warrant issued against him and sending him to judicial remand was held to be invalid and violative of Article 21 of the Constitution of India.[95.]

94. *Satchidanand Jena v State of Orissa*, 1996 Cr LJ 1863 (Ori).

95. *Katuri Sreenivasa Rao v State of AP*, 2003 Cr LJ 1640 (AP).

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 351] Appeals from convictions under sections 344, 345, 349 and 350.—

(1) Any person sentenced by any Court other than a High Court under section 344, section 345, section 349, or section 350 may, notwithstanding anything contained in this Code, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXIX shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any Registrar or Sub-Registrar deemed to be a Civil Court by virtue of a direction issued under section 347 shall lie to the Court of Session for the sessions division within which the office of such Registrar or Sub-Registrar is situate.

[s 351.1] "Notwithstanding anything contained in this Code".—

The right of appeal conferred by sub-section (1) is not controlled by any other provision of the Code.[96.] Therefore, an appeal against conviction and sentence under sections 345, 349 and 350 of the Code lies under this sub-section even when fine imposed does not exceed the limit prescribed by section 376.[97.]

96. *State v Tribeni Sharma*, AIR 1960 All 214 : 1960 Cr LJ 435 ; *State of Madhya Pradesh v Premchand Kashyap*, (1962) 2 Cr LJ 680 .

97. *The State v Sukumar Chakravarty*, AIR 1965 Cal 622 (FB) : 1965 Cr LJ 735 ; **overruling** *Bhowani Mohan Joardar v Emperor*, (1944) 1 Cal 31 .

The Code of Criminal Procedure, 1973

CHAPTER XXVI PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

[s 352] Certain Judges and Magistrates not to try certain offences when committed before themselves.—

Except as provided in sections 344, 345, 349 and 350, no Judge of a Criminal Court (other than a Judge of a High Court) or Magistrate shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

[s 352.1] "Try any person".—

There has been a divergence of opinion whether the word "try" refers only to the trial of a case or includes also the hearing of an appeal. The High Court of Calcutta[98.] inclines to the latter view, while the High Court of Madras[99.] has adopted the former view. It seems that the purpose of the section can be carried out by the view that the Judge or Magistrate is precluded not only from trying the case but from hearing the appeal as well.

[s 352.2] "As such Judge or Magistrate".—

The prohibition implied is "a personal prohibition, the mischief to be prevented being that the same person should not decide a matter which he may have already prejudged".[100.] This view is not adopted by the High Courts of Bombay[101.] and Calcutta,[102.] which hold that the Sessions Judge can try an offence which came to his knowledge as a District Judge. The correctness of the latter view requires re-examination. A Magistrate who refuses to set aside an order sanctioning a prosecution on a charge of perjury cannot try the case himself,[103.] nor can a Sessions Judge try a person whose trial has been directed by him for the offence of giving false evidence committed in the course of a judicial proceeding of a criminal nature.[104.]

98. *Madhub Chunder Mozumdar v Novodeep Chunder Pundit*, (1888) ILR 16 Cal 121.

99. *Kesavaiya*, (1879) 2 Weir 607.

100. (1877) 1 Mad 305.

101. *D'Silva*, (1882) 6 Bom 479; *Raiji Daji*, (1893) 18 Bom 380 (FB).

102. *Queen-Empress v Sarat Chandra Rakhit*, (1889) ILR 16 Cal 766.
103. *Seshadri Ayyangar v Nataraja Ayyar*, (1896) ILR 20 Mad 383.
104. *Queen-Empress v Makhdum*, (1892) 14 All 354 .

The Code of Criminal Procedure, 1973

CHAPTER XXVII THE JUDGMENT

[s 353] Judgment.—

(1) **The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders,—**

(a) **by delivering the whole of the judgment; or**

(b) **by reading out the whole of the judgment; or**

(c) **by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.**

(2) **Where the judgment is delivered under clause (a) of sub-section (1), the presiding officer shall cause it to be taken down in short-hand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in open Court.**

(3) **Where the judgment or the operative part thereof is read out under clause (b) or clause (c) of sub-section (1), as the case may be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him.**

(4) **Where the judgment is pronounced in the manner specified in clause (c) of sub-section (1), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.**

(5) **If the accused is in custody, he shall be brought up to hear the judgment pronounced.**

(6) **If the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted:**

Provided **that, where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence.**

(7) **No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.**

(8) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 465.

This section provides for the manner in which a judgment is to be delivered. The next section declares what a judgment should contain.

"Judgment" means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments.[1.] Judgment means a judgment of conviction or acquittal, but not an order of discharge under section 245.[2.]

It is a fundamental rule of criminal jurisprudence that the Judge who hears the evidence should write the judgment. When a Sessions Judge hands over charge to his successor, the former becomes *functus officio* and has no jurisdiction to write a judgment, and the successor has no jurisdiction to pronounce a judgment based on evidence recorded by his predecessor. This section does not authorise a succeeding Sessions Judge to pronounce a judgment of his predecessor who heard the Sessions case; what is pronounced by the succeeding Sessions Judge would be merely an expression of the opinion of his predecessor on the evidence that he has heard, and the defect, if it may be so called, cannot be cured by the application of section 465.[3.]

[s 353.1] "At some subsequent time".—

These words contemplate pronouncement of judgment without undue delay. The Supreme Court explained the effect of these words as follows: The intention of the legislature regarding pronouncement of judgments can be inferred from the provisions of the Code. Sub-section 353(1) provides that the judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court immediately after the conclusion of the trial or on some subsequent time for which due notice shall be given to the parties or their pleaders. The words "some subsequent time" mentioned in section 353 contemplate the passing of the judgment without undue delay, as delay in the pronouncement of judgment is opposed to the principle of law. Such subsequent time can at the most be stretched to a period of six weeks and not beyond that time in any case. The pronouncement of judgments in the civil case should not be permitted to go beyond two months.

It is true, that for the High Courts, no period for pronouncement of judgment is contemplated either under the Civil Procedure Code or the Criminal Procedure Code, but as the pronouncement of the judgment is a part of the justice dispensation system, it has to be done without delay. In a country like ours where people consider the Judges only second to God, efforts should be made to strengthen that belief of the common man. Delay in disposal of the cases facilities the people to raise eyebrows, sometimes genuinely which, if not checked, may shake the confidence of the people in the judicial system. It is the policy and purpose of law to have speedy justice for which efforts are required to be made to come up to the expectation of the society by ensuring speedy.[4.]

[s 353.2] "Shall be dated and signed by the presiding officer in open Court".—

The "presiding officer" means the presiding officer at the trial, who is assumed in the section to have written and pronounced his judgment while still holding the same office.[5.] An omission to sign and date a judgment by a Magistrate in open Court at the time of pronouncing it amounts to mere irregularity curable by section 465.[6.]

The provisions regarding dating and signing of written judgments do not apply to a High Court. Section 388 requires that the judgment of the High Court should be certified to the Court below.[7.]

[s 353.3] Non-availability of judgment.—

It has been held that where judgment is not available on record, the declaration of the result cannot tantamount to a judgment as prescribed in the CrPC. Trial in the cases has to be treated to be pending[8.]

Personal attendance of accused to receive judgment.—In the case of prosecution for dishonour of a cheque, the personal appearance of the accused for receiving the judgment can be directed if the sentence is one of substantive imprisonment.[9.]

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1. *Damu Senapati v Sridhar Rajwar*, (1893) 21 Cal 121 , 127.
2. *Dwarka Nath v Beni Madhab*, (1901) 28 Cal 652 ; *Emperor v Maheshwara Kondaya*, (1908) 31 Mad 543.
3. *Alli Khan*, (1947) Mad 365; *Uttam Chand v State of Rajasthan*, (1960) Raj 1292 : AIR 1961 Raj 1 : 1961 Cr LJ 154 .
4. *Anil Rai v State of Bihar*, (2001) 7 SCC 318 : 2001 SCC (Cr) 1009; *Amina Ahmed Dossa v State of Maharashtra*, AIR 2001 SC 656 : 2001 Cr LJ 965 : (2001) 2 SCC 675 , practice of writing lengthy judgment deprecated. Case under TADA (now POTA).
5. *Alli Khan*, (1947) Mad 365.
6. *Mahomed Hayer Mulla*, (1929) 7 Ran 370; II *Sodawala v State of Maharashtra*, AIR 1974 SC 1880 : (1975) 3 SCC 140 : 1974 Cr LJ 1291 .
7. *Pragmadho Singh v Emperor*, (1932) 55 All 132 : AIR 1933 All 40 .
8. *Ajay Singh v State of Chhattisgarh*, AIR 2017 SC 310 : 2017 (1) Scale 400 : LNIND 2017 SC 20 .
9. *Jain Babu v KJ Joseph*, AIR 2009 NOC 404 (Ker).

The Code of Criminal Procedure, 1973

CHAPTER XXVII THE JUDGMENT

[s 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 decisions.

A judgment should contain the points for determination, the decision and the reasons for the decision. It should be written in the language of the Court. The particular offence, the relevant section of the Indian Penal Code (IPC) or other law under which an accused is punished, and the quantum of punishment should be mentioned. In case of

acquittal, the judgment must mention the offence of which the accused is acquitted. The language and contents of the judgment must be self-contained and should show that the Magistrate/Judge had applied his mind to the facts and the evidence.[10.] It has to specify the offence of which and the section of the Indian Penal Code or any other law under which the accused is convicted and the punishment to which he is sentenced.[11.] Judging the prosecution case by partly referring to the prosecution evidence and partly to the defence evidence is not permissible.[12.] Where charge was framed under sections 302/323/149 of IPC but the trial Court did not record any finding on the charge under section 323 or sections 323/149 of IPC, it was held to be a sketchy judgment and no Court is expected to be so unmindful and nonchalant.[13.]

Where alternative sentence of death, imprisonment for life or imprisonment for a term of years may be imposed, the Court, while imposing any one of them, should specify its reasons and, in case of imposition of sentence of death, its special reasons for the imposition. This necessarily involves application of mind in determination of sentence most suited to the facts of the case.

It has been held by the Supreme Court that the wide discretion that is vested in the Courts in matters of sentencing must be exercised on rational parameters in the light of totality of the facts of any given case. The doctrine of proportionality has to be invoked in the context of the facts. Thus, in a case under section 326 of IPC, it was held that the sentence of two years rigorous imprisonment is just and adequate and does not require any modification.[14.]

Many-a-times, while determining the sentence, the Courts take it for granted that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation. It has been held by the Supreme Court that in case of offences like section 302, the Court may, in appropriate cases, call for a report to determine whether the accused could be reformed, which depends upon the facts of each case.[15.]

[s 354.1] "Points for determination, the decision thereon and the reasons for the decision."—

Every judgment of a criminal Court must contain a clear statement of the points for determination, the decision thereon, and the reasons for the decision. It should state sufficient particulars to enable a Court of appeal to know what facts are proved and how.[16.] An order which does not embody the reasons which weigh with a Court in arriving at a decision may open the Court to the charge that it did not apply its mind to the case and, therefore, the order is capricious and arbitrary. The order finally deciding a case must be self-contained and should be what is called a speaking order.[17.] A judgment has not to be a resume of the entire evidence or a discussion of the relevancy of all the evidence. A Court is entitled to select such evidence as it considers important and sufficient to prove the point in issue.[18.] An exception has been made in regard to judgments in summary trials (see sections 263, 264 and 265), and judgments of Metropolitan Magistrates (section 355).

[s 354.2] Name of the victim of sexual offence.—

In a case of sexual offence, the name of the victim is not to be mentioned.[19.]

[s 354.3] Appellate Court's judgment.—

This section applies to a judgment of an appellate Court.[20.] However, it was held by the Supreme Court that where an appellate Court agreed generally with the view of the trial Court, it was not necessary to reiterate the reasons given by the trial Court.[21.]

[s 354.4] Disparaging remarks against police and others and ungermane remarks.—

A judgment should be confined to the facts of the case and legal issues involved. Observations regarding subjects totally ungermane and disparaging remarks against the police as a whole were held to be totally uncalled for.[22.] Adverse remarks were passed in a judgment against persons who were not before the Court, without granting them an opportunity of having their say and when the observations were not necessary for decision of the case. They were held to be most uncalled for caustic observations made by the High Court in the *Best Bakery* case,[23.] against journalists and advocates and were directed to be expunged.[24.]

[s 354.5] Contents of order of acquittal [*Sub-section (1)(d)*].—

Where an accused was acquitted but no orders were passed to set him at liberty and he remained confined in jail without any fresh remand, the Allahabad High Court held that it is mandatory to pass an order to set the person at liberty where he is acquitted of the charge and any further detention was illegal.[25.]

[s 354.6] Reasons for sentence and special reasons for death sentence [*Sub-section (3)*].—

This sub-section casts a duty on the Court to give special reasons for awarding sentence of death in a capital case in order that the High Court is in a position to judge whether the lower Court has exercised its discretion judicially and also to provide material to the authorities concerned at the time of considering the mercy petition by the condemned accused. "Under the present Code, the unmistakable shift in legislative emphasis is on life imprisonment for murder as the rule and capital sentence an exception to be resorted to for reasons to be stated".[26.] The sentence of life imprisonment is more preferred form of punishment at present. Death sentence is ordinarily ruled out and is resorted to only for "special reasons", as provided in section 354(3). The personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some linkage with these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.[27.] It has been held that death sentence is not violative of Article 21 of the Constitution if it is given in the rarest of rare cases.[28.]

In awarding the sentence of death, "substantial history of serious assault and criminal conviction" is an aggravating circumstance when the Court is dealing with offences relating to heinous crime. But, the prior record of conviction will be a relevant factor when that conviction has attained finality so as to treat it as aggravating circumstance for awarding death sentence. Thus, in a case, where the accused has been charge-

sheeted but not convicted in the cases pending against him, the Supreme Court felt that though it may not be a relevant factor in applying the "rarest of rare" case test, it calls for a longer period of incarceration.[29.]

Section 354(3) provides for recording of special reasons for awarding death penalty. This provision puts a restriction on the exercise of discretion of the Court. The law contemplates recording of special reasons and, therefore, the expression "special" has to be given a definite meaning and connotation. "Special reasons" in contradistinction to "reasons" simpliciter conveys the legislative mandate in this regard. The Court, therefore, has to consider matters like the nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attending circumstances. Between the aggravating and mitigating circumstances, a balance has to be struck before deciding punishment.[30.] In the above case, the Supreme Court has enumerated principles to be applied for determining whether death sentence is to be awarded:

(1) The Court has to apply the test to determine, if it was the "rarest of rare" case for imposition of death sentence.

(2) In the opinion of the Court, imposition of any other punishment, ie, life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, *etc*.) in which the crime was committed and the circumstances leading to the commission of such heinous crime.[31.]

[s 354.7] Determination of sentence.—

On the question of standardisation of sentence according to the degree of culpability and aggravating and mitigating circumstances, the Supreme Court observed as follows:

> Regarding the question of laying down the standards and norms restricting the area of imposition of death penalty, if by "laying down standards", it is meant that "murder" should be categorised beforehand according to the degrees of its culpability and all the aggravating and mitigating circumstances should be exhaustively and rigidly enumerated so as to exclude all free play of discretion, the argument merits rejection. Such standardisation is well-nigh impossible. *Firstly*, degree of culpability cannot be measured in each case; *secondly*, criminal cases cannot be categorised, there being infinite, unpredictable and unforeseeable variation in circumstances, *thirdly*, on such categorisation, the sentencing process will cease to be judicial; and fourthly, such standardisation or sentencing discretion is a policy-matter which belongs to the legislature and is beyond the Court's function. Only broad guidelines consistent with the policy indicated by the legislature in section 354(3) can be laid down.[32.] Brutality is involved in every murder. The type and magnitude of brutality are the relevant factors. The victim in this case was unarmed. He was murdered by gun-shots. The Supreme Court was of the view that the brutality was not of such a nature as to merit capital punishment.[33.]

The Supreme Court has observed that generally, the policy which the Court adopts while awarding sentence is that the punishment must be appropriate and proportional to the gravity of the offence committed. Law demands that the offender should be adequately punished for the crime, so that it can deter the offender and other persons from committing similar offences. Nature and circumstances of the offence, the need for the sentence imposed to reflect the seriousness of the offence, to afford adequate deterrence to the conduct and to protect the public from such crimes are certain factors to be considered while imposing the sentence. The imposition of sentence without considering its effect on the social order in many cases, is, in reality, a futile exercise.[34.]

The terrorist attack in Mumbai in 2008 was aimed at India and Indians. People were killed only because they were Indians, or they were foreign nationals on Indian soil. The trial Court found the accused guilty of waging war and committing large-scale murders. The said terrorist attack was of unprecedented enormity. The conspiracy behind the attack was as deep as it was vicious, and the killings were done with casualness showing brutality and depravity. It was found by the Court that the accused showed no remorse for the acts done and continued to consider himself a patriot at war with India and made confession only with a view to set example for others to follow. It was held by the Supreme Court that the plea that he was a mere tool in the hands of terrorist organisation who remotely controlled him was belied by the desire of the accused to serve the organisation. Since the attack had shocked the collective conscience of Indian people and the possibility of reform was foreclosed by absence of remorse, the option of life imprisonment thus stood excluded.[35.]

***Nirbhaya* gang rape case.—**he Supreme Court has affirmed that where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large. The Supreme Court held that *i*n the present case, the brutal, barbaric and diabolic nature of crime which is evincible from acts committed by accused persons, definitely falls in category of rarest of rare cases. The Supreme Court held that the sentence of death penalty was proper.[36.]

The Supreme Court has held that when sentence is imposed, it has to be based on sound legal principles, regard being had to the command of the statute, nature of the offence, collective cry and anguish of the victim and above all, the "collective conscience" and doctrine of proportionality. Neither the vanity of the Judge nor his pride of learning in other fields should influence his decision or imposition of sentence. Thus, in a case of dacoity and murder, where death sentence was awarded placing reliance on criminal jurisprudence of other countries, opinion expressed by a Judge in his lecture or by taking the view that death sentence is the only weapon in the hands of judiciary to eliminate crime, the Supreme Court observed that the order is based on strange reasoning and is most unwarranted.[37.]

[s 354.8] Lenient or Short-term sentence—Give reasons for [*Sub-section (4)*]. —

In the case of a rape, the minimum sentence is prescribed by section 376(1) and (2). Any sentence, lesser than the prescribed minimum sentence, can be imposed only by a reasoned order. Reasons should be adequate and special, and not fanciful. Merely because the accused belonged to a rural area, was held to be not an adequate or special reason to reduce the sentence.[38.]

Relying on a decision from the United States, the Supreme Court has propounded that "residual doubt" is a mitigating circumstance. It has held that "residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere in between "beyond a reasonable doubt" and "absolute certainty". It has been held that counsel's ineffectiveness in conducting a criminal trial, if established from record, can be a mitigating circumstance in favour of the accused where question of awarding death penalty arises.[39.] Explaining the proposition, KS Radhakrishnan J, speaking for the Bench, observed as follows:

> 31. We also, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt, but not with 'absolute certainty'. But in between 'reasonable doubt' and 'absolute certainty', a decision maker's mind may wonder possibly, in a given case, he may go for 'absolute certainty' so as to award death sentence, short of that he may go for 'beyond reasonable doubt'. Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other group of persons numbering 35. All element tests as well as the residual doubt test, in a given case, may favor the accused, as a mitigating factor.[40.]

[s 354.9] Direction, when sentence of death [*Sub-section (5)*].—

Capital sentences are passed by Sessions Judges subject to confirmation by the High Court. As to submitting a sentence of death for confirmation—see Chapter XXVIII and as to execution of such sentence—see section 413, *infra*. The words "that he be hanged by the neck till he is dead" should be inserted in the sentence.

The validity of clause (5) of this section was challenged on the ground that it was violative of Article 21 of the Constitution as being prescriptive of a cruel punishment. The Supreme Court, however, held that the section was valid.[41.] It was held that execution of death sentence by hanging by the neck as provided in clause (5) of section 354 was not violative of Article 21 of the Constitution.[42.]

It has been held by the Supreme Court that the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for death penalty, the circumstances of the offender also require to be taken with consideration along with the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the Court comes to the conclusion that life imprisonment is totally inadequate in the circumstances of the case. Thus, for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances.[43.] In awarding the death sentence, discretion lies with the Court; hence, no norms can be laid down.[44.]

However, it has been held by the Supreme Court that prolonged delay in execution of death sentence due to delay in disposal of mercy petition renders the process of execution of the sentence arbitrary, whimsical and capricious and, therefore, are in executable. It has been further held that prolonged delay in execution, by itself gives rise to mental suffering and agony. There is no obligation on the convict to demonstrate suffering occasioned by such delay as a pre-requisite for commutation of death sentence.[45.] Explaining the proposition, P Sathasivam CJI, speaking for the three-Judge Bench, observed as follows:

> 18. Before we advert to respond the aforesaid contention, it is relevant to comprehend the primary ground on the basis of which the relief was granted in cases of delayed disposal of the mercy petition and that is, such delay violates the requirement of a fair, just and reasonable procedure. Regardless and independent of the suffering it causes, delay makes

> the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby, violates procedural due process guaranteed under Article 21 of the Constitution and the dehumanising effect is presumed in such cases. It is in this context, this Court, in past, has recognised that incarceration, in addition to the reasonable time necessary for adjudication of mercy petitions and preparation for execution, flouts the due process guaranteed to the convict under Article 21 which inheres in every prisoner till his last breath.[46.]

When the above judgment was passed on 18 February 2014, the Tamil Nadu Government issued a letter dated 19 February 2014 whereby it proposed to remit the sentence of life imprisonment of the convicts of the Rajiv Gandhi Assassination case, whose death sentence were commutated by the above judgment dated 18 February 2014. The Union of India filed a criminal writ petition under Article 32 for quashing the letter dated 19 February 2014 issued by the Tamil Nadu Government. A three-Judge Bench of the Supreme Court held that all the issues raised in the case are of utmost critical concern for the whole country, as the decision on these issues will determine the procedure for awarding sentences in the criminal justice system. The Bench framed seven questions and directed the writ petition to be placed before Constitution Bench for consideration.[47.]

In a case of death sentence, within three years of the award of death penalty, the sentence attained finality. But his mercy petition remained pending for more than three years ten months and during this period, he was kept in solitary confinement. It was held by the Supreme Court that the delay in disposal of mercy petition can be said to be inordinate. A condemned prisoner is never segregated till the disposal of his mercy petition. Thus, keeping the prisoner under segregation for such a long period is complete transgression of the rights under Article 21. Hence, the Supreme Court commuted the sentence to one of life imprisonment.[48.]

[s 354.10] Special Reasons (Sub-section 6).—

Where Court awards maintenance from the date of the application, no special reasons are required to be recorded.[49.]

In a recent judgment, the Supreme Court noticed the above decision in *Shail Kumari Devi's* case (above cited) and observed that what was in fact decided in that case was that as a normal rule, the Magistrate should grant maintenance from the date of order and not from the date of application. But it is open to the Magistrate to award maintenance from the date of application. However, for awarding maintenance from the date of application, an express order is necessary. Thus, in a case where the wife was a working lady before marriage and was not working during marriage and there was no evidence of her income during the period of marriage, it was held by the Supreme Court that circumstances in *Jaminiben Hiren Bhai Vyas v Hiren Bhai Rameshchandra Vyas* eminently justified grant of maintenance from the date of application.[50.]

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10. *Niranjan Mandal v State of Bihar*, 1978 Cr LJ 636 (Cal) : AIR 1978 Pat 1 .
11. *Palekanda Karumbaiah v State of Karnataka*, 1989 Cr LJ (NOC) 73 (Kant).

12. *Gulzari Lal v State of UP*, 1994 Cr LJ 3537 (All).
13. *Chandar Singh v State of Madhya Pradesh*, 1992 Cr LJ 3947 (MP).
14. *Pritam Chauhan v State (Govt of NCT Delhi)*, AIR 2014 SC 2553 : (2014) 9 SCC 637 .
15. *Anil v State of Maharashtra*, 2014 Cr LJ 1608 : (2014) 4 SCC 69 .
16. *Queen-Empress v Dhurmya*, (1895) Unrep CRC 833, Cr R No. 76 of 1895; *Emperor v Shankar*, (1915) 17 Bom LR 890 : AIR 1915 Bom 137 ; *Mohammad Hussain v Emperor*, (1945) Nag 441.
17. *Balwant Rai v Chhangi Ram*, AIR 1963 Punj 124 : 1963 Cr LJ 314 .
18. *Jhabwala v Emperor*, (1933) ILR 55 All 1040 : AIR 1933 All 690 .
19. *S Ramakrishna v State*, AIR 2009 SC 885 : (2009) 1 SCC 133 .
20. *Jamait Mullick v Emperor*, (1907) 35 Cal 138 .
21. *Karnataka v Hema Reddy*, AIR 1981 SC 1417 : 1981 Cr LJ 1019 . *Narinder Singh v State of Punjab*, AIR 2000 SC 2212 : 2000 Cr LJ 3462 : (2000) 4 SCC 603 , mention of the particular section of the statute is not necessary (section 34, IPC) for conviction. A conviction can be sustained if the ingredients of the offence are present.
22. *State of Karnataka v Registrar General, High Court of Karnataka*, AIR 2000 SC 2626 : 2000 Cr LJ 3958 : (2000) 7 SCC 333 .
23. *Best Bakery* case, (2004) CrLJ 771 (Guj).
24. *Testa Setalvad v State of Gujarat*, AIR 2004 SC 1979 : (2004) 10 SCC 88 .
25. *State of Gujarat v Rajubhai Dhamirbhai Bariya*, (2004) Cr LJ 771 (Guj); *Mohd. Daood Qureshi v State of UP*, 1993 Cr LJ 1437 (All).
26. Per KRISHNA IYER J, in *Ediga Anamma v State of Andhra Pradesh*, AIR 1974 SC 799 , 804 : 1974 Cr LJ 683 : (1974) 4 SCC 443 ; *Balwant Singh v The State of Punjab*, 1976 Cr LJ 291 (Punj) : AIR 1976 SC 230 : (1976) 1 SCC 425 ; **See** *also Ambaram v The State of Madhya Pradesh*, 1976 Cr LJ 1716 : AIR 1976 SC 2196 : (1976) 4 SCC 298 ; *Bachan Singh v The State of Punjab*, 1980 Cr LJ 638 : AIR 1980 SC 898 : (1980) 2 SCC 684 ; *Muniappan v The State of Tamil Nadu*, 1981 Cr LJ 726 : AIR 1981 SC 1220 : (1981) 3 SCC 11 .
27. *Lehna v State of Haryana*, (2002) 3 SCC 76 : 2002 SCC (Cri) 526 .
28. *Bachan Singh v State of Punjab*, AIR 1980 SC 898 : 1980 Cr LJ 636 : (1980) 2 SCC 684 .
29. *Birju v State of MP*, AIR 2014 SC 1504 : (2014) 3 SCC 421 : 2014 Cr LJ 1568 (SC).
30. *Ramnaresh v State of Chhattisgarh*, AIR 2012 SC 1357 : (2012) 4 SCC 257 : (2012) 2 SCC (Cri) 382 .
31. *Ibid*.
32. *Mohd Chaman v State (NCT of Delhi)*, 2001 Cr LJ 725 : 2000 (8) Scale 218 ; *Kishori v State of Delhi*, (1999) 1 SCC 148 : AIR 1999 SC 382 : 1999 Cr LJ 584 , anti-Sikh riots in the aftermath of the assassination of the Prime Minister, the accused in this case was neither the leader of the mob, nor exhorted others to do any particular act. Death sentence was considered to be not appropriate. *Ranjit Roy v State of Bihar*, (1999) 8 SCC 389 : AIR 1999 SC 3857 : 2000 Cr LJ 19 , another case of killings by a riotous mob, death sentence reduced to life imprisonment. *State of UP v Dharamendra Singh*, (1999) 8 SCC 325 : AIR 1999 SC 3789 : 2000 Cr LJ 5 , reduction of death sentence to life imprisonment, expectation in the mind of the accused that he would survive, not a legitimate mitigating factor. In this case, there was murder of 5 persons, an old man of 75 years, a woman of 32 years, 2 boys aged 12 years and a girl aged 15 years, multiple injuries at night to wreck vengeance, the lower part of the girl denuded, held ghastly and barbaric, could be termed as rarest of rare case. The High Court reduced to death sentence to life imprisonment saying that the accused persons had been languishing in death cell for more than 3 years. The Supreme Court held that the High Court erred. There was no law requiring mitigation of death because of languishing in death cell. *Shobhit Chamar v State of Bihar*, (1998)

3 SCC 455 : AIR 2000 SC 219 , where more than one accused, have to be sentenced, each individual should be considered as a separate unit of punishment and sentenced accordingly. *Ronny v State of Maharashtra*, (1998) 3 SCC 625 : AIR 1998 SC 1251 : 1998 Cr LJ 1638 , statement of special considerations for determining rarest of rare category.

33. *Subhash Ramkumar Bind v State of Maharashtra*, AIR 2003 SC 269 : (2003) 1 SCC 506 ; *Jagannath Choudhary v Ramajan Singh*, 2002 Cr LJ 2945 (SC) : (2002) 5 SCC 659 .

34. *State through PS Lodhi Colony, New Delhi v Sanjeeva Nanda*, AIR 2012 SC 3104 : (2012) 8 SCC 450 : (2012) 3 SCC (Cri) 899 [Per KS Radhakrishnan J].

35. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, AIR 2012 SC 3565 : (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481 .

36. *Mukesh v State for NCT of Delhi*, AIR 2017 SC 2161 : 2017 Cr LJ 4365 (SC) : LNIND 2017 SC 252 .

37. *Omprakash v State of Tamil Nadu*, AIR 2013 SC 825 : (2013) 3 SCC 440 .

38. *State of MP v Munna Choubey*, AIR 2005 SC 682 : (2005) 2 SCC 710 : 2005 Cr LJ 913 .

39. *Ashok Debbarama v State of Tripura*, (2014) 4 SCC 747 : 2014 Cr LJ 1830 (SC).

40. *Ibid*, para 31, at p 1840 (of CrLJ).

41. *Deena v UOI*, AIR 1983 SC 1155 : 1983 Cr LJ 1602 : (1983) 4 SCC 645 . **See** SP Sathe "Constitutional Law I" in XIX Annual Survey of Indian Law (1983) p 178, 203–204. *Govt of India v Lachma Devi*, AIR 1986 SC 467 : 1986 Cr LJ 364 .

42. *Deena v UOI*, 1983 Cr LJ 1602 : AIR 1983 SC 1155 : (1983) 4 SCC 645 .

43. *Raj Kumar v State of MP*, 2014 Cr LJ 1943 (SC) : (2014) 5 SCC 353 .

44. *Triveniben v State of Gujarat*, 1990 Cr LJ 273 (Guj).

45. *V Sriharan v UOI*, AIR 2014 SC 1368 : (2014) 4 SCC 242 . (Three-Judge Bench).

46. *Ibid*, para 18, at p 1372–1373 (of AIR).

47. *UOI v V Sriharan*, (2014) 11 SCC 1 : 2014 Cr LJ 2724 (SC).

48. *Ajay Kumar Pal v UOI*, AIR 2015 SC 715 (Three-Judge Bench) : 2014 (13) Scale 762 : (2015) 2 SCC 478 .

49. *Shail Kumari Devi v Krishan Bhagwan Pathak*, 2008 Cr LJ 3881 (2890) : AIR 2008 SC 3006 .

50. *Jaminiben Hiren Bhai Vyas v Hiren Bhai Rameshchandra Vyas*, AIR 2015 SC 300 : 2014 (13) Scale 104 : (2015) 2 SCC 385 .

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CHAPTER XXVII THE JUDGMENT

[s 355] Metropolitan Magistrate's judgment.—

Instead of recording a judgment in the manner hereinbefore provided, a Metropolitan Magistrate shall record the following particulars, namely:—

(a) the serial number of the case;

(b) the date of the commission of the offence;

(c) the name of the complainant (if any);

(d) the name of the accused person, and his parentage and residence;

(e) the offence complained of or proved;

(f) the plea of the accused and his examination (if any);

(g) the final order;

(h) the date of such order;

(i) in all cases in which an appeal lies from the final order either under section 373 or under sub-section (3) of section 374, a brief statement of the reasons for the decision.

This section lays down that the Metropolitan Magistrate need not write a detailed judgment as provided in the preceding section but should only record the particulars set out in this section. Clause (i), however, makes it obligatory on the part of the Metropolitan Magistrate to give a brief statement of the reasons for his decision in all cases in which an appeal lies.

This clause requires a brief statement of the reasons so that the High Court may know the Magistrate's reasons, if the record is called for on revision.[51.]

The terms of this section are not abrogated by section 404, which merely allows a Metropolitan Magistrate to supplement the reasons which have been already recorded under this section. If the statement submitted under section 404 discloses sufficient grounds for the decision, the defect in not recording reasons under this section may be excused under section 465, provided no substantial failure of justice has occurred.[52.]

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51. *Yacoob v Adamsom*, (1866) 13 Cal 272 ; *Emaman v Emperor*, (1904) ILR 31 Cal 983; *Emperor v Shankar*, (1915) 17 Bom LR 890 : AIR 1915 Bom 137 ; *Re Dervish Hussain*, (1922) 46 Mad 253.

52. *Re Dervish Hussain*, (1922) 46 Mad 253.

The Code of Criminal Procedure, 1973

CHAPTER XXVII THE JUDGMENT

[s 356] Order for notifying address of previously convicted offender.—

(1) When any person, having been convicted by a Court in India of an offence punishable under section 215, section 489A, section 489B, section 489C or section 489D [53][or section 506 (in so far as it relates to criminal intimidation punishable with imprisonment for a term which may extend to seven years or with fine or with both)] of the Indian Penal Code (45 of 1860), or of any offence punishable under Chapter XII [54][or Chapter XVI] or Chapter XVII of that Code, with imprisonment for a term of three years or upwards, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by any Court other than that of a Magistrate of the second class, such Court may, if it thinks fit, at the time of passing a sentence of imprisonment on such person, also order that his residence and any change of, or absence from, such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) The provisions of sub-section (1) with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences and attempts to commit them.

(3) If such conviction is set aside on appeal or otherwise, such order shall become void.

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

(5) The State Government may, by notification, make rules to carry out the provisions of this section relating to the notification of residence or change of, or absence from, residence by released convicts.

(6) Such rules may provide for punishment for the breach thereof and any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.

[s 356.1] CrPC (Amendment) Act, 2005 [*Clause (29)*].—

In order to curb the goonda menace, sub-section (1) of section 356 of the Code is being amended to bring within its ambit all offences in Chapter XVI of the IPC (offences affecting the human body) punishable with imprisonment for three years or more as well as the aggravated form of offence under section 506 (criminal intimidation punishable with imprisonment for a term which may extend to seven years, or with fine, or with both). (*Notes on Clauses*).

COMMENT

This section can be compared with section 75 of the IPC. It is one of the remedial measures for prevention of crimes. With a view to ensure good behaviour, it requires a released convict, in some cases, to report his movements for a period not exceeding five years. As, however, it interferes with the liberty of a citizen, it "must be" construed strictly.[55.]

It will be noticed that there should be (1) a previous conviction for an offence under sections 215, 489A, 489B, 489C or 489D of the IPC or any offence punishable under Chapter XII or Chapter XVI or Chapter XVII of the Code, with imprisonment for three years or upwards; (2) the previous conviction should be by a Court in India; and (3) there must be a subsequent conviction for any of the offences specified above by any Court in India (except that of a Magistrate of the second class).

If the above three conditions are fulfilled, the accused may, by an order passed at the time of passing the sentence, be required to report his residence after release for a period not exceeding five years.[56.] The order may also be made by an appellate Court or by the High Court or the Court of Session in revision.[57.]

[s 356.2] Applies also under criminal conspiracies [*Sub-section (2)*].—

This sub-section extends the application of sub-section (1) to criminal conspiracies to commit such offences, to the abetment of such offences and also to attempts to commit them.

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53. Ins. by Act No. 25 of 2005, section 29(a) (w.e.f. 23-6-2006).
54. Ins. by Act No. 25 of 2005, section 29(b) (w.e.f. 23-6-2006).
55. *Emperor v Fulji Ditya*, (1910) 35 Bom 137 : 12 Bom LR 901.
56. *King v Maung Thein Aung*, AIR 1940 Rangoon 280 : (1940) Ran 507; *Re Naddi Chengadu*, (1917) 40 Mad 789 : AIR 1918 Mad 644 (1).
57. *Re Hussain Beg*, (1908) ILR 31 Mad 548.

The Code of Criminal Procedure, 1973

CHAPTER XXVII THE JUDGMENT

[s 357] Order to pay compensation.—

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

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

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

[s 357.1] State Amendments

Andhra Pradesh.— *The following amendments were made by A.P. Act No. 21 of 1993, section 2, (w.e.f. 3-9-1993).*

S 357.—In the Code of Criminal Procedure, 1973 in its application to the State of Andhra Pradesh, in section 357,—

(i) in sub-section (1), after the words "the court may", the expression "and where a person against whom an offence is committed belongs to Scheduled Castes or Scheduled Tribes as defined in Clauses (24) and (25) of Article 366 of the Constitution of India except when both the accused person and the person, against whom an offence is committed belong either to such castes or tribes, the Court shall," shall be inserted, and

(ii) for sub-section (3), the following sub-section shall be substituted, namely:—

"(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, and where a person against whom an offence is committed belongs to Scheduled Castes or Scheduled Tribes as defined in Clauses (24) and (25) of Article 366 of the Constitution of India, the Court shall, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced:

Provided that the Court may not order the accused person to pay by way of compensation any amount, if both the accused person and the person against whom an offence is committed belong either to the Scheduled Castes or the Scheduled Tribes."

Bihar.— *The following amendments were made by Bihar Act, 9 of 1985, section 2, (w.e.f. 13-8-1985).*

S 357.—In its application to the State of Bihar in sub-section (1) of section 357 the following proviso shall be added:—

"*Provided* that the person against whom an offence is committed belongs to Scheduled Castes and to Scheduled Tribes as defined under clause (24) and clause (25) to Article 366 of the Constitution, the Court shall at the time of judgment pass order that the entire amount of fine realised or any part of it will be utilised for the benefit of person by way of compensation."

Goa.— *The following amendments were made by Goa Act 1 of 1987, section 2 (w.e.f. 12-2-1987).*

S 357.—In its application to the State of Goa, in section 357,—

(i) in sub-section (1), for the brackets, figure and words "(1) When a Court imposes a sentence of fine or a (sentence including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied— "substituted" (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, and where a person against whom an offence is committed belongs to the Schedule Castes or the Scheduled Tribes as defined in clauses (24) and (25) of Article 366 of the Constitution except when both the accused person and the person against whom an offence is committed belong either to such

Castes or Tribes, order the whole or any part of the fine recovered to be applied—";

(ii) for sub-section (3), substitute the following sub-section, namely :—

"(3) When a Court imposes a sentence, of which fine does not form a part, the court may, and where a person against whom an offence is committed belongs to the Scheduled Castes or the Scheduled Tribes as defined in clauses (24) and (25) of article 366 of the constitution, the Court shall, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced:

Provided that the Court may not order the accused person to pay by way of compensation any amount, if both the accused person and the person against, whom an offence is committed belong either to the Scheduled Castes or the Scheduled Tribes."

Karnataka.— *The following amendments were made by Karnataka Act 27 of 1987, section 2 (w.e.f. 22-7-1987).*

S 357.—(1) In section 357 in sub-section (1), after the words "the Court may". the brackets, figures and words "and where the person against whom an offence it committed belongs to a Scheduled Caste or a Scheduled Tribe as defined in clauses (24) and (25) of Article 366 of the Constitution and the accused person does not belong to a Scheduled Caste or a Scheduled Tribe the Court shall", shall be *inserted*;

(2) for sub-section (3), the following sub-section shall be *substituted*, namely:—

"(3) When a Court imposes a sentence of which fine does not form a part, the Court may, and where a person against whom an offence is committed belongs to a Scheduled Caste or Scheduled Tribe as defined in clauses (24) and (25) of Article 366 of the Constitution and the accused person does not belong to a Scheduled Caste or a Scheduled Tribe, the Court shall, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced".

Madhya Pradesh.— *The following amendments were made by M.P. Act 29 of 1978, section 3 (w.e.f. 5-10-1978).*

S 357.—In its application to the State of Madhya Pradesh, in section 357—

(i) in sub-section (1), for the words "(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied", substitute as follows:

"(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, and where a person against whom an offence is committed belongs to Scheduled Castes or Scheduled Tribes as defined in clauses (24) and (25) of Article 366 of the Constitution except when both the

accused person and the person against whom an offence is committed belong either to such Castes or Tribes, the Court shall, when passing judgment, order the whole or any part of the fine recovered to be applied—", and

(ii) for sub-section (3) substitute the following:—

"(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, and where a person against whom an offence is committed belongs to Scheduled Castes or Scheduled Tribes as defined in clauses (24) and (25) of Article 366 of the Constitution, the Court shall, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced:

Provided that the Court may not order the accused person to pay by way of compensation any amount, if both the accused person and the person against whom an offence is committed belong either to the Scheduled Castes or the Scheduled Tribes".

Rajasthan.— *The following amendments were made by Rajasthan Act No. 3 of 1993, section 2.*

S 357—In section 357 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974),—

(i) in sub-section (1), between the expression to "the Court may" and the expression "when passing judgment", the expression "and where the person against whom an offence is committed belongs to a Scheduled Caste or a Scheduled Tribe, but the accused person does not so belong the Court shall", shall be inserted; and

(ii) in sub-section (3), between the expression "the Court may", and the expression "when passing judgment", the expression "and where the person against whom an offence is committed belongs to a Scheduled Caste or a Scheduled Tribe but the accused person does not so belong, the Court shall", shall be inserted.

Uttar Pradesh.— *The following amendments were made by U.P. Act No. 17 of 1992, section 2.*

S 357.—In section 357 of the Code of Criminal Procedure, 1973,—

(a) in sub-section (1), after clause (d), the following proviso shall be inserted, namely:

"*Provided* that if a person who may receive compensation under clauses (b), (c) and (d) is a member of the Scheduled Castes or the Scheduled Tribes and the person sentenced is not a member of such Castes or Tribes the Court shall order the whole on any part of the fine recovered to be applied in payment of such compensation.";

(b) for sub-section (3) the following sub-section shall be substituted namely,—

"(3) When the Court imposes a sentence, of which fine does not form a

part, the Court may, and where the person who has suffered the loss or injury is a member of the Scheduled Castes or the Scheduled Tribes and the person sentenced is not a member of such Castes or Tribes the Court shall, when passing judgment, order the person sentenced to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the person has been so sentenced.";

(c) after sub-section (5), the following Explanation, shall be inserted namely.—

"*Explanation.*—For the purposes of this section the expressions 'Scheduled Castes' and 'Scheduled Tribes' shall have the meanings respectively assigned to them in clauses (24) and (25) of Article 366 of the Constitution."

West Bengal.— *Following amendments were made by W.B. Act 33 of 1985, section 3.*

S 357.—In section 357 of the principal Act,—

(a) in sub-section (1), for the words and brackets. "When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—", the words and brackets "When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, and where the person against whom an offence has been committed belongs to a Scheduled Castes or Scheduled Tribes, except when both the accused person and the person against whom an offence has been committed belong either to Scheduled Castes or to Scheduled Tribes, shall, when passing judgment, order the whole or any part of the fine recovered to be applied—" shall be substituted;

(b) for sub-section (3), the following sub-section shall be substituted:—

"(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, and where the person against whom an offence has been committed belongs to Scheduled Castes or Scheduled Tribes, shall, when passing judgment, order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced:

Provided that the Court may not order the accused person to pay by way of compensation, any amount if both the accused person and the person against whom an offence has been committed belong either to Scheduled Castes or to Scheduled Tribes.";

(c) after sub-section (5), the following Explanation shall be inserted:

"*Explanation.*—For the purposes of this section, the expression 'Scheduled Castes' and 'Scheduled Tribes' shall have the meanings respectively assigned to them in clauses (24) and (25) of Article 366 of the Constitution of India."

Under this section, an order of compensation can be passed by the trial Court, appellate Court or by the High Court or Court of Session in revision, at the time of passing judgment, out of the fine imposed, in four cases:—

(a) to the complainant, for meeting expenses properly incurred in the prosecution;

(b) to any person, who has suffered loss or injury by the offence, when he can recover compensation in a Civil Court;

(c) to a person entitled to recover damages under the Fatal Accidents Act, when there is a conviction for causing death or abetment thereof;

(d) to a *bona fide* purchaser of property, which has become the subject of theft, criminal misappropriation, criminal breach of trust, cheating, or receiving or retaining or disposing of stolen property, and which is ordered to be restored to its rightful owner.

Sub-section (3), however, enables the Court to order payment of compensation even in cases where substantive sentence of imprisonment only is awarded.

The section must be taken to exclude those expenses in regard to which the Court has no discretion, e.g., payment of Court and process fees[58.]; *cf.* section 453 which deals with money found on the person of the accused.

In *State v Sanjiv Bhalla*,[59.] the Supreme Court culminated following four principles—

(a) For awarding a just sentence, the Trial Judge must consider the provisions of the Probation of Offenders Act and the provisions on probation in the Criminal Procedure Code;

(b) When it is not possible to release a convict on probation, the Trial Judge must record his or her reasons;

(c) The grant of compensation to the victim of a crime is equally a part of just sentencing;

(d) When it is not possible to grant compensation to the victim of a crime, the Trial Judge must record his or her reasons; and

(e) The Trial Judge must always be alive to alternative methods of a mutually satisfactory disposition of a case.

[s 357.2] "Fine".—

The imposition of fine is a condition precedent to making an order under sub-section (1).[60.] Compensation can be allowed only out of "whole or any part of the fine recovered".[61.] But see also, sub-section (3).

[s 357.3] Defraying expenses of prosecution [*Clause (a)*].—

This clause extends only to expenses properly incurred by the complainant in the prosecution. It was held by the Supreme Court that an order directing payment of litigation costs to the State could be passed unless substantive sentence of fine was imposed on the accused. The High Court's direction under section 357(a) to the

accused on whom no fine was imposed and who was let off on probation was liable to be set aside.[62.] (Decision of Punjab High Court Reversed).

[s 357.4] Compensation to victim [*Clause (b)*].—

Any person is entitled to compensation for the loss or injury caused by the offence, and it includes the "wife, husband, parent[63.] and child" of the deceased victim.[64.]

Power to award compensation to victims should be liberally exercised by Courts to meet the ends of justice. Considerations for determining the compensation were stated as under: Where a person not at all involved in the crime was subjected to arrest and prosecution and this happened due only to the fact that he intervened to save the victim and to set him free, his detention and prosecution being illegal, the state was directed to pay compensation to him.[65.]

The Supreme Court has held that the provision for payment of compensation has been in existence for considerable period of time on the statute book in this country, but the Criminal Courts, it appears, have not taken significant note of the said provision or exercised the power vested in them thereunder.[66.]

The Law commission has stated in its report[67.] regarding this regrettable omission in the following words:

> We have a fairly comprehensive provision for payment of compensation to the injured party under section 545 of the Criminal Procedure Code. It is regrettable that our courts do not exercise their statutory powers under this Section as freely and liberally as could be desired. The Section has, no doubts, its limitations. Its application depends, in the first instance, on whether the court considers a substantial fine as proper punishment for the offence. In the most serious cases, the Court may think that a heavy fine in addition to imprisonment for a long terms is not justifiable, especially when the public prosecutor ignores the plight of the victim of the offence and does not press for compensation on his behalf.

Where order to pay compensation has been passed by a Court, the said order does not bar a subsequent suit for compensation. Section 357 recognises separate suit for compensation by dependents of a deceased person.[68.]

[s 357.5] Amount of compensation.—

In addition to the conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of accused. It is not alternative to but in addition thereto. The payment of compensation must be reasonable. The quantum of compensation depends upon facts, circumstances, the nature of the crime, the justness of the claim of the victim and the capacity of the accused to pay. If there are more than one accused, the quantum may be divided equally unless their capacity to pay varies considerably. Reasonable period for payment of compensation, if necessary by instalment, may be given.[69.] The Supreme Court has said that the power to award compensation under section 357(3) is not ancillary to other sentences but it is in addition thereto.[70.]

Compensation should be commensurate with the capacity of the accused to pay as also other facts and circumstances of the case like the gravity of the offence, needs of the victim's family. Where material on record was scanty, Court had to assess the quantum from the material available and also take into consideration the facts, judicial notice of which could be taken by the Court.[71.]

The Supreme Court has observed that there is no limit upon the award of compensation. The Court said:

> The method usually adopted by the Parliament for conferring special jurisdiction or powers on Magistrate of the First Class in the matter of awarding sentences, obviating the limitation stipulated in s 29(2) of the Code can be illustratively seen in s 12 of the Essential Commodities Act or s 36 of the Drugs and Cosmetics Act or s 21 of the Prevention of Food Adulteration Act [now replaced by the Food Safety Act, 2006 (34 of 2006)]. In the absence of any such provision in the Negotiable Instruments Act, it is not possible to read any special power into it as having conferred on a Magistrate of the First Class in the matter of imposition of sentence. If a Magistrate of the First Class thinks that the fact-situation in a particular case warrants imposition of a sentence more severe than the limit fixed 29 of the Code, the legislature has taken care of such a situation also 325(1), Cr.P.C. A Magistrate who thinks it fit that the complainant must be compensated for his loss can resort to the course indicated in s 357 of the Code. He can, after imposing a term of imprisonment, award compensation to the complainant for which no limit is prescribed in s 357 of the Code.[72.]

The nature of crime, the injury caused and the capacity of the convict to pay compensation, among other things, have to be taken into consideration.[73.] The Supreme Court has held that the amount of compensation is to be determined by the Courts depending upon the facts and circumstances of each case, nature of the offence and the capacity of the accused to pay.[74.]

The Supreme Court has held that when fine too is imposed on an accused compensation could be paid out of fine. There is no need to award separate compensation. Only where sentence does not include fine, but the Court finds that the person who suffered loss or injury by the act of the accused, the Court is permitted to award compensation under section 357(3) of the Code. Thus, in a case under section 138 of the Negotiable Instruments (NI) Act, 1881, where the Magistrate had power to impose a fine of Rs 5,000 (increased by amendment to Rs 10,000, w.e.f. 23 June 2006), the Magistrate could not have increased the fine to Rs 22,000 where the dishonoured cheque was for Rs 20,000.[75.]

[s 357.6] Additional compensation.—

Compensation for infringement of right to life under Article 21 is an appropriate public law remedy. It does not bar any additional claim for compensation under the private law or under section 357 CrPC.[76.]

[s 357.7] Stay of order [*Sub-section (2)*].—

The order of compensation passed by the Court can be stayed under sub-section (2) pending adjudication of the appeal. But sub-section (2) does not envisage imposing a condition regarding furnishing of third-party security for suspending the order directing payment of compensation. The order under the section is not restricted to sub section (1). It applies to sub-section (3) also.[77.] Section 357(2) will not be attracted where there is no direction to pay any compensation out of fine imposed. Section 357(2) has nothing to do with suspension of sentence awarded by the trial Court and sentence of fine imposed on accused is in no way affected by section 357(2).[78.]

[s 357.8] Adjustment of fine amount against civil decree [*Sub-section (5)*].—

The Supreme Court said that a specific duty has been cast on the Civil Courts by section 357(5) CrPC to take into account the sum paid as compensation. The decree was directed to be amended.[79.]

58. *Queen-Empress v Yamana Rao*, (1901) ILR 24 Mad 305, 307.

59. *State v Sanjiv Bhalla*, (2015) 13 SCC 444 .

60. *Re Bastoo Dumaji*, (1898) 22 Bom 717; *Pamula Saraswathi v State of AP*, AIR 2003 SC 2416 : 2003 Cr LJ 2531 : JT 2003 (2) SC 240 : 2003 (2) Scale 223 : (2003) 3 SCC 317 , murder charge not proved, only theft by the accused persons was proved, a fine of Rs 10,000 was imposed on each accused.

61. *Queen-Empress v Yamana Rao, supra*.

62. *Girdhari Lal v State of Punjab*, AIR 1982 SC 1229 : (1982) 1 SCC 608 ; *NE Verghese v State of Kerala*, 2002 Cr LJ 1712 (Ker), it was not proper for the Sessions Judge to order crediting to the State Rs 3,000 as compensation for the loss suffered in terms of judicial time and resources in settling the controversy. He had not imposed any fine nor any fine formed part of the sentence.

63. *The State of Mysore v Tythappa*, AIR 1967 Kant 51 : 1967 Cr LJ 557 .

64. *Emperor v Morgan*, (1909) ILR 36 Cal 302.

65. *Surendra Choudhary v State of Bihar*, 2003 Cr LJ 2596 (Pat), a sum of Rs 15,000 was awarded.

66. *Roy Fernandes v State of Goa*, AIR 2012 SC 1030 : (2012) 3 SCC 221 : (2012) 2 SCC (Cri) 111 ; **See** *also Manish Jalan v State of Karnataka*, AIR 2008 SC 3074 : (2008) 8 SCC 225 .

67. 42nd. Report of the Law Commission of India, para 3.17.

68. *Suba Singh v Davinder Kaur*, AIR 2011 SC 3163 : (2011) 13 SCC 296 .

69. *Hari Kishan and State of Haryana v Sukhbir Singh*, 1989 Cr LJ 116 : AIR 1988 SC 2127 : (1988) 4 SCC 551 .

70. *Balraj v State of UP*, AIR 1995 SC 1935 : 1995 Cr LJ 3219 : (1994) 4 SCC 29 .

71. *Rachhpal Singh v State of Punjab*, AIR 2002 SC 2710 : (2002) 6 SCC 462 .

72. *Pankajbhai Nagjibhai Patel v State of Gujarat*, AIR 2001 SC 567 : (2001) 104 Comp Cases 418 : (2001) 1 KLT 517 : (2001) 2 SCC 595 .

73. *Manish Jalan v State of Karnataka*, AIR 2008 SC 3074 : (2008) 8 SCC 225 .

74. *Vinay v State of Karnataka*, (2015) 11 SCC 612 : 2015 (5) Scale 314 .

75. *R Vijayan v Baby*, AIR 2012 SC 528 : (2012) 1 SCC 260 : (2012) 1 SCC (Cri) 520 .

76. *Sube Singh v State of Haryana*, AIR 2006 SC 1117 : (2006) 3 SCC 178 : 2006 Cr LJ 1242 .

77. *V Prasada Rao v State of AP*, 2002 Cr LJ 395 (AP).

78. *Satyendra Kumar Mehra v State of Jharkhand*, AIR 2018 SC 1587 : 2018 (5) Scale 109 : LNIND 2018 SC 115 .

79. *D Purushotama Reddy v K Sateesh*, AIR 2008 SC 3202 : (2008) 8 SCC 505 .

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CHAPTER XXVII THE JUDGMENT

[80.][[s 357A] Victim compensation scheme.—

(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State of the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.]

[s 357A.1] Amendment Act, 2008.—

Clause 28 inserts a new section 357A in order to provide for the State Government to prepare, in co-ordination with the Central Government, a scheme called "victim compensation scheme" for the purpose of compensation to the victim or his dependants who have suffered loss or injury as a result of the crime. (Notes on Clauses).

Compensation to be in addition to fine under section 326A or section 376D of IPC.

In a case relating to compensation scheme for victims of mob violence, a question was raised before the Supreme Court about discrimination between members of the Central

Armed Police Forces (CAPF) who are state subjects and non-state subjects. It was held by the Supreme Court that it was made to reduce the disparity in amount of *ex-gratia* awarded by the Central Government and by the State to which victims belong. Article 35A of the Constitution of J&K also provides for protective treatment to state subjects. Thus, it was held that the scheme does not suffer from fundamental error.[81.]

In a case where the accused was unable to pay the compensation, it was held that the Court ought to award compensation under section 357A of CrPC against State from funds available under Victim Compensation Scheme framed thereunder.[82.]

In cases of crimes against women, the Supreme Court has expressed the necessity of formulation and implementation of policies to uplift socio-economic conditions of women to curb gender violence. The humiliation or the reputation that is suffered out cannot be recompensed but then monetary compensation will at least provide some solace. Under this new provision, the onus is put on the District Legal Services Authority or State Legal Service Authority to determine the quantum of compensation in each case.[83.]

The Supreme Court has held that a minimum of Rs 3,00,000 (Rs three lakhs only) shall be made available to each victim of acid attack under section 357A, full medical assistance should be provided to the victims of acid attack, private hospitals should also provide free medical treatment to such victims and action may be taken against hospital/clinic for refusal to treat victims of acid attacks in contravention of the provisions of section 357C of the Code. Free medical treatment shall not only imply physical treatment to the victim of acid attack but also availability of medicines, bed and food in the concerned hospital. It was also directed that the hospital, where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack which may be utilised by the victim for treatment and reconstructive surgeries or any other scheme.[84.]

In *Zorawar Singh v Gurbax Singh Bains*,[85.] the Supreme Court ordered compensation for delay in investigation to be recovered from erring officials.

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80. Ins. by Act 5 of 2009, sec. 28 (w.e.f. 31-12-2009).

81. *Sudesh Dogra v UOI*, AIR 2014 SC 1940 : (2014) 6 SCC 486 .

82. *State of Himachal Pradesh v Ram Pal* (2015) 11 SCC 584 : 2015 (3) Scale 111 . See also *State of Himachal Pradesh v Vijay Kumar*, AIR 2019 SC 1543 .

83. *Mohd Haroon v UOI*, (2014) 5 SCC 252 : 2014 Cr LJ 2170 (SC) (Three-Judge Bench).

84. *Laxmi v UOI*, (2016) 3 SCC 669 : AIR 2015 SC 3662 : 2015 (5) Scale 77 .

85. *Zorawar Singh v Gurbax Singh Bains*, (2015) 2 SCC 572 .

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CHAPTER XXVII THE JUDGMENT

86.[[s 357B] Compensation to be in addition to fine under section 326A or section 376D of Indian Panel Code.—

The Compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim [87.] [under section 326A, section 376AB, section 376D, section 376DA and section 376DB of the Indian Penal Code (45 of 1860)].

The newly introduced section 357B makes it clear that compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the IPC. Thus, in the cases relating to murder and rape in the wake of communal violence in Uttar Pradesh in the year 2013, the Supreme Court directed the State Government to pay compensation of Rs five Lakhs each for the rehabilitation of the victims.[88.]

[s 357B.1] The Criminal Law (Amendment) Act, 2018.—

In section 357B of the Code of Criminal Procedure, for the words, figures and letters "under section 326A or section 376D of the Indian Penal Code", the words, figures and letters "under section 326A, section 376AB, section 376D, section 376DA and section 376DB of the Indian Penal Code" have been substituted. The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of the section.

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86. Ins. by Act No. 13 of 2013, section 23 (w.r.e.f. 3-2-2013).

87. Subs. by Act No. 22 of 2018, section 18, for "under section 326A or section 376D of the Indian Penal Code (45 of 1860)" (w.r.e.f. 21-4-2018).

88. *Mohd Haroon v UOI*, (2014) 5 SCC 252 : 2014 Cr LJ 2170 (SC).

The Code of Criminal Procedure, 1973

CHAPTER XXVII THE JUDGMENT

[89][s 357C] Treatment of victims.—

All hospitals, public or private, whether run by the Central Government the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A 376, [90][376A, 376AB, 376B, 376C, 376D, 376DA, 376DB] or section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident].

[s 357C.1] Criminal Law (Amendment) Act, 2013.—

The two new sections 357B and 357C have been inserted on the recommendations of the Justice JS Verma Committee. Section 357B provides that compensation payable to a victim by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the IPC. Section 357C lays down that all hospitals run by the Central Government, the State Government, the local bodies or any other person shall provide first-aid or medical treatment to victims of any offence enumerated in the said section and shall immediately inform the police of such incident.

[s 357C.2] The Criminal Law (Amendment) Act, 2018.—

In section 357C of the Code of Criminal Procedure, for the figures and letters "376A, 376B, 376C, 376D", the figures and letters "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB" have been substituted The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of the section.

89. Ins. by Act No. 13 of 2013, section 23 (w.r.e.f. 3-2-2013).

90. Subs. by Act No. 22 of 2018, section 19, for "376A, 376B, 376C, 376D" (w.r.e.f. 21-4-2018).

The Code of Criminal Procedure, 1973

CHAPTER XXVII THE JUDGMENT

[s 358] Compensation to persons groundlessly arrested.—

(1) Whenever any person causes a police officer to arrest another person, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding [91][one thousand rupees], to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding [92][one thousand rupees], as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

[s 358.1] CrPC (Amendment) Act, 2005 [*Clause (30)*].—

This clause seeks to amend section 358 of the Code to enhance the limit of fine of Rs 100 to 1,000 so as to make this provision more effective. (*Notes on Clauses*).

COMMENT

There must be direct and proximate nexus between the complaint and the arrest for the award of compensation under section 358.[93] Before making an order for compensation, an opportunity to show cause against the order must be given to the complainant. Principles of natural justice have to be read in section 358.[94] Where two persons were illegally detained for two days by Haryana Police, they were held to be entitled to compensation, had they not indulged in falsehood in the Supreme Court making themselves disentitled to receive compensation.[95]

91. Subs. by Act No. 25 of 2005, section 30, for "one hundred rupees" (w.e.f. 23-6-2006).

92. Subs. by Act 22 of 2018, section 18, for "under section 326A or section 376D of the Indian Penal Code (45 of 1860)" (w.r.e.f. 21-4-2018).

93. *Mallappa v Veerabasappa*, 1977 Cr LJ 1856 (Kant).

94. *Shah Chandulal v Patel Baldevbhai Ranchhoddas*, 1980 Cr LJ 514 (Guj).
95. *Dhanjay Sharma v State of Haryana*, AIR 1995 SC 1795 : (1995) 3 SCC 757 .

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CHAPTER XXVII THE JUDGMENT

[s 359] Order to pay costs in non-cognizable cases.—

(1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days and such costs may include any expenses incurred in respect of process fees, witnesses and pleader's fees which the Court may consider reasonable.

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

This section empowers the Court to order payment of the entire costs that may have been incurred by the complainant including the expenses incurred by way of payment of process-fees, *bhatta* charges to the witnesses and fees paid to the pleader. It refers to any complaint in respect of non-cognizable offence. This section may be compared with section 357(1)(a) which is wider in terms and refers to "expenses properly incurred in the prosecution". The order in both cases is discretionary. Under section 357, compensation is generally paid out of fine levied (though it may be independent of any such levy also), whereas under this section, it is in addition to the fine.

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CHAPTER XXVII THE JUDGMENT

96.[s 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.

This section is a piece of beneficent legislation. It enables the Court, under certain circumstances, to release the accused, who has been convicted, on probation of good conduct. It applies only to first offenders, who are entitled to the indulgence on the score of their age, character or antecedents, and to the circumstances in which the offence is committed. The object of this section is to avoid sending the first offender to prison for an offence, which is not of a serious character and thereby running the risk of turning him into a regular criminal.[97.] First offenders fall into two classes: (1) those above the age of 21 years and convicted of an offence punishable with fine only or imprisonment for a term of seven years or less, and (2) those under the age of 21 years or women, and "convicted of an offence not punishable with death or imprisonment for life". A Court cannot pass an order under this section where the offence charged is punishable with more than seven years' imprisonment and the person accused is more than 21 years old.[98.] Even where the conditions set out in section 360(1) are fulfilled, the person convicted cannot, as of right, claim the benefit of the provisions of the section. The fact that it is his first conviction would not alone be sufficient. The discretion is to be exercised having regard to the circumstances in which the crime was committed and the age, character and antecedents of the offender. It needs a considerable sense of responsibility. Misplaced leniency and sympathy for the accused are matters which should never be allowed to come in and influence the Court's mind. Otherwise, the very object for which punishments are provided would be defeated.[99.]

[s 360.1] Scope.—

Sub-section (1) is expressed in general language. It applies to a person convicted of an offence punishable with fine only or imprisonment of not more than a certain period. It covers the case of a conviction under any law. The term "previous conviction" similarly applies to a conviction under any law and is not confined to a conviction under the IPC.[100.]

[s 360.2] "Instead of sentencing him".—

This expression used in this sub-section and subs. (3) indicates that the order of probation can be passed after conviction, but before awarding the sentence and in substitution of it. If the sentence is once awarded, no order for probation can be passed thereafter.[101.]

The section mandatorily requires the Court to record in its judgment specific reasons for not granting benefit of the section if the case could have been dealt with under the section.[102.]

[s 360.3] First class Magistrate competent hereunder [*Proviso*].—

The proviso to sub-section (1) does not extend to the powers conferred by sub-section (3). Hence, a second-class Magistrate is entitled to exercise the powers conferred by sub-section (3).[103.] A proviso governs what goes before it and does not affect what follows after it.[104.]

[s 360.4] Release on admonition [*Sub-section (3)*].—

The operation of this sub-section is confined to certain offences under the IPC[105.] and not offences under any other special Acts.[106.] It covers offences punishable with not more than two years imprisonment or with fine only.[107.] Power under the sub-section can be exercised by a second class Magistrate.[108.] In order to give the benefit of this sub- section, the offence should be of a trivial nature.

[s 360.5] "Any offence under the Indian Penal Code".—

These words cannot be read *ejusdem generis* with the offences which are mentioned earlier in the section. This clause stands by itself and indicates that all offences punishable with not more than two years' imprisonment are also capable of being dealt with under this sub-section.[109.] The accused was charged with an offence under section 326 IPC. Section 360 CrPC has no application to such offence as it is punishable with life imprisonment. The Probation of Offenders Act, 1958, was to apply. Release of the accused under section 360 CrPC was not proper. The matter was remitted to the High Court for fresh consideration.[110.]

[s 360.6] Revisionary power [*Sub-section (5)*].—

The High Court or the Court of Session has power, on appeal or in revision, to set aside the order of the Magistrate and *in lieu* thereof to pass sentence on the offender according to law, provided that it cannot inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

[s 360.7] Effect of Probation of Offenders Act, 1958.—

The provisions of section 360 CrPC become wholly inapplicable in areas where the Act is made applicable. The provisions of the two statutory enactments have significant differences. They cannot co-exist.[111.]

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96. As per section 19 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989)—The provisions of section 360 of the Code shall not apply to any person above the age of eighteen years who is found guilty of having committed an offence under this Act.

97. *Emperor v Mahomed Hanif*, (1942) 44 Bom LR 456 : AIR 1942 Bom 215 .

98. *Emperor v Yeshaba Sakhoba*, (1938) 40 Bom LR 927 : AIR 1938 Bom 463 .

99. *Sita Ram v Malkiat Singh*, (1956) Patiala 13; *Ibrahim v State*, 1974 Cr LJ 993 ; *NM Parthasarthy v State by SPE*, AIR 1992 SC 988 : 1992 Cr LJ 1284 ; *Madhusudan Sahoo v Bajunder Pradhan*, 1992 Cr LJ 1359 (Ori).

100. *Emperor v Chhotan*, (1935) 37 Bom LR 182 : 59 Bom 514 : AIR 1935 Bom 188 ; *State v A Parthiban*, AIR 2007 SC 51 : (2006) 11 SCC 473 : 2006 Cr LJ 4772 , the benefit of the section cannot be extended to and powers under it cannot be involved for the benefit of convicts under Probation of Offenders Act, 1958.

101. *Emperor v Misri Lal*, (1918) 17 ALJR 426 : AIR 1919 All 394 .

102. *Chandreshwar Sharma v State of Bihar*, (2000) 9 SCC 245 : (2000) 2 JT 36 , the accused was found in possession of 3.5 kg of non-ferrous metal, Court recorded no reason for not dealing with the accused under section 360, he was directed to be released on probation of good conduct after executing a bond with one surety.

103. *Emperor v Waman Patil*, (1937) 39 Bom LR 1065 : (1938) Bom 58 (FB) : AIR 1937 Bom 481 ; *Murlidhar v Mahbub Khan*, (1924) 47 All 353 ; *The King v Maung Thein Aung*, (1940) Ran 507 : AIR 1940 Rangoon 280 .

104. *The King v Maung Thein Aung, ibid*.

105. *Emperor v Pandu Ramji*, (1926) 28 Bom LR 297 : AIR 1926 Bom 230 ; *Emperor v Merwanji Mistry*, (1928) 30 Bom LR 375 : 52 Bom 250 : AIR 1928 Bom 152 ; *Emperor v Piara Singh*, (1925) 7 Lah 32.

106. *Hiralal*, (1955) Hyd 425.

107. *Emperor v Manchershaw*, (1935) 37 Bom LR 105 : 59 Bom 352 : AIR 1935 Bom 156 .

108. *Murlidhar v Mahbub Khan*, (1924) 47 All 353 .

109. *Akarapu Katta Mallu v Puska Chandra*, AIR 1967 SC 1363 : 1967 Cr LJ 1212 ; *Himachal Pradesh v Sheelan Devi*, 1986 Cr LJ 245 (HP).

110. *Ramesh Das v Raghu Nath*, AIR 2008 SC 1298 : (2008) 4 SCC 588 : 2008 Cr LJ 1945 .

111. *Chhanni v State of CIP*, AIR 2006 SC 3051 : (2006) 5 SCC 396 : 2006 Cr LJ 4068 .

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CHAPTER XXVII THE JUDGMENT

[s 361] Special reasons to be recorded in certain cases.—

Where in any case the Court could have dealt with,—

(a) **an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or**

(b) **a youthful offender under the Children Act, 1960[112.] (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders,**

but has not done so, it shall record in its judgment the special reasons for not having done so.

This provision was inserted in the new Code because it was observed that the Courts used those salutary provisions incorporated in the Probation of Offenders Act, 1958, or the Children Act, 1960 [now Juvenile (Care and Protection of Children) Act, 2015] or other similar laws only rarely. To ensure that such provisions should be used frequently, the Courts are now required to give reasons in their judgments for not applying the provisions of those special laws whenever they were applicable.[113.] In the absence of any material in respect of the character, age and antecedent of the offender, the mere circumstances that the accused was found in possession of a large quantity of liquor could not be said to be "Special reasons" as under section 361.[114.]

Section 361 of CrPC supplements the provisions of the Probation of Offenders Act, 1958 and there is no conflict between the CrPC and the Probation of Offenders Act, 1958 Section.[115.] Provisions of section 361 are mandatory.[116.]

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112. New Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).

113. *Khali v State*, 1976 Cr LJ 465 .

114. *Nanua v State of Rajasthan*, 1989 Cr LJ 279 (Raj).

115. *State of Himachal Pradesh v Lat Singh*, 1990 Cr LJ 723 (HP).

116. *Leela v State of Rajasthan*, 1989 Cr LJ NOC 70 (Raj).

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CHAPTER XXVII THE JUDGMENT

[s 362] Court not to alter judgment.—

Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

The section applies to judgments as well as final orders. It prohibits the Court from altering or revising any judgment or final order disposing of a case after it has been signed except for the purpose of correction of clerical or arithmetical error. Any alteration, therefore, of a judgment or final order disposing of a case not sanctioned by this section is a nullity. As soon as the judgment or final order disposing of a case is signed, it becomes final and the Court is *functus officio*.[117.]

The word "judgment" as used in the Code is "the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments.[118.] In order to constitute "judgment" within the meaning of this section, there must be an investigation of the merits of the case on evidence and after hearing the arguments. Where, however, the order is passed summarily without consideration of the entire evidence as in the case of an order of discharge, it will not obviously amount to a judgment.[119.]

Where the predecessor Magistrate had ordered transfer of a case to the file of a Chief Judicial Magistrate, order to set aside the transfer by the successor Magistrate was held to be null and void.[120.]

Where a case or appeal is dismissed for default of the prosecuting party or his Advocate, without going into merits, the order is not a "judgment" within the ambit of section 362 and it could be restored to a pending file if good cause for the default was shown.[121.]

[s 362.1] "Save as otherwise provided by this Code".—

This expression refers to section 348 of the Code and not section 482.[122.] The Bar placed under section 362 cannot be overcome by having resort to the provisions of section 482.[123.] In a case of murder, three persons were convicted, two of whom were acquitted in appeal by the High Court and the third one was convicted under section 304, Pt I, IPC. Subsequently, that conviction was also altered to that under section 324 of IPC in a petition under section 482 of CrPC on the plea that the alleged injury said to have been caused by him, was not serious. The Supreme Court held that in view of section 362 of CrPC, the High Court had no jurisdiction to alter its earlier judgment under section 482 of CrPC.[124.]

Inherent power cannot be exercised to re-open or alter final orders.[125.]

[s 362.2] "Alter or review the same".—

The Court has no power to alter or review its judgment after it is signed. The same principle holds good in respect of final orders which are of the nature of judgment.[126.] There is, however, one section in the Code (*viz*., section 348) which permits a Court to revise its own order.

This section does not empower the High Court to revise or review its judgment in a criminal appeal or revision after it has been pronounced and signed,[127.] except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits or to correct a clerical error.[128.] The High Court can alter or review its judgment before it is signed.[129.] Where after a judgment had been pronounced but before it had been typed or signed, it was discovered that the defence had relied on an inaccurate copy of a notification showing that the Special Judge by whom the case had been tried had no power to try it and the High Court directed a *de novo* hearing, it was held that it was wrong to say that the former judgment, having been pronounced by the High Court was final, and that the High Court was not competent to rehear the appeal.[130.] Where the offence had been lawfully compounded prior to the date of summary dismissal of the revision but it was not brought to the notice of the Court, it was held that the order of summary dismissal had the effect of confirming the conviction and sentence and it was not open to the High Court to review or alter that order merely because it has subsequently come to light that prior to that date, the parties had lawfully compounded the offence. To allow such a review would be clearly against the principle of finality of orders of dismissal passed by the High Court.[131.] Section 482 does not modify this section so as to give a general and undefined power of review of judgment; nor was such a power inherent in the High Court.[132.] The only remedy is to move the State Government to exercise its powers where the accused has been prejudiced.[133.] Where a case is disposed of merely for default of appearance, or an order is passed to the prejudice of the accused, and by mistake or inadvertence no opportunity was given him to be heard, the High Court may review the same.[134.]

Court becomes *functus officio* the moment order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is no provision for modification of judgment. Even the High Court in exercise of its inherent powers under section 482 of CrPC has no authority or jurisdiction to alter or review the same.[135.]

[s 362.3] Recall of order.—

The counsel or his clerk could not notice the case in the cause list. The counsel could not appear. The judgment was passed in the absence of counsel. Direction of the Court for recall of the order was held to be proper. The application itself was for recall and not review.[136.]

[s 362.4] Review.—

1. In a case pending before the trial Court for a long time, an order was passed by the High Court in unequivocal terms that if the trial was not completed within a certain time, the accused would stand acquitted. This order being final could not be reviewed. Application for extension of time was in substance an application for review as it sought an amendment of the judgment. Application was dismissed.[137.]

2. Where revision application was dismissed by the High Court on merits, an application for review of the dismissal of the revision petition was not maintainable.[138.]

3. An allegation that criminal revision under sections 397 and 401 was allowed without hearing the other party, the order could be recalled under section 482. Section 362 does not impose prohibition for recalling such an order.[139.]

4. During the course of the settlement arrived between parties, the Magistrate had not passed any "final judgment". After couple of days the parties separated. Resumption of trial with express consent of the either of the party was held, not barred by section 362.[140.]

5. Where a convict sent a petition from jail to the High Court praying for rehearing of his appeal, which had already been dismissed by the Court, it was held that rehearing of appeal on some additional ground was not permitted under the law as section 362 of CrPC clearly prohibits alteration or review of the judgment except for correcting clerical or arithmetical error.[141.]

The High Court has no jurisdiction to alter or review its own judgment or order except to the extent of correcting any clerical or arithmetical error. The practice of filing criminal miscellaneous petition after disposal of the main case for issuance of fresh directions is unwarranted and amounts to an abuse on process of the Court. Once a matter is finally disposed of the Court, in the absence of a specific statutory provision, becomes *functus officio* in respect of that matter.[142.]

[s 362.5] Clerical Error.—

This means a mistake in copying or writing.

1. Recording of conviction against the accused who was dead. Non-supply of information about the death of the accused by the parties. Mistake of the Court being a clerical mistake can be corrected notwithstanding the bar provided under section 362.[143.]

2. Making sentence of imprisonment to run concurrently instead of consecutively. It involves review of judgment and cannot be considered to be correction of a clerical error.[144.]

3. Where the High Court directed restoration of possession to the respondent, an application under section 362 for clarification by a declaration that it was not binding on the applicant and did not affect her possession was held to be not maintainable.[145.]

[s 362.6] Rectification of error without hearing accused.—

There was an erroneous recording by the Court on the order sheet that the accused had been released on bail. He was granted bail on account of such recording. After rectification of this error, the trial Judge was ordered to take the accused into custody. It was held that such rectification without hearing the accused was not proper.[146.]

[s 362.7] Final Order.—

Where an appeal against conviction was dismissed on appearance of the accused and his counsel having been absent, such an order of dismissal being final could not be reheard or reviewed under section 482 of the Code.[147] However, for default of appearance an order of dismissal of revision petition cannot be treated as a final order disposing of a case within the meaning of section 362 and such an order can be set aside by the High Court under section 482.[148] Even where a High Court refused to recall its order passed under section 482 on account of the bar under section 362, it was held that this would not prevent the Supreme Court from considering the legality of the order under writ jurisdiction under Article 136.[149]

[s 362.8] Judgment.—

The word "judgment" in this section means a judgment of conviction or acquittal. A decision on a writ petition is neither a case of conviction nor that of acquittal.[150]

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117. *Sahadat Miran*, (1895) Unrep CRC 804, Cr R No. 62 of 1895; *Wahongbam Gulab Singh v Moirangthem Ningol*, AIR 1964 Gau 24 .
118. *Sarbeswar Panda v Adhir Kumar Jana*, (1959) ILR 2 Cal 69.
119. *Raghubans Prasad v State*, AIR 1961 Pat 397 .
120. *Baba Abdulkhan v AD Savant*, 1994 Cr LJ 2836 (Bom).
121. *Md Sauman Ali v State of Assam*, 1994 Cr LJ 2809 (Gau).
122. *Kunji Lal v Emperor*, (1934) 56 All 990 .
123. *Suresh T Kilachand v Sampat Sripat Lambate*, 1992 Cr LJ 1203 ; *State of Maharashtra v Sunder P Lalvani*, 1992 Cr LJ 2015 (Bom); *State v Baldev Raj*, 1992 Cr LJ 1251 (All).
124. *Moti Lal v State of MP*, AIR 1994 SC 1544 : 1994 Cr LJ 2184 : (2012) 11 SCC 427 .
125. *State v KV Rajendran*, AIR 2009 SC 46 : (2008) 8 SCC 673 : 2009 Cr LJ 355 .
126. *Re Harilal Buch*, (1897) 22 Bom 949; *Laxman Rao v The Crown*, (1940) Nag 267.
127. *Queen v Godai Raout*, (1866) 5 WR (Cr) 61-65 FB; Fox, (1885) 10 Bom 176 (FB); *Kunhammad Haji v Emperor*, (1922) 46 Mad 382; *Raju*, (1928) 10 Lah 1; *Kunji Lal v Emperor*, (1934) 56 All 990 .
128. *Sardar Diwan Singh v Emperor*, (1936) Nag 99 : AIR 1936 Nag 55 .
129. *Amodini Dasee v Darsan*, (1911) ILR 38 Cal 828.
130. *Mohan Singh v King-Emperor*, (1943) 23 Pat 28.
131. *Namdeo v The State*, (1957) Cut 355 : AIR 1958 Ori 20 : 1958 Cr LJ 67 .
132. *Banwari Lal v State*, (1955) 57 All 867 : AIR 1956 All 385 : 1956 Cr LJ 841 .
133. *Dahu Raut v Emperor*, (1934) ILR 61 Cal 155 : AIR 1933 Cal 870 ; *Kunji Lal*, (1934) 56 All 990 .
134. *Rajab Ali v Emperor*, (1918) 46 Cal 60 .
135. *State of Punjab v Davinder Pal Singh Bhullar*, AIR 2012 SC 364 : (2011) 14 SCC 770 .
136. *Vishnu Agarwal v State of UP*, AIR 2011 SC 1232 : (2011) 3 JT 538 .
137. *State of Maharashtra v Madadevan Iyer*, 1992 Cr LJ 1008 (Bom).

138. *Kedar Nath Jadhav v State of WB*, 1989 Cr LJ NOC 195 (Cal).
139. *Giridharilal v Pratap Rai Mehta*, 1989 Cr LJ 2382 (Kant).
140. *Pavittar Singh v Bhupinder Kaur*, 1988 Cr LJ 1624 (P&H).
141. *Rabindra Sabar v State of Orissa*, 1995 Cr LJ 4222 (Ori).
142. *Hari Singh Mann v Harbhajan Singh Bijwa*, AIR 2001 SC 43 : 2001 Cr LJ 128 : (2001) 1 Mad LJ 465; *State of Kerala v MM Manikantan Nair*, AIR 2001 SC 2145 : 2001 Cr LJ 2346 : (2001) 4 SCC 752 .
143. *Ram Ishwar v State of Bihar*, 1986 Cr LJ 1366 (Pat).
144. *Kapoor Singh v State of Punjab*, 1988 Cr LJ 636 (Punj).
145. *Sooraj Devi v Pyare Lal*, AIR 1981 SC 736 : 1981 Cr LJ 296 : (1981) 1 SCC 500 .
146. *Rajendra Prasad Arya v State of Bihar*, (2000) 9 SCC 514 : AIR 2000 SC 3536 : 2000 Cr LJ 4046 : JT 2000 (7) SC 338 .
147. *Chandrabali v State*, 1979 Cr LJ 1218 (All).
148. *Haji Shahabuddin*, 1983 Cr LJ NOC 173 (Gau).
149. *R Sarala v TS. Velu*, AIR 2000 SC 1731 : 2000 Cr LJ 2453 : (2000) 4 SCC 459 .
150. *Shaj Singh*, (1954) Patiala 31.

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CHAPTER XXVII THE JUDGMENT

[s 363] Copy of judgment to be given to the accused and other persons.—

(1) **When the accused is sentenced to imprisonment, a copy of the judgment shall, immediately after the pronouncement of the judgment, be given to him free of cost.**

(2) **On the application of the accused, a certified copy of the judgment, or when he so desires, a translation in his own language if practicable or in the language of the Court, shall be given to him without delay, and such copy shall, in every case where the judgment is appealable by the accused, be given free of cost:**

***Provided* that where a sentence of death is passed or confirmed by the High Court, a certified copy of the judgment shall be immediately given to the accused free of cost whether or not he applies for the same.**

(3) **The provisions of sub-section (2) shall apply in relation to an order under section 117 as they apply in relation to a judgment which is appealable by the accused.**

(4) **When the accused is sentenced to death by any Court and an appeal lies from such judgment as of right, the Court shall inform him of the period within which, if he wishes to appeal, his appeal should be preferred.**

(5) **Save as otherwise provided in sub-section (2), any person affected by a judgment or order passed by a Criminal Court shall, on an application made in this behalf and on payment of the prescribed charges, be given a copy of such judgment or order or of any deposition or other part of the record:**

***Provided* that the Court may, if it thinks fit for some special reason, give it to him free of cost.**

(6) **The High Court may, by rules, provide for the grant of copies of any judgment or order of a Criminal Court to any person who is not affected by a judgment or order, on payment, by such person, of such fees, and subject to such conditions, as the High Court may, by such rules, provide.**

[s 363.1] State Amendment

Karnataka.— *Following amendments made by Karnataka Act 19 of 1985, section 2 (w.e.f. 25-6- 1985).*

S 363.—In Section 363 after the proviso to sub-section (5), the following proviso shall be *inserted*, namely:—

"*Provided further* that the State shall, on an application made in this behalf by the Prosecuting Officer, be given, free of cost, a certified copy of such judgment, order, deposition or record with the prescribed endorsement".

This section lays down as to when, how and to whom the copy of the judgment, certified as well as uncertified, is to be given. It also provides that in certain cases the copy should be given free of cost and in others on payment of prescribed charges.

[s 363.2] Sub-section (3).—

This is a new provision and the same is incorporated for the simple reason that an order under section 117 of the Code may also ultimately lead to a substantive sentence of imprisonment as provided under section 122 of the Code.

Under this section, a party has *prima facie* an implied right to ask the presiding Magistrate or Judge to allow him inspection of the record referred to in the section. The right to a certified copy presupposes a right of inspection because a party cannot be expected to make up his mind whether he wants to have a copy of a document, if he is not entitled in the first place to read it and see what it is about.[151.]

[s 363.3] "Any person affected by a judgment or order".—

According to the Bombay High Court, any member of the public is not a person so affected and is not entitled to such copy.[152.] But the Allahabad High Court has taken a different view and held that any member of the public has a right to obtain a copy of a judgment of any Criminal Court.[153.]

Where the applicant sought that the earlier order of the High Court directing restoration of possession of the property to the respondent be clarified by a declaration that it was not binding on her and did not affect her possession, and the respondent disputed the allegations, it was held that the controversy could not be brought within the description "clerical or arithmetical error". The applicant in fact asked for an adjudication that the right to possession alleged by her remained unaffected by the earlier order. Therefore, it was not maintainable.[154.] Sub-section (6) enables the High Court to make necessary provision for grant of copies to persons not affected by the judgment.

[s 363.4] Copy of judgment [*Sub-section (5)*].—

A right to get copies of any part of the record of the trial under this sub-section is, of course, subject to an order under section 14 of the Official Secrets Act, 1923. But merely because there is such an order the Court cannot deprive the accused of his right to get the copies, unless it is shown that the publication of the copies which the accused desires to have would be prejudicial to the safety of the State.[155.]

[s 363.5] Copy of judgment to persons not affected [*Sub-section (6)*].—

This sub-section now makes it clear that the High Court may by rule provide for grant of copies to any person who is not affected by the judgment or order of a Criminal Court. Any member of the public, therefore, can get copies of judgment or order of Criminal Court if the High Court makes any rule in that behalf.

151. *Shamdasani v Sir Hugh Cocke*, (1941) 43 Bom LR 961 : (1942) Bom 71 : AIR 1942 Bom 26 .

152. *Re Pandurao Desai*, (1932) 34 Bom LR 1445 : AIR 1932 Bom 636 .

153. *Ladli Prasad Zutshi v Emperor*, (1931) ILR 53 All 724 : AIR 1931 All 364 .

154. *Krishnan Sreevalsan v State of Kerala*, 1992 Cr LJ 584 (Ker).

155. *Superintendent and Remembrancer of Legal Affairs, West Bengal v Satyen Bhowmik*, AIR 1970 Cal 535 : 1970 Cr LJ 1631 .

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CHAPTER XXVII THE JUDGMENT

[s 364] Judgment when to be translated.—

The original judgment shall be filed with the record of the proceedings and where the original is recorded in a language different from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

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CHAPTER XXVII THE JUDGMENT

[s 365] Court of Session to send copy of finding and sentence to District Magistrate.—

In cases tried by the Court of Session or a Chief Judicial Magistrate, the Court or such Magistrate, as the case may be, shall forward a copy of its or his finding and sentence (if any) to the District Magistrate within whose local jurisdiction the trial was held.

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CHAPTER XXVIII SUBMISSION OF DEATH SENTENCES FOR CONFIRMATION

[s 366] Sentence of death to be submitted by Court of Session for confirmation.—

(2) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

(2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

It is only in cases in which a sentence of death has been passed that the Judge should refer the proceedings to the High Court; and the High Court can only deal with them as a Court of reference. It is the practice of the High Court to be satisfied on the facts as well as the law of the case, that the conviction is right, before it proceeds to confirm that sentence.[1.] The High Court has to come to its own independent conclusion as to the guilt or innocence of the accused, independently of the opinion of the Judge.[2.]

The Supreme Court has held that the acquittal of a large number of the accused persons was no ground for not awarding death sentence to those whose conviction had been upheld.[3.] The Supreme Court explained in the following words the duty of the High Court on a reference:[4.]

> When a reference is made to the High Court under section 366 by the Sessions Judge on passing a sentence of death, the High Court has to satisfy itself whether a case beyond reasonable doubt has been made out against the accused for infliction of the extreme penalty of death. The proceedings before the High Court in such a case require a reappraisal and reassessment of the entire facts and law so that it may come to its independent conclusion but, while so doing, the High Court cannot also totally overlook the conclusion arrived at by the Sessions Judge. In performing its duty, the High Court is of necessity bound to consider the merits of the case itself and has to examine the entire evidence on record. In the instant case, the High Court, as a Court of Appeal, failed to exercise its power under section 386 and instead of discharging its bounden duty of examining the evidence and other materials on record, it, without appreciating the same, merely on surmises and conjectures, came to the conclusion that the accused was entitled to the benefit of doubt. Therefore, its conclusion could not be sustained. Moreover, such infraction of duty by the High Court caused a gross miscarriage of justice.

Where apart from appeal by convicted accused, reference is made by Sessions Judge for confirmation of the death sentence, a High Court is duty bound to independently consider the matter carefully and examine all relevant and material evidence.[5.] Whilst confirming a capital sentence a High Court is under an obligation to itself to consider what sentence should be imposed and not be content with the trial Court's decision on the point.[6.] Where, in addition to an appeal filed by an accused sentenced to death, the High Court has to dispose of the reference for confirmation of death sentence under section 366 of the Code, the High Court, while dealing with reference, should consider the proceedings in all their aspects and come to an independent conclusion on the material on record apart from the view expressed by the Sessions Judge. Under the

provisions of law, it is for the High Court to come to an independent conclusion of its own.[7.]

[s 366.1] Reference of death sentence.—

The High Court should give reasons for differing with the view of the trial Court and not just only mechanically reject the reference.[8.]

[s 366.2] Confinement till execution [*Sub-section (2)*].—

This provision confers statutory power on the Sessions Court to keep the accused in prison until the sentence is executed in due course.

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1. *Masalti v State of Uttar Pradesh*, AIR 1965 SC 202 : (1965) 1 Cr LJ 226 ; *Gurbachan Singh v State of Punjab*, AIR 1963 SC 340 : (1963) 1 Cr LJ 323 ; *Rama Shankar Singh v State of West Bengal*, AIR 1962 SC 1239 : (1962) 2 Cr LJ 296 .
2. *Balak Ram v State of UP*, AIR 1974 SC 2165 : 1974 Cr LJ 1486 : (1975) 3 SCC 219 .
3. *Subash Chander v Krishan Lal*, AIR 2001 SC 1903 : 2001 Cr LJ 1825 : (2001) 4 SCC 458 .
4. *State of TN v Rajendran*, (1999) 8 SCC 679 : 1999 Cr LJ 4552 .
5. *State of UP v Iftikhar Khan*, AIR 1973 SC 863 : 1973 Cr LJ 636 : (1973) 1 SCC 512 ; *Binayendra Chandra Pande v Emperor*, (1936) 63 Cal 929 .
6. *N Sreeramulu v State of Andhra Pradesh*, AIR 1973 SC 2551 : 1973 Cr LJ 1775 : (1974) 3 SCC 314 .
7. *Charan Singh v State of Punjab*, AIR 1975 SC 246 at p 251 : 1974 Cr LJ 1253 : (1975) 3 SCC 39 .
8. *Ramji Rai v State of Bihar*, (1999) 8 SCC 389 : AIR 1999 SC 3857 : 2000 Cr LJ 19 ; *State of TN v Suresh*, (1998) 2 SCC 372 : AIR 1998 SC 1044 , death sentence awarded to rape and murder convicts. The High Court set aside the conviction and sentence. The Supreme Court found it to be erroneous and restored the conviction, but because of long passage of time, death sentence was not restored. They were sentenced to undergo imprisonment for life on the Court of murder and RI for a period of 10 years on the Court of rape, sentences on both counts to run concurrently.

The Code of Criminal Procedure, 1973

CHAPTER XXVIII SUBMISSION OF DEATH SENTENCES FOR CONFIRMATION

[s 367] Power to direct further inquiry to be made or additional evidence to be taken.—

(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.

This section is similar in its terms to section 391 relating to appeals which has been extended by section 401 to cases before a High Court on revision.

In a proceeding submitted to the High Court for confirmation of a sentence of death under the previous section, it is open to the defence to ask for a postponement of the proceedings on the ground that the accused, on account of his unsoundness of mind, is incapable of making his defence.[9.]

Proceedings for confirmation of a death sentence have been held to be something in the nature of an extended trial. An application was made to bring on record the dying declaration of the deceased. It was furnished to all the accused. Rejection of the dying declaration on the ground that the doctor who recorded it was not examined on that issue during the trial was held to be improper. The Public Prosecutor's opposition to the application was considered to be inappropriate. The Court observed that fairness of a criminal trial is a basic requirement.[10.]

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9. *State v Sindhi Dalwai*, (1970) 72 Bom LR 396 .

10. *Dilip Premnarayan Tiwari v State of Maharashtra*, AIR 2010 SC 361 : (2010) SCC 775 : 2010 Cr LJ 905 .

The Code of Criminal Procedure, 1973

CHAPTER XXVIII SUBMISSION OF DEATH SENTENCES FOR CONFIRMATION

[s 368] Power of High Court to confirm sentence or annul conviction.—

In any case submitted under section 366, the High Court—

- **(a) may confirm the sentence, or pass any other sentence warranted by law, or**
- **(b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or**
- **(c) may acquit the accused person:**

Provided **that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.**

The powers of the High Court in dealing with confirmation cases under this section are not affected by the provisions of section 386 of the Code. The fact that an appeal has been preferred by the accused cannot affect the exercise of those powers. It would make no difference even if the appeal preferred by the accused is technically heard before the final orders are passed in the confirmation case. Where both the confirmation case and the appeal arise from the same order of conviction, the uniform practice of the High Court has been to hear both the confirmation case and the appeal preferred by the accused together and to deal with the merits of the case on the basis that all material questions of fact and law can be agitated by the accused. This practice is fully justified by the provisions of the Code of Criminal Procedure, 1973.[11.]

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11. *Emperor v Narayan Ramchandra*, (1948) 50 Bom LR 151 : AIR 1948 Bom 244 .

The Code of Criminal Procedure, 1973

CHAPTER XXVIII SUBMISSION OF DEATH SENTENCES FOR CONFIRMATION

[s 369] Confirmation or new sentence to be signed by two Judges.—

In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

The Code of Criminal Procedure, 1973

CHAPTER XXVIII SUBMISSION OF DEATH SENTENCES FOR CONFIRMATION

[s 370] Procedure in case of difference of opinion.—

Where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case shall be decided in the manner provided by section 392.

Provision is made by section 392 for similar contingency in case of hearing of an appeal, and section 392 has been applied by section 401 to cases heard on revision.

The Code of Criminal Procedure, 1973

CHAPTER XXVIII SUBMISSION OF DEATH SENTENCES FOR CONFIRMATION

[s 371] Procedure in cases submitted to High Court for confirmation.—

In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court and attested with his official signature, to the Court of Session.

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 372] No appeal to lie unless otherwise provided.—

No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

[1] **[*Provided* that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.]**

[s 372.1] CrPC (Amendment) Act, 2008 [*Clause (29)*].—

This clause amends section 372 of the Code relating to appeals from judgment or order of a Criminal Court. It gives to the victim the right to prefer an appeal against any adverse order passed by the trial Court (*Notes on Clauses*).

COMMENT

The word "appeal" means the right of carrying a particular case from an inferior to a superior Court with a view to ascertain whether the judgment is sustainable. An appeal is a creature of statute and only exists where expressly given. This Chapter declares what sentences or orders are appealable. There are other provisions of the Code which also give the right of appeal, e.g., sections 86, 250, 351, 449, 454, 458(2), *etc*.

Generally, where the right of appeal is not exercised, no proceedings by way of revision can be entertained. The amendment to the provision of section 372 of CrPC was prompted by 154th Law Commission Report giving a right to appeal to the victim as defined under section 2(wa) of the Code. It confers a statutory right upon the victim to prefer an appeal before the High Court against acquittal order, or an order convicting the accused for the lesser offence or against the order imposing inadequate compensation.

A Full Bench of the High Court of Delhi[2] after examining the relevant provisions under section 2(wa) and proviso to section 372, in the light of their legislative history held that the right to prefer an appeal conferred upon the victim or relatives of the victim by virtue of proviso to section 372 is an independent statutory right. Therefore, it held that there is no need for the victim in terms of definition under section 2(wa) to seek the leave of the High Court as required under sub-section (3) of section 378 of CrPC to prefer an appeal under proviso to section 372 of CrPC.

The question arose for the consideration of the Supreme Court in *Satya Pal Singh v State of MP*,[3] that whether there is a need for the victim as under section 2(wa) to seek the leave of the High Court as required under sub-section (3) of section 378 of CrPC to prefer an appeal under proviso to section 372 of CrPC. Answering in the affirmative and overruling *Ram Phal v State*,[4] the Supreme Court held that the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim including the legal heir and others, as defined under

section 2(wa) of CrPC, under proviso to section 372, but only after obtaining the leave of the High Court as required under sub-section (3) to section 378 of CrPC.

[s 372.2] Provisions of the Indian Constitution in matters of criminal appeal.—

Article 132(1) provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Article 132(2) provides that where the High Court has refused to give such a certificate, the Supreme Court may, on being satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant special leave to appeal from such judgment, decree or final order.

Article 134(1) provides that an appeal shall lie to the Supreme Court from any judgment final order or sentence in a criminal proceeding of a High Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death, or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has on such trial convicted the accused person and sentenced him to death, or (c) certifies that the case is a fit one for appeal to the Supreme Court.

Article 136(1) provides that the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. Where the High Court convicted a person for recovery of prohibited drug from his house, under section 18(c) read with section 27 of the Drugs and Cosmetics Act, 1940, the Supreme Court reduced the sentence from one year to six weeks' imprisonment, but the fine imposed was maintained in the Special Leave Appeal.[5.] Article 136(2) provides that judgment, determination, sentence or order passed or made by any Court or tribunal relating to the Armed Forces is not affected by Article 136(1).

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1. Ins. by Act No. 5 of 2009, section 29 (w.e.f. 31-12-2009).
2. *Ram Phal v State*, 2015 SCC Online Del 9802 : (2015) 221 DLT 1 : 2015 Cr LJ 3220 .
3. *Satya Pal Singh v State of MP*, (2015) 15 SCC 613 : 2015 Cr LJ 4929 : 2015 (10) Scale 444 .
4. *Ram Phal v State, Supra*.
5. *Mugut Rao Digambar Ghorge v State of Maharashtra*, AIR 1994 SC 1442 : 1994 Cr LJ 2191 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 373] Appeal from orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour.—

Any person,—

(i) who has been ordered under section 117 to give security for keeping the peace or for good behaviour, or

(ii) who is aggrieved by any order refusing to accept or rejecting a surety under section 121,

may appeal against such order to the Court of Session:

***Provided* that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of subsection (2) or sub-section (4) of section 122.**

The section applies to appeals from (i) orders requiring security for keeping peace or good behaviour, and (ii) against order refusing to accept or rejecting a surety under section 121. The appeal lies to the Court of Session, except, of course, in cases where u/sub-s. (2) or sub-section (4) of section 122, the proceedings are already laid before the Sessions Judge.

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 374] Appeals from convictions.—

(1) Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court.

(2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years [6][has been passed against him or against any other person convicted at the same trial] may appeal to the High Court.

(3) Save as otherwise provided in sub-section (2), any person,—

(a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or

(b) sentenced under section 325, or

(c) in respect of whom an order has been made or a sentence has been passed under section 360 by any Magistrate,

may appeal to the Court of Session.

[7][**(4) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860), the appeal shall be disposed of within a period of six months from the date of filing of such appeal]**

[s 374.1] State Amendments

Punjab.— *The following amendments were made by Punjab Act 22 of 1983 (w.e.f. 27-6- 1983).*

S. 374.—In s. 374(3), for words "Magistrate of First Class" substitute the words "Executive Magistrate".

Union Territory of Chandigarh (Same as Punjab). S. 374.—Amendment of s. 374 as under—

S. 374(3) shall be so read as if for the words "Magistrate of the first class", the words "Executive Magistrate" were substituted.

[s 374.2] Legislative Changes.—

In section 374 of the Code of Criminal Procedure, a new sub-section (4) has been inserted. The newly inserted sub-section (4) provides that "when an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal".

COMMENT

This section lays down the forums for filing appeals by the accused against the order of conviction. Three different forums have been laid down in respect of the trials held by different Courts. (1) If a trial is held by High Court in its extraordinary original criminal jurisdiction, an appeal would lie to the Supreme Court and not to a Bench of Judges of the High Court. (2) If a trial is held by a Sessions Judge or an Additional Sessions Judge or by any other Court in which a sentence of imprisonment of more than seven years has been passed, an appeal would lie to the High Court. (3) If a trial is held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first or second class [except cases falling under sub-section (2)], or in cases falling under sections 325 and 360, an appeal will lie to the Court of Session.

Where several persons are convicted at a single trial by a Sessions Judge or by an Additional Sessions Judge, all persons or some of the convicted persons can file one joint appeal in the High Court, and it is not necessary for them to file separate appeals with separate petitions.[8.]

In dealing with appeals under this section from sentences of Court of Session, the High Court should give reasons for rejection of an appeal and if arguable and substantial points are raised, the High Court should not summarily reject the appeal.[9.]

A question may arise as to what will be the forum in the appeal in a case where a trial is held by an Assistant Sessions Judge or a Magistrate of the first or second class, and during the trial, the Presiding Judge or the Magistrate is invested with higher powers. Such a question arose in different High Courts and the same has been answered in the following manner: The Madras High Court has held that where a case is taken up for trial by a Magistrate of the second class and before judgment is pronounced, he is invested with first class powers, a conviction by him in the case would be a conviction only as a Magistrate of the first class.[10.] Similarly, the Bombay High Court has held that where a case is taken cognizance of by a Magistrate who has second class powers, but who is since invested with first class powers and a great part of the trial takes place before him after such investment, an appeal from the conviction by such Magistrate lies to the Court of Session.[11.] The Allahabad High Court has taken a different view. It has held that the trial of a case includes those stages of the proceedings of the case in which the parties thereto are entitled to take part. The "trial", therefore, extends to the recording of evidence and to the hearing of arguments. But so far as the act of the preparation and delivery of judgment is concerned, it is an act of the Judge and the Judge alone, and the parties can take no part in the same. Judgment is therefore no part of the trial and is outside the scope of a "trial" as contemplated by the Code. A trial was held by an Assistant Sessions Judge; after he had recorded the evidence in the Court and heard the arguments, but before writing and delivering his judgment, he was invested with the powers of an Additional Sessions Judge. It was held that an appeal from the conviction lay to the Sessions Judge and not to the High Court, as the accused had been convicted "on a trial held by" an Assistant Sessions Judge within the meaning of this section; the fact that he was an Additional Sessions Judge when he wrote and delivered judgment did not affect the question.[12.]

For deciding the appellate forum under section 374(2) of CrPC, the default sentence of imprisonment cannot be added to the substantive sentence of imprisonment.

Therefore, when an accused was sentenced to suffer RI for seven years and also to pay a fine and in default of payment, to suffer simple imprisonment for one month, the appeal filed against it could not be rejected by the Court of Session on the ground that the substantive sentence of imprisonment and the default sentence of imprisonment put together was more than seven years. Therefore, appeal would go to the High Court.[13.]

[s 374.3] Interference by High Court without independent appreciation of evidence.—

While hearing appeal against conviction, the High Court should not only scrutinize the judgment of the trial Court but should also re-appreciate the entire evidence independently, and after an independent examination of evidence, come to its own finding. Thus, where the High Court interfered with the order of conviction passed by the trial Court without examining the evidence meticulously, the Supreme Court held that the order of High Court was improper.[14.]

[s 374.4] Individual cases to be considered.—

In an appeal against conviction, the High Court should consider individual cases of the accused persons. In this case, the High Court considered the entire evidence, though not in detail. There was no infirmity in the judgment of the High Court. But the High Court had not considered the individual cases of the accused persons. The Supreme Court itself considered the individual cases instead of remitting the appeal.[15.]

[s 374.5] Re-appreciation of evidence.—Method of disposal of appeal against conviction.—

Re-appreciation of evidence by the appellate Court is essential.

It cannot proceed to dispose of the appeal upon appraisal of evidence by the trial Court alone, particularly when the appeal has been already admitted and placed for final hearing. Disposal of a criminal appeal in contravention of the procedure, if permitted, held, would amount to negation of valuable right of appeal of an accused. Since the High Court had disposed of the appeal without reappraising the evidence independently, the matter was remitted to it for disposal afresh.[16.]

The High Court being the final Court of fact should examine evidence critically. Holding that the prosecution has proved its case because the eyewitness consistently deposed against the accused was described to be not a correct approach for the first appellate Court. The holding was in the appeal against conviction.[17.]

[s 374.6] Acquittal of appealing accused, effect upon similarly situated non-appealing accused [*Article 136, Constitution*].—

One of the convicts preferred an appeal, but his co-accused did not do so. The case against both of them stood on the same footing. The appealing accused was

acquitted. As a corollary effect, the non-appealing accused also became acquitted in the exercise of the power under Article 136 of the Constitution.[18.]

[s 374.7] No advisory jurisdiction with High Court.—

The High Court does not have authorisation by and under the existing legal system to exercise any advisory jurisdiction. The Government has its agencies for its aid and advice. If the Government feels it expedient to obtain the advice from any of its agencies, it is for the Government to decide and not for the High Court to suggest. The State is otherwise capable of managing its own affairs in a manner conducive to the people at large, and the State itself has got its own law officer/officers to advise in its legal affairs. The methodology of filing an appeal lay with the State, and the High Court has no authority or jurisdiction to issue such a directive. A direction by the High Court for filing an appeal would be an excessive use of jurisdiction. It would also amount to exercise of advisory jurisdiction which the High Court does not possess and is unknown to law.[19.]

[s 374.8] Conviction by judge who was advocate of complainant before elevation.—

Where a criminal appeal was disposed of by a judge who as an advocate before his elevation had filed a revision for the complainant, the Supreme Court said that this could occasion failure of justice. The order convicting the accused for murder was set aside.[20.]

[s 374.9] Failure of counsel to appear.—

The failure of the counsel to appear was due to mistake by the Registry of the High Court in not showing the name of the counsel in the cause list properly and, therefore, the counsel remained unaware of the listing of the case before the Court. The disposal of the case on merits in the absence of the counsel was held to be improper. The Supreme Court directed the restoring of the appeal.[21.]

In the absence of the appellant or his counsel, the appellate Court was required to decide the appeal on merits. Dismissal of the appeal in default without considering the merits could not be sustained.[22.]

[s 374.10] Order of re-trial.—

A re-trial cannot be ordered without setting aside the judgment of the trial Court.[23.]

6. Subs. by Act No. 45 of 1978, section 28, for "has been passed" (w.e.f. 18-12-1978).

7. Ins. by Act No. 22 of 2018, section 20 (w.r.e.f. 21-4-2018).

8. *Lalu Jela v State of Gujara*, AIR 1962 Guj 125 FB; *Madan Bagdi v The State*, AIR 1967 Cal 528 .

9. *Dnyanu Hariba Mali v State of Maharashtra*, AIR 1970 SC 979 : 1970 Cr LJ 893 : (1970) 3 SCC 7 ; *Shivaji Narayan Bachhav v State of Maharashtra*, 1983 Cr LJ 1497 : AIR 1983 SC 1014 : (1983) 4 SCC 129 : 1983 (2) Scale 117 .

10. *Venkata Reddy v Ramayya*, (1927) 51 Mad 257.

11. *Emperor v Maganlal*, (1927) 29 Bom LR 482 : AIR 1927 Bom 366 ; *Emperor v Kisan Sakharam Patil*, 1943 45 Bom LR 74 : AIR 1943 Bom 94 .

12. *Bakshi Ram*, (1938) All 157 .

13. *MN Rao alias Nagaiah v State of Andhra Pradesh*, 1991 Cr LJ 549 (AP); *Niranjan Nayak v RK Mohapatra*, 1994 Cr LJ 3821 (Ori).

14. *State of Rajasthan v Chandgi Ram*, (2014) 14 SCC 596 : 2014 Cr LJ 4571 (SC).

15. *Amar Malla v State of Tripura*, (2002) 7 SCC 91 : 2002 SCC (Cri) 1608 .

16. *Rama v State of Rajasthan*, (2002) 4 SCC 571 : AIR 2002 SC 1814 : 2002 Cr LJ 2533 : JT 2002 (3) SC 566 : 2002 (3) Scale 355 .

17. *Badam Singh v State of MP*, AIR 2004 SC 26 : (2003) 12 SCC 792 : 2004 Cr LJ 22 .

18. *Anjlus Dungdung v State of Jharkhand*, AIR 2005 SC 1394 : (2005) 9 SCC 765 .

19. *Dwarka Dass v State of Haryana*, (2003) 1 SCC 204 : AIR 2003 SC 185 : 2003 Cr LJ 414 : JT 2002 (9) SC 292 : 2002 (8) Scale 396 . The Court **relied on** *Mohinder Singh v State of Punjab*, (1985) 1 SCC 342 : AIR 1985 SC 383 .

20. *Aqueela v State of UP*, AIR 1999 SC 1586 : (1998) 9 SCC 526 .

21. *G Raj Mallaiah v State of AP*, AIR 1998 SC 2315 : 1998 Cr LJ 3290 : (1998) 5 SCC 123 ; *Sethuhuri Veeraiah v PP*, *High Court of AP*, 2003 Cr LJ 2433 (AP), counsel of the accused could not appear because of the failure of the registry to print his name in the cause list. The Bench appointed another counsel on a Crown brief. Both sides were heard at length. A judgment reversing the acquittal was passed. The Court refused to interfere in the judgment.

22. *Mewa Lal v State of UP*, 2003 Cr LJ 675 (All).

23. *Avtar Singh v Bhajan Singh*, AIR 1998 SC 2910 : (1998) 2 SCC 750 ; *Panchhi v State of UP*, AIR 1998 SC 2726 : (1998) 7 SCC 177 , an application for intervention not permissible in the absence of an applicable provision under the Act.

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 375] No appeal in certain cases when accused pleads guilty.—

Notwithstanding anything contained in section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal,—

(a) if the conviction is by a High Court; or

(b) if the conviction is by a Court of Session, Metropolitan Magistrate or Magistrate of the first or second class, except as to the extent or legality of the sentence.

The plea of guilty is regarded as a waiver of the right to appeal except as to the severity or legality of the sentence.[24.] An accused person who pleads guilty before a Magistrate and is convicted can contend that his conviction is illegal.[25.] Plea of guilty, obtained by trickery, is not a plea of guilty, and the accused is entitled to satisfy the Court that there was in fact no plea of guilty.[26.] It has been held by the Supreme Court that enhancement of sentence given on the basis of plea bargaining by the trial Court by an appellate or revisional Court was violative of Article 21 of the Constitution. The proper course for appellate or revisional Court to adopt would be to set aside the conviction and sentence of the accused and remand him to the trial Court for fresh trial so that the accused could defend himself.[27.]

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24. *Jafar M Talab*, (1880) 5 Bom 85.

25. *Emperor v Chunilal*, (1926) 28 Bom LR 1023 .

26. *Prafulla Kumar Ray Chaudhuri v Emperor*, (1943) 1 Cal 540 ; *Gamdoor Singh v State of Punjab*, 1981 Cr LJ 1912 (P&H).

27. *Thippeswamy v State of Karnataka*, 1983 Cr LJ 1271 : AIR 1983 SC 747 : 1982 (2) Scale 1398 : (1983) 1 SCC 194 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 376] No appeal in petty cases.—

Notwithstanding anything contained in section 374, there shall be no appeal by a convicted person in any of the following cases, namely:—

(a) where a High Court passes only a sentence of imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees, or of both such imprisonment and fine;

(b) where a Court of Session or a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees, or of both such imprisonment and fine;

(c) where a Magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees; or

(d) where, in a case tried summarily, a Magistrate empowered to act under section 260 passes only a sentence of fine not exceeding two hundred rupees:

Provided **that an appeal may be brought against any such sentence if any other punishment is combined with it, but such sentence shall not be appealable merely on the ground—**

(i) that the person convicted is ordered to furnish security to keep the peace; or

(ii) that a direction for imprisonment in default of payment of fine is included in the sentence; or

(iii) that more than one sentence of fine is passed in the case, if the total amount of fine imposed does not exceed the amount hereinbefore specified in respect of the case.

This section specifies the cases in which there is no appeal.

[s 376.1] "A sentence of fine".—

The words "a sentence of fine" include the cases where the aggregate sentence does not exceed a fine of Rs 100. Where two sentences of fine are passed, it is the aggregate which is to be looked at for the purpose of determining the right of appeal.

[s 376.2] Concurrent sentences.—

For the purpose of appeal, concurrent sentences passed by the trying Magistrate on an accused must be taken in the aggregate.[28.]

The proviso is explanatory and lays down that the appeal may be brought against any sentence referred to in clauses (a), (b), (c) and (d) of this section, in which any other

punishment is combined. Section 31(3) also declares that for the purpose of appeal aggregate of consecutive sentences passed against the accused shall be deemed to be a single sentence.

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28. *Abdul Khalek v Emperor*, (1912) 17 Cal WN 72.

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 377] Appeal by the State Government against sentence.—

(1) Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present [29][an appeal against the sentence on the ground of its inadequacy—

(a) to the Court of Session, if the sentence is passed by the Magistrate; and

(b) to the High Court, if the sentence is passed by any other Court].

(2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [30][the Central Government may also direct] the Public Prosecutor to present [31][an appeal against the sentence on the ground of its inadequacy—

(a) to the Court of Session, if the sentence is passed by the Magistrate; and

(b) to the High Court, if the sentence is passed by any other Court].

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, [32][the Court of Session or, as the case may be, the High Court] shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence.

[33][(4) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.]

[s 377.1] CrPC (Amendment) Act, 2005 [*Clause (31)*].—

Section 377 is being amended so as to permit the filing of an appeal in the Court of Session instead of the High Court on the ground of inadequacy of sentence passed by a Magistrate. This amendment is intended not only to make it easier for the administration to prefer appeals against unduly lenient sentences by Magistrates but will also deter the latter from passing sentences that are grossly inadequate (*Notes on Clauses*).

[s 377.2] The Criminal Law (Amendment) Act, 2018.—

In section 377 of the Code of Criminal Procedure, a new sub-section (4) has been inserted. The newly inserted sub-section (4) provides that "when an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal".

COMMENT

This section empowers (i) the State Government and (ii) the Central Government in respect of cases investigated by the Delhi Special Police Establishment or any other Agency under a Central Act (other than this Code), e.g., Railway Protection Force Act, to file appeal through their respective Public Prosecutors to the High Court against the sentence imposed on the ground of inadequacy of such sentence. As the law stood before the present Code came into force, the position was that any error in sentencing an accused could be remedied only by the exercise of revisional powers of the High Court. This provision appeared to be rather unsatisfactory to the Law Commission as large numbers of cases of inadequate sentences were occurring. It was, therefore, thought proper to empower the Government to file appeals to High Court against the sentence on the ground of its inadequacy to maintain certain uniform standards in the matter of inflicting adequate and proper sentence.[34.]

The prosecution can only urge the inadequacy of sentence. It cannot ask for conviction for a different offence with higher punishment.[35.] Section 377 did not preclude interested private party from invoking the revisional jurisdiction for the enhancement of a sentence.[36.] Not only the Central Government but the State Government also is empowered by sub-section (1) of this section to prefer an appeal against inadequate sentence.[37.]

[s 377.3] Appeal against inadequacy of sentence [*Sub-section (3)*].—

The accused should be given reasonable opportunity of showing cause against enhancement, and whilst showing cause, he has also the right to challenge the conviction itself and plead for his acquittal or for reduction of the sentence.[38.]

Where no notice of the enhanced sentence was given to the accused, the enhanced sentence was liable to be set aside.[39.]

Sub-section (3) applies when an appeal is filed before the High Court by the State on the ground of inadequacy of sentence. It does not apply when such appeal is filed before the Supreme Court under Article 136 of the Constitution.[40.]

When there was no representation on behalf of the accused despite personal service effected on him, the High Court was justified in appointing a lawyer as *amicus curiae* to safeguard his interest and to assist the Court as well. The *amicus curiae* had never made any complaint in the High Court for not giving him more time for preparation of the case. Even in appeal before the Supreme Court, *amicus curiae* did not file any affidavit to this effect. There was held to be due compliance with the requirements of section 377(3) of the Code.[41.]

[s 377.4] Appeal by unauthorised person converted into revision.—

In an appeal against sentence, where the appeal was not filed by State, but at the instance of an injured person, it was held by the Supreme Court that the principles analogous to section 377(3) are applicable and the power under Article 136 is of wide amplitude. Thus, it was held that while entertaining an appeal under Article 136 at the instance of an injured, the Supreme Court can impose adequate sentence when the facts and circumstances so warrant.[42.]

Only the Public Prosecutor can file an appeal against inadequacy of sentence. The complainant has no *locus standi* for the purpose.[43.]

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29. Subs. by the CrPC (Amendment) Act, 2005, section 31 for "an appeal to the High Court against the sentence on the ground of its inadequacy" (w.e.f. 23-6-2006 *vide* Notification No. SO 923(E), dated 21-6-2006).

30. Subs. by Act 45 of 1978, section 29, for "the Central Government may direct" (w.e.f. 18-12-1978).

31. Subs. by Act 25 of 2005, section 31(a), for "an appeal to the High Court against the sentence on the ground of its inadequacy" (w.e.f. 23-6-2006).

32. Subs. by the CrPC (Amendment) Act, 2005, section 31 for "the High Court" (w.e.f. 23-6-2006 *vide* Notification. No. SO 923(E), dated 21-6-2006).

33. Ins. by Act 22 of 2018, section 21 (w.r.e.f. 21-4-2018).

34. *State of Karnataka v Krishna*, 1987 Cr LJ 776 : AIR 1987 SC 861 .

35. *Eknath Shankarrao Mukkawar v State of Maharashtra*, 1977 Cr LJ 964 : AIR 1977 SC 1177 : (1977) 3 SCC 25 .

36. *Food Inspector, Mangalore Municipality v KS. Rajhal*, 1981 Cr LJ 1149 .

37. *State of Maharashtra v Mahipati*, AIR 1977 SC 1200 : 1977 Cr LJ 968 : (1977) 4 SCC 598 .

38. *State v P Manohara*, 2003 Cr LJ 1002 (Kant), the accused was convicted and sentenced by reason of plea bargaining, enhancement of the sentence by the appellate Court acting on plea of guilty without evidence was not reasonable.

39. *Surjit Singh v State of Punjab*, AIR 1984 SC 1910 (2) : 1985 Cr LJ 358 : (1984) Supp SCC 518 : 1984 (2) Scale 368 .

40. *State of UP v Dharmendra Singh*, AIR 1999 SC 3789 at 3791-92 : 2001 Cr LJ 5 : (1999) 8 SCC 325 ; *Chandrakant Patil v State*, AIR 1998 SC 1165 : 1998 Cr LJ 1613 : (1998) 3 SCC 338 , TADA (now repealed) convict was not allowed any further opportunity under section 19 of TADA after confirmation by the Supreme Court.

41. *Bharatkumar Rameshchandra Barot v State of Gujarat*, AIR 2018 SC 1598 : 2018 (5) Scale 35 : LNIND 2018 SC 112 .

42. *Sumer Singh v Surajbhan Singh*, AIR 2014 SC 2840 : (2014) 7 SCC 323 : 2014 Cr LJ 3246 (SC).

43. *Assistant Collector of Central Excise v V Krishnamoorthy*, AIR 1997 SC 1904 : 1997 Cr LJ 1930 : (1997) 3 SCC 100 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 378] Appeal in case of acquittal.—

[44][(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),—

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act, other than this Code, [45][the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal—

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision].

(3) [46][No appeal to the High Court] under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

[s 378.1] CrPC (Amendment) Act, 2005 [*Clause (32)*].—

In order to guard against the arbitrary exercise of power and to reduce reckless acquittals, section 378 is being amended to provide that an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence filed on a police report would lie to the Court of Session, and the District Magistrate will be authorised to direct the Public Prosecutor to file such appeals. In respect of all other cases filed on a police report, an appeal against an order of acquittal passed by any Court other than the High Court should lie only to the High Court, and the authority to direct the Public Prosecutor to present an appeal shall continue to be with the State Government (*Notes on Clauses*).

COMMENT

The law restricting the right of appeal against a judgment of acquittal prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal. The Government will interfere only where there is a grave miscarriage of justice.[47.]

In *Murlidhar v State of Karnataka*,[48.] the Supreme Court enumerated a list of 27 of its previous decisions from which the Court has culled out the principles relating to appeals from a judgment of acquittal. The Supreme Court has consistently held that in dealing with appeals against acquittal, the Appellate Court must bear in mind the following:

> (i) There is presumption of innocence in favor of an accused person and such presumption is strengthened by the order of acquittal passed in his favor by the trial Court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally loath in disturbing the finding of facts recorded by the trial Court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate Court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial Court is a possible view. The evenly balanced views of the evidence must not result in interference by the Appellate Court in the judgment of the trial Court.

[s 378.2] Scope of power [*Sub-section (1)*].—

The Privy Council had held that in an appeal from acquittal, the High Court has full power to review the entire evidence upon which the order of acquittal was founded and then to come to its own conclusion. No limitation can be placed on that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusion upon facts, the High Court should and will always give proper weight and consideration to such matters as (1) the view of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.[49.] The Supreme Court in *Sanwat Singh's* case affirmed these principles.[50.] In actual application, keeping in consideration these four matters must mean that the High Court should find such reasons which may be

termed compelling and substantial reasons or which may be deemed to be clinching and conclusive before it would be justified in upsetting an order of acquittal. It would not be so justified merely because it, after considering the criterion of the Sessions Judge and his views, feels that a different view should be taken[51.] for reasons which are not so strong as to be classed into substantial or compelling reasons, which seems to be at par with such reasons against which practically nothing can possibly be said.[52.]

In an appeal against acquittal, the appellate court has every power to re-appreciate the evidence and come to its own conclusion. However, it has to keep in mind that the presumption of innocence available to the accused has been reinforced by his acquittal. Moreover, the legislative intent behind conferring special status to appeal against order of the High Court altering acquittal should also be kept in mind.[53.] Thus, where the appreciation of evidence by the Trial Court is capricious or its conclusions are without evidence that the High Court may reverse an order of acquittal. The High Court, however, must be satisfied that the incident cannot be explained except on the basis of the guilt of the accused and is inconsistent with their innocence.[54.]

The Supreme Court has held that unless the judgment of acquittal is contrary to evidence and palpably erroneous, the court shall be reluctant to interfere with acquittal.[55.]

Only because other view is possible, judgment of acquittal should not be interfered with. Thus, in a case of rape of a child by a constable, the prosecution case was not supported either by the parents of the child or by medical evidence or by the child witness who allegedly saw the occurrence. It was held by the Supreme Court that the order of acquittal cannot be said to be perverse. As such, interference with acquittal was unjustified.[56.]

The Supreme Court has held that in an appeal under this section, the High Court has full power to review the evidence upon which the order of acquittal was founded and come to its own conclusion. The different terms like "substantial and compelling reasons","good and sufficiently cogent reasons" and "strong reasons" are not intended to curtail or place any limitation on the undoubted power of an appellate Court in an appeal against the acquittal to review the entire evidence and to come to its own conclusion.[57.] State Government cannot maintain an appeal under section 378(1) and (2) where special leave to appeal has been refused by the High Court to a complainant.[58.] An order was passed by a Special Judge, CBI, acquitting accused persons. The Court said that in view of the exceptional clause in section 378(1), the State Government is not competent to direct its Public Prosecutor to file appeal against it.[59.]

In an appeal against acquittal under this section, the appellate Court cannot hear the appeal against acquittal unless respondents are served with notice under section 385 of the Code, and where a respondent is absconding and cannot be served, this is no ground for hearing the appeal in his absence. The proper procedure to be followed in such cases is to separate the appeal so far as the absconding respondents are concerned, and keep the appeal pending so long as they are not served and to hear and decide the appeal concerning the respondents who are served.[60.] An order of acquittal cannot be passed before exhausting all the processes to secure the attendance of all the witnesses.[61.]

[s 378.3] Inadvertent mistake in legislation.—

The reference in section 378(1) to sub-section (5) is clearly an inadvertent mistake. Sub-section (5) applies only to applications for special leave by a complainant. It has no application to an appeal by the State Government or to an application for leave under sub-section (3). What the legislature clearly intended was to continue to provide that an appeal by the State Government would not be maintainable if special leave to appeal had been refused to a complainant. Thus, sub-section (1) of section 378 was to be subject to the provisions of sub-section (6) and not sub-section (5) as inadvertently provided therein. Inadvertently, the figure (5) in section 417(1) was continued, without noticing that now under section 378 the relevant provision was sub-section (6). The figure (5) in section 378(1) is inadvertently retained. Thus, in section 378(1), the figure (6) will have to be read in place of the figure (5).[62.]

[s 378.4] Alteration of conviction.—

In a case, the State filed appeal only against part of the judgment convicting other accused persons for lesser offence and acquitting one accused, but no appeal filed against the alternation of conviction of the main accused from the offence under section 302 to one under section 304, Pt I. Thus, it was held by the Supreme Court that as no appeal was filed by the state against the alternation of conviction, the State cannot challenge that the said accused should have been convicted under section 302 IPC.[63.]

[s 378.5] Hearing in absence of counsel.—

The appeal against acquittal was heard in the absence of the counsel of accused. The non-appearance of the counsel was due to a mistake in the cause list. The Court set aside the order reversing acquittal. The matter was remitted to the High Court for fresh consideration.[64.]

[s 378.6] Who can file, "Public Prosecutor".—

The Public Prosecutor only can file an appeal under this section. The Legal Remembrancer is not a Public Prosecutor within the meaning of this section.[65.] Appeal under section 378 must be presented by the Public Prosecutor. That provision is mandatory, and section 382 does not override section 378.[66.] An appeal against acquittal can be filed by the Special Public Prosecutor because under section 378(1) the Special Public Prosecutor also is Public Prosecutor.[67.] The Public Prosecutor has to be associated in an appeal from an order of acquittal under section 378(1). The State Government may direct its Public Prosecutor to file an appeal from an order of acquittal under section 378(2). The Central Government may direct its Public Prosecutor to file appeal from order of acquittal.[68.]

The State's power to file an appeal is not restricted by the course which the complainant (the Food Inspector in this case) may or may not choose to take. Once the requirements that the State Government should direct the Public Prosecutor to file the appeal and obtain leave of the High Court were fulfilled, the appeal could be maintained by the State.[69.] In a case under the Drugs and Cosmetics Act, 1940 (23 of 1940), the accused contended that he entered into understanding with the Government that cases filed against him by the Drugs Administration Authorities would be withdrawn if he agreed to surrender his license, it was held that the doctrine of "Issue Estoppel" does

not apply to criminal cases and set aside the acquittal. The Court also said that since the prosecution was at the instance of a public authority, the appeal filed by Public Prosecutor was validly and correctly instituted.[70.]

Appeal under section 378 is maintainable only against the order of acquittal, and not against an order of discharge.[71.] Where re-trial is impractical due to inordinate delay, re-trial should not be ordered even though acquittal is improper according to the High Court.[72.] However, the High Court cannot, while granting leave to appeal before itself, order the issue of a notice to the accused to show cause why he should not be sent up for trial. Such an order of the High Court would be without jurisdiction.[73.]

[s 378.7] Appeal to be entertained with leave of High Court [*Sub-section (3)*].—

The subsection puts a restriction on entertainment of appeals by imposing a condition that leave of the High Court should first be obtained before any such appeal is entertained. In the first instance, therefore, a proper application praying for leave to appeal is to be made; and only on such leave being granted further steps in the prosecution of the appeal be taken.

[s 378.8] Issuance of notice for hearing accused.—

In an application by the complainant for special leave to appeal, the Court considered it necessary to hear the accused before granting leave. The Court accordingly directed issuance of notice. The notice could not be served because of the failure of the complainant to take necessary steps. An order was passed granting leave *ex parte* without hearing the accused. This was held to be not proper. Once having directed issuance of notice, the Court ought not to have granted leave *ex parte*.[74.]

A State appeal filed within ninety days from the date of the order of acquittal was within time as limitation was governed not by the latter part of clause (5) of section 378 but by Article 114 of the Limitation Act.[75.]

[s 378.9] "Entertained".—

The word "entertained" in this section means an application filed before or received by the Court, and it does not have any reference to actual hearing of application for special leave to appeal.[76.]

[s 378.10] Appeal in complaint case with special leave [*Sub-section (4)*].—

Under this clause, a private party can challenge an acquittal by way of appeal to the High Court after obtaining special leave to appeal, and when such a party does not take requisite steps for filing an appeal, no proceedings by way of revision can be entertained by the High Court at the instance of that party under section 401.[77.] It is not necessary as a matter of law that an application for leave to entertain the appeal should be lodged first and only after the grant of leave by the High Court, an appeal may be preferred against the order of acquittal. The appeal must be preferred within

ninety days from the date of the order of acquittal and a prayer for leave may be included in that appeal itself.[78.]

Under section 417 of the Criminal Procedure Code, 1898, no application for special leave to appeal had to be made by the State Government or the Central Government, if they filed an appeal against acquittal. The right of the State Government to file an appeal under section 417(1) was subject to sub-section (5) which provided that if special leave to appeal had been refused to a complainant, then the State Government could not maintain an appeal. A comparison of section 378 with the old section 417 shows that whilst under the old section no application for leave to appeal had to be made by the State Government or the Central Government, now by virtue of section 378(3), the State Government or the Central Government has to obtain leave of the High Court before the appeal could be entertained. Section 378(4) is identical to sub-section (3) of section 417. Thus, a complainant desirous of filing an appeal against acquittal must still obtain special leave. Section 378 makes a distinction between an appeal filed by the State Government or the Central Government, who only need to obtain "leave", and an appeal by a complainant who needs to obtain "special leave".[79.]

[s 378.11] "Complaint".—

The word "complaint" has a wider meaning since it includes even an oral allegation. Though it may possibly be argued that no form is prescribed which the complaint must take, yet there must be an allegation which *prima facie* discloses a commission of an offence with the necessary facts for the Magistrate to take action.[80.]

"Any case instituted upon complaint" in this clause means only those cases where not only the complainant comes to Court with a petition of complaint but the Magistrate takes cognizance of the offence or offences alleged on the basis of that complaint.[81.] Hence, when the Magistrate had taken cognizance on police report and not on the complaint, the complainant was held to have no right to file appeal against acquittal.[82.]

Sub-section (5) of this section is a "special law" of limitation, governing appeals by private prosecutors and, in view of section 29(2) of the Limitation Act, 1908, now replaced by Limitation Act, 1963 (36 of 1963), precludes the application of section 5 of the Limitation Act, 1908, to applications under sub-section (4).[83.] The above Full Bench view of the Bombay High Court is approved by the Supreme Court in *Kaushalya Rani v Gopal Singh*.[84.] See also Chapter XXXVI.

[s 378.12] Notice to accused.—

When the High Court allowed an appeal against acquittal without notice to the accused, it was held that on the ground of want of notice alone, the appeal before the High Court was liable to be restored to its file for fresh disposal after notice to the accused.[85.]

[s 378.13] Period of limitation for filing appeal [*Sub-section (5)*].—

The limitation provided in sub-section (5) is only in respect of applications under sub-section (4), i.e., application for special leave to appeal by a complainant. A complainant may be either a public servant or a private party. If the complainant is a public servant,

the period of limitation for an application for special leave is 6 months. If the complainant is a private party, the period of limitation for an application for special leave is 60 days. The periods of 6 months and/or 60 days do not apply to appeals by the State Government under sub-section (1) or the Central Government under sub-section. (2). Appeals by the State Government or the Central Government continue to be governed by Article 114(a) of the Limitation Act. In other words, those appeals must be filed within 90 days from the date of the order appealed from. If there is a delay in filing an appeal by the State Government or Central Government, it would be open to them to file an application under section 5 of the Limitation Act for condonation of such delay. That period can be extended if the Court is satisfied that there was sufficient cause for not preferring the appeal within the period of 90 days.[86.]

Where some of the accused persons were convicted and others acquitted by the trial judge and the convicted accused filed an appeal before the High Court, it was held that the High Court could not, while exercising its appellate jurisdiction under section 374(2), direct the State Government to file an appeal against the accused who were acquitted by the trial Court particularly when the period of limitation for filing appeal had already expired. It is a matter which is wholly within the powers of the Government to decide.[87.]

Section 378(5) applies only to an application for special leave to be filed by complainants, who may be a public servant or a private party but not to appeals by the state or Central Government.[88.]

Dismissal of appeal even on the ground of limitation is a dismissal for all purposes.[89.]

[s 378.14] Appeal against maintenance order.—

It was not permissible for the revisional Court to order that the order of maintenance under section 125 was applicable from the date of the order without considering the correctness, legality or propriety of the reasons recorded by the Magistrate for awarding maintenance from the date of the application.[90.]

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44. Subs. by Act 25 of 2005, section 32(i), for sub-section (1) (w.e.f. 23-6-2006). Earlier sub-section (1) was amended by Act 45 of 1978, section 30 (w.e.f. 18-12-1978).

45. Subs. by Act 25 of 2005, section 32(ii), for "the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal" (w.e.f. 23-6-2006).

46. Subs. by Act 25 of 2005, section 32(iii), for "No appeal" (w.e.f. 23-6-2006).

47. *Deputy Legal Remembrancer v Karuna Baistobi*, (1894) ILR 22 Cal 164.

48. *Murlidhar v State of Karnataka*, AIR 2014 SC 2200 : (2014) 5 SCC 730 .

49. *Sheo Swarup v King-Emperor*, AIR 1934 PC 227 ; *Noorkhan v State of Rajasthan*, AIR 1964 SC 286 : (1964) 1 Cr LJ 167 ; *Dappili Vema Reddi v State of Andhra Pradesh*, AIR 1973 SC 153 : 1973 Cr LJ 223 : (1973) 3 SCC 89 ; *Lekha Yadav v State of Bihar*, AIR 1973 SC 2241 : 1973 Cr LJ 1421 : (1973) 2 SCC 424 ; *Bishan Singh v State of Punjab*, AIR 1973 SC 2443 : 1973 Cr LJ 1596 : (1974)

3 SCC 288 ; *Roop Singh v State of Punjab*, AIR 1973 SC 2617 : 1973 Cr LJ 1778 : (1974) 3 SCC 307 ; *Mohandas Lalwani v State of Madhya Pradesh*, AIR 1973 SC 2679 : 1973 Cr LJ 1812 : (1974) 3 SCC 361 ; *Dargahi v State of UP*, AIR 1973 SC 2695 : 1973 Cr LJ 1828 : (1974) 3 SCC 302 ; *Sita Ram Durga Prasad v State of Madhya Pradesh*, AIR 1975 SC 77 : 1975 Cr LJ 37 : (1974) 3 SCC 361 ; *Ram Anjore v State of Uttar Pradesh*, AIR 1975 SC 185 : 1975 Cr LJ 249 : (1975) 3 SCC 379 ; *Mehtab Singh v State of Madhya Pradesh*, AIR 1975 SC 274 : 1975 Cr LJ 290 : (1975) 3 SCC 407 , where it is pointed out that these are self-imposed limitations on a power otherwise plenary and serve as valuable guidelines.

50. *Sanwat Singh v State of Rajasthan* AIR 1961 SC 715 : (1961) 1 Cr LJ 766 ; *Bhagwanbhai Dulabhai Jadhav v State of Maharashtra*, (1963) 2 Cr LJ 694 : (1963) 3 SCR 386 (SC). Powers of the Appellate Court restated in *Dhanna v State of MP*, AIR 1996 SC 2478 : 1996 Cr LJ 3516 : (1996) 10 SCC 79 ; *Jagan M Sheshadri v State of TN*, AIR 2002 SC 399 : 2002 Cr LJ 2982 , while dealing with an appeal against acquittal the appellate Court, ought to have dealt with the grounds on which the acquittal was based and dispelled those grounds before reversing the order of acquittal, if reappreciation shows defects in evidence, the appellate Court ought not to have set aside the order of acquittal even if a view other than that taken by the trial Court was possible. Similar statements as to the points to be kept in mind occur in *State of Rajasthan v Kesa*, 2002 Cr LJ 432 (Raj). *Rama v State of Rajasthan*, 2002 Cr LJ 2533 : (2002) 4 SCC 571 , the power of reappraisal of evidence is also a duty. The High Court cannot simply say that there was no error apparent on the face of the record.

51. *Babu v State of Uttar Pradesh*, AIR 1983 SC 308 : (1983) 2 SCC 21 : 1983 Cr LJ 334 ; *Harijan Megha v State of Gujarat*, AIR 1979 SC 1566 : 1979 Cr LJ 1137 : (1979) 3 SCC 474 .

52. *Ram Autar Chaudhry*, (1955) 2 All 97 ; *Khedu Mohton v State of Bihar*, AIR 1971 SC 66 : 1971 Cr LJ 20 : (1970) 2 SCC 450 .

53. *Murugesan v State through Inspector of Police*, AIR 2013 SC 274 : (2012) 10 SCC 383 ; **Also see** *Mookkiah v State*, AIR 2013 SC 321 : (2013) 2 SCC 89 .

54. *Munishamappa v State of Karnataka*, AIR 2019 SC 2710 *; Sampat Babso Kale v State of Maharashtra*, AIR 2019 SC 1852 : 2019 (2) MLJ (Crl) 702 : LNIND 2019 SC 333 .

55. *State of Rajasthan v Shera Ram*, AIR 2012 SC 1 : (2012) 1 SCC 602 : (2012) 1 SCC (Cri) 406 .

56. *K Venkateshwarlu v State of Andhra Pradesh*, AIR 2012 SC 2955 : (2012) 8 SCC 73 .

57. *Ram Kumar v State of Haryana*, AIR 1995 SC 280 : 1994 Cr LJ 3836 : (1995) Supp SCC 1 248; *Subash Chander v Krishan Lal*, AIR 2001 SC 1903 : 2001 Cr LJ 1825 : (2001) 4 SCC 458 , it appeared that four of the accused were impleaded only to mislead the Court, and to provide protection to real culprits, two of them were acquitted by the trial and two others by the High Court. No interference. *Haripada Das v State of WB*, AIR 1999 SC 1482 : (1998) 9 SCC 678 , irregularities in taking samples under the prevention of Food Adulteration Act, 1954, interference in acquittal on the grand that the shopkeeper had not protested against irregularities was held to be not proper.

58. *State (Delhi Admn) v Dharampal*, (2001) 10 SCC 372 : AIR 2001 SC 2924 .

59. *Lalu Prasad Yadav v State of Bihar*, AIR 2010 SC 1561 : (2010) 5 SCC 1 : 2010 Cr LJ 2427 .

60. *State v Vishwanath*, (1954) ILR Nag 159.

61. *CN Dey v State of West Bengal*, 1989 Cr LJ 467 (Cal).

62. *State (Delhi Admn) v Dharampal*, (2001) 10 SCC 372 : AIR 2001 SC 2924 .

63. *Gopal v State of Madhya Pradesh*, AIR 2011 SC 2325 : (2011) 6 SCC 354 : (2011) 2 SCC (Cri) 961 .

64. *Netraj Singh v State of MP*, AIR 2008 SC 14 : (2007) 12 SCC 520 .

65. *Deputy Legal Remembrancer, Bengal v Gaya Prasad*, (1913) 41 Cal 425 .

66. *Almeida J M (D.)*, 1980 Cr LJ 145 (Goa).

67. *PV Antony v State of Kerala*, 1989 Cr LJ 2482 (Ker).
68. *Lalu Prasad Yadav v State of Bihar*, AIR 2010 SC 1561 : (2010) 5 SCC 1 : 2010 Cr LJ 2427 .
69. *State of Maharashtra v Kishore Chawade*, 1990 Cr LJ 1556 (Bom).
70. *State of Maharashtra v Jethmal Himatmal Jain*, 1994 Cr LJ 2613 (Bom).
71. *Alim v Taufiq*, 1982 Cr LJ 1264 (All).
72. *S Guin v Grindlays Bank Ltd*, 1986 Cr LJ 255 : AIR 1986 SC 289 : (1986) 1 SCC 654 : 1985 (2) Scale 1264 .
73. *Dr RV Murthy v State of Karnataka*, AIR 1982 SC 677 : (1981) 4 SCC 157 : 1982 Cr LJ 423 ; *Ramlal v State of Rajasthan*, 2000 Cr LJ 4783 : AIR 2001 SC 47 : (2001) 1 SCC 175 , food adulteration case, accused of 19 years, on ordering conviction, sentence reduced to the statutory minimum.
74. *JJ Merchant v SN Chaturvedi*, AIR 2005 SC 490 : (2005) 1 SCC 587 .
75. *State of Maharashtra v Deepchand Jain*, 1983 Cr LJ 561 (Bom).
76. *Lala Ram v Hari Ram*, AIR 1970 SC 1093 : 1970 Cr LJ 1014 : (1969) 3 SCC 173 : (1969) 3 SCC 173 .
77. *State of Bombay v NG Tayawade*, (1958) 60 Bom LR 1339 : AIR 1959 Bom 94 : 1959 Cr LJ 170 ; *Dharamaji v Vithoba Khade*, 1992 Cr LJ 870 (Bom).
78. *State of Rajasthan v Ramdeen*, AIR 1977 SC 1328 : 1977 Cr LJ 997 : (1977) 2 SCC 630 .
79. *State (Delhi Admn) v Dharampal*, (2001) 10 SCC 372 : AIR 2001 SC 2924 .
80. *Bhimappa v Laxman*, AIR 1970 SC 1153 : 1970 Cr LJ 1132 : (1970) 1 SCC 665 .
81. *Osman Gani v Baramdeo Singh*, (1959) ILR 2 Cal 13 : AIR 1959 Cal 145 : 1959 Cr LJ 311 .
82. *Ahmad Kutty v Johnson*, 1989 Cr LJ 2462 (Ker).
83. *Anjanabai v Yeshvantrao*, (1960) 63 Bom LR 98 : (1961) Bom 135 (FB).
84. *Kaushalya Rani v Gopal Singh*, AIR 1964 SC 260 : (1964) 1 Cr LJ 152 ; **See** also *Asst Registrar of Cos v Standard Paint Works Pvt Ltd*, AIR 1971 SC 1115 .
85. *P Ramchandra Rao v State of Karnataka*, (2002) 4 SCC 607 : 2002 Cr LJ 2547 .
86. *State (Delhi Admn) v Dharampal*, (2001) 10 SCC 372 : AIR 2001 SC 2924 .
87. *Dawarka Das v State of Haryana*, (2003) 1 SCC 204 : AIR 2003 SC 185 : 2003 Cr LJ 414 : JT 2002 (9) SC 292 : 2002 (8) Scale 396 .
88. *State (Delhi Admn) v Dharampal*, (2000) 10 SCC 372 : AIR 2001 SC 2924 .
89. *Bindeshwari Prasad Singh v State of Bihar*, 2002 Cr LJ 3788 : AIR 2002 SC 2907 : (2002) 6 SCC 650 .
90. *Kismati Bai v Ganapati Vanaspati*, 2002 Cr LJ 2164 (MP).

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 379] Appeal against conviction by High Court in certain cases.—

Where the High Court has, on appeal, reversed an order of acquittal of an accused person and convicted him and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more, he may appeal to the Supreme Court.

This is a new provision which gives right to an accused person in certain cases to file an appeal to the Supreme Court. An appeal would lie to the Supreme Court as a matter of right when High Court has, on appeal, (1) reversed an order of acquittal of an accused person and (2) convicted and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more. In other cases, appeal can be filed, if the High Court certifies that the case is a fit one for appeal to the Supreme Court.[91.]

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91. *Chandra Mohan Tiwari v State of Madhya Pradesh*, AIR 1992 SC 891 : 1992 Cr LJ 1091 . *Sumerchand Jain v State of Gujarat*, AIR 2000 Guj 72 , suspension of sentence or release of accused on personal bond makes no difference and disqualifying effect will be there. It continues so long as it is not set aside.

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 380] Special right of appeal in certain cases.—

Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

An accused person whose sentence is unappealable has a right of appeal under this section if his co-accused has been given an appealable sentence.[92.] But where a co-accused was directed to be released on executing a bond under section 360, from which an appeal lay, it was held that the accused who was sentenced to six months' imprisonment by a Metropolitan Magistrate had no right of appeal by virtue of section 374.[93.]

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92. *Akabbai Ali*, (1931) 59 Cal 19 .

93. *Kali Kumar Mitra v Emperor*, (1937) 1 Cal 123 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 381] Appeal to Court of Session how heard.—

(1) Subject to the provisions of sub-section (2), an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

Provided **that an appeal against a conviction on a trial held by a Magistrate of the second class may be heard and disposed of by an Assistant Sessions Judge or a Chief Judicial Magistrate.**

(2) An Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate shall hear only such appeals as the Sessions Judge of the division may, by general or special order, make over to him or as the High Court may, by special order, direct him to hear.

This section provides for hearing of appeals in Courts of Session. While sub-section (1) provides that an appeal to the Court of Session or Sessions Judge should be heard by the Sessions Judge himself or an Additional Sessions Judge, sub-section (2) restricts the jurisdiction of the Additional Sessions Judge, Assistant Judge or a Chief Judicial Magistrate to hear only such appeals as the Sessions Judge may by general or special order make over to him or as the High Court by special order direct him to hear. Sub-section (2) is clearly a provision restricting jurisdiction conferred on Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate. It is not a mere procedural provision for evading appeals to be heard by them and for distribution of work between them and the Sessions Judge.[94.] If a trial is held by a second class Magistrate, the Assistant Sessions Judge or the Chief Judicial Magistrate may hear an appeal against the order of conviction passed by him.

94. *Narayanamma v Satyanarayana*, AIR 1960 AP 425 : 1960 Cr LJ 1070 ; *Pompati Pasupulati Nanjappa*, AIR 1961 AP 471 (FB) : 1961 Cr LJ 611 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 382] Petition of appeal.—

Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against.

[s 382.1] State Amendment

Andaman and Nicobar Islands and Lakshadweep Islands (U.T.).— *The following amendments were made by Regulation 1 of 1974, section 4(c), (d) (w.e.f. 30-3-1974).*

S 382.—In its application to the Union Territories of Andaman and Nicobar Islands and Lakshadweep Islands—

(*i*) S 382 is renumbered as sub-section (1) thereof, and to sub-section (1) so renumbered, the following provisos and *Explanation* be added —

"*Provided* that, where it is not practicable to file the petition of appeal to the proper Appellate Court, the petition of appeal may be presented to the Administrator or to an Executive Magistrate, not below the rank of a Sub-Divisional Magistrate, who shall forward the same to the proper Appellate Court; and when any such appeal is presented to the Administrator or to an Executive Magistrate, he shall record thereon the date of its presentation and, if he is satisfied that by reason of the weather, transport or other difficulties, it is not possible for the appellant to obtain, from the proper Appellate Court, orders for the suspension of sentence or for bail, he may, in respect of such appeal, or an appeal forwarded to him u/s. 383, exercise all or any of the powers of the proper Appellate Court under sub-section (1) of section 389 with regard to suspension of sentence or release of a convicted person on bail:

Provided further that the order so made by the Administrator or the Executive Magistrate shall have effect until it is reversed or modified by the proper Appellate Court.

Explanation.—For the purposes of the proviso to this section, and section 383, "Administrator", in relation to a Union Territory, means the Administrator appointed by the President under Article 239 of the Constitution for that Union Territory."

(ii) After sub-section (1) so re-numbered, insert the following:—

"(2) For the purposes of computation of the period of limitation, and for all other purposes, an appeal presented to an Administrator or an Executive Magistrate under sub-section (1) or as the case may be under section 383, shall be deemed to be an appeal presented to the proper Appellate Court".

This section prescribes the form of a petition of appeal, which corresponds with the complaint in the original proceeding, and gives jurisdiction to the appellate Court.

A memorandum of appeal is meant to be a succinct statement of the grounds upon which the appellant proposes to support the appeal. The practice prevailing in the Allahabad High Court of not taking specific grounds either of law or fact is to be disapproved even assuming that this section does not in terms require the setting out of such grounds.[95.]

Where several accused persons jointly tried are acquitted by the trial Court, the State can prefer one appeal against the acquittal of them all.[96.]

[s 382.2] "Presented by the appellant or his pleader".—

See section 383. The petition is to be delivered to the proper officer of the Court either by the appellant or his pleader. Presentation of the petition by a clerk of the pleader is equivalent to a presentation by the pleader himself when it is signed by him, and he is duly authorised.[97.] A petition is not duly presented when, having been signed by the pleader, it is handed in by a person who is not his clerk and over whose conduct and actions he has no control.[98.]

Presentation of an appeal by post is not a proper presentation[99.] nor is the deposit of a petition of appeal in a petition-box, for it may have been placed there by a person who could not legally present it.[100.]

[s 382.3] "Accompanied by a copy the judgment or order appealed against".—

The petition must be accompanied by a copy of the judgment or order appealed against. But the appellate Court has a discretion to receive an appeal unaccompanied by such a copy.[101.] This copy is required to be a certified copy.[102.]

95. *Kapil Deo Shukla v The State of Uttar Pradesh*, (1958) SCR 640 : AIR 1958 SC 121 : 1958 Cr LJ 262 .

96. *Ramprakash v Mohammad Ali Khan*, (1969) 73 Bom LR 138 : AIR 1973 SC 1269 : (1973) 2 SCC 163 .

97. *Chinnasami Pillai v Karuppa Udayan*, (1896) 20 Mad 87.

98. *Ramaswami*, (1897) 21 Mad 114.

99. *Arlappa*, (1891) 15 Mad 137.

100. *Vasudevayya*, (1896) 19 Mad 354.

101. *Sitaram*, (1903) 5 Bom LR 704 .

102. *State of Uttar Pradesh v C Tobit*, AIR 1958 SC 414 : 1958 Cr LJ 809 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 383] Procedure when appellant in jail.—

If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

[s 383.1] State Amendment

Andaman and Nicobar Islands and Lakshadweep Islands (U.T.).— *The following amendments were made by Regulation 1 of 1974, section 4(e) (w.e.f. 30-3-1974).*

S 383.—In application to Union Territories of Andaman and Nicobar Islands and Lakshadweep Islands in section 383 insert the following at the end—

"Or if, by reason of the weather, transport or other difficulties, it is not possible to forward them to the proper Appellate Court, they shall be forwarded to the Administrator or an Executive Magistrate, not below the rank of a Sub-Divisional Magistrate, who shall, on receipt of such petition of appeal and copies, record thereon the date of receipt thereof and thereafter forward the same to the proper Appellate Court."

This section lays down the procedure of presenting an appeal when the appellant is in jail.

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 384] Summary dismissal of appeal.—

(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

***Provided* that—**

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law.

This section deals with appeals presented (a) by the appellant or his pleader, or (b) through the officer in charge of the jail in which the appellant is confined. In the former class of appeals, the appellant or his pleader must have a reasonable opportunity of being heard. When, however, an appeal is presented through the officer in charge of the jail, the appellant is nearly always unrepresented. The appellate Court can summarily dismiss an appeal if it considers that there is no ground for interfering. When there was clear finding of the trial Court as to interference by the accused with the discharge of his duty by the public servant, the High Court was held to be justified in dismissing the appeal by the accused *in limine*.[103.] When an appeal is filed by an accused person from jail, it should not be so dismissed unless the person is heard. The Court may, however,

if it is of opinion that the appeal is frivolous or that to bring the accused before it will cause inconvenience disproportionate in the circumstances, dismiss the case summarily without hearing him. Even where a jail appeal is summarily dismissed and the appellate Court finds that another petition of appeal duly presented under section 382 has not been considered by it, the Court, instead of considering itself to be *functus officio*, will hear and dispose of that appeal.

Once an appeal lodged whether by the accused or by the Government has been admitted, it is neither in the power of any Court nor in the power of the appellant to allow it to be withdrawn. The Court is bound, once the appeal is admitted to proceed under this section or under sections 385 and 386 to decide it on merits.[104.] While there are provisions for withdrawals of trials (sections 224, 257 and 321), there is no provision in the Code for the withdrawal of appeals.

Section 382 comprises within its ambit appeals filed also under section 378. Therefore, the non-mention of section 378 in this section does not and cannot exclude appeals against acquittals from the purview of this section.[105.]

[s 384.1] "May dismiss the appeal summarily".—

The word "summarily" means "in an informal manner and without the delay of formal proceeding"[106.] The Supreme Court observed that although the High Court has power to dismiss an appeal *in limine* under section 384, such power should be exercised sparingly and with great circumspection. Speaking order, held, should be made.[107.] The Supreme Court cannot set aside the order of the High Court for the solitary reason that the order of the High Court dismissing the appeal is not a speaking one. The Supreme Court may examine the evidence for itself and dispose of the appeal even though the High Court has dismissed the appeal summarily.[108.] See also sub-section (3) for recording of reasons by the Court of Session or the Chief Judicial Magistrate.

An appeal dismissed without considering the impugned judgment and the memo of appeal was held to be improper.[109.] In cases under section 302 which are punishable with death or life imprisonment, Court should consider the appeal on merits.[110.] When in a criminal trial a number of accused are convicted of such a serious offence as one under section 302 IPC and there is only one appeal on facts to the High Court, it is expected that the contentions raised by the accused would receive serious considerations at the hands of the High Court. It is undoubtedly open to the High Court to dismiss such an appeal *in limine*, but it must be by a speaking order.[111.]

[s 384.2] Non-appearance of the appellant.—

An appeal cannot be dismissed on the ground that no one appeared to support the petition. The Court must consider whether there is sufficient ground for interfering which implies judicial consideration on the merits.[112.] When notice of hearing was duly served on the accused but the accused neither appeared nor did he make any arrangements for defending the appeal, it was held that the authority of the advocates, appointed by the High Court, could not be put in issue as the High Court was entitled to hear the appeal in the absence of the accused.[113.]

[s 384.3] Power to call record before disposal of appeal [*Sub-section (2)*].—

An appeal raising questions of fact ought not to be disposed of without the original records being called for from the lower Court.[114.]

[s 384.4] Reasons for dismissal of appeal by Court of Session or CJM [*Sub-section (3)*].—

It makes it obligatory upon the Court of Session or the Court of the Chief Judicial Magistrate to record its reasons for dismissing an appeal summarily. This is with a view to assist the High Court to decide whether a summary dismissal was justified. If no reasons are given, the order of summary dismissal is liable to be set aside by the High Court which may remand the case back to the trial Court for disposal in accordance with law.

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103. *Manumiya v State of Gujarat*, AIR 1979 SC 1706 : 1979 Cr LJ 1384 : (1979) 4 SCC 717 .
104. *Ghulam Mohammad v Emperor*, (1942) 23 Lah 241 (FB) : AIR 1942 Lah 271 .
105. *Re Public Prosecutor*, AIR 1960 AP 64 .
106. *Rash Behari Das v Balgopal Singh*, (1893) 21 Cal 92 .
107. *Raghunath Laxman Makadwada v State of Maharashtra*, AIR 1986 SC 1070 : 1986 Cr LJ 858 : (1986) 2 SCC 90 ; *Shivaji Narayan v State of Maharashtra*, AIR 1983 SC 1014 : (1983) 4 SC 129 : 1983 Cr LJ 1497 ; *MSI Hussain v State of Maharashtra*, AIR 1976 SC 1992 : (1976) 2 SCR 687 : 1976 SCC (Cr) 459; *Rajendra Kr Chaturvedi v State of Maharashtra*, AIR 1974 SC 852 : 1974 Cr LJ 737 .
108. *Rajpal Bhiraram v State of Maharashtra*, AIR 1974 SC 1150 : 1974 Cr LJ 806 : (1974) 3 SCC 633 .
109. *Nathuni Ahir*, 1984 Cr LJ NOC 69 (Pat).
110. *Dagadu v State of Maharashtra*, 1981 Cr LJ 724 (SC) : AIR 1981 SC 1218 : (1981) 2 SCC 575 .
111. *Babboo v State of Madhya Pradesh*, AIR 1979 SC 1042 : (1979) 4 SCC 74 : 1979 Cr LJ 908 .
112. *Kunhammad Haji v Emperor*, (1922) 46 Mad 382; *Emperor v Trimbak Balvant*, (1926) 28 Bom LR 1022 : 50 Bom 673; *Roora v Emperor*, (1929) 11 Lah 242 : AIR 1930 Lah 659 .
113. *Rambachan Hardwar v State of Gujarat*, AIR 1974 SC 855 : (1975) 3 SCC 139 : 1974 Cr LJ 739 .
114. *Turka Hussain*, (1924) ILR 48 Mad 385.

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 385] Procedure for hearing appeals not dismissed summarily.—

(1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given—

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

(iv) if the appeal is under section 377 or section 378, to the accused,

and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:

Provided **that if the appeal is only as to extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.**

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.

This section provides for the case where the appeal is not dismissed summarily. All the grounds taken in the petition of appeal are open for consideration at the final hearing, and the appellant cannot be restricted to any selected ground out of those specified in his petition.[115.] Even where the ground of appeal is the severity of sentence only, the Court may allow the appellant to urge any other ground.

When once an appeal is admitted and a notice is issued under this section, the appellate Court should dispose of the appeal on merits and there is no provision for dismissing the appeal in default of the appellant's appearance.[116.] In an appeal against conviction for rape, the Appellate Court upheld the conviction but reduced the sentence by a short and cryptic judgment and that too without consideration of the evidence-on-record. Such disposal of the appeal was held to be improper.[117.]

[s 385.1] "Notice...to the appellant or his pleader".—

This is obligatory. No notice of hearing was given after the appeal was transferred. *Ex parte* order was passed by the Additional Sessions Judge. It was held that the order was not sustainable.[118.]

When there was an improper publication of cause-list, *viz.*, cause list mentioning appeal number, but not the names of the respondent and his advocate which resulted in not posting the respondent's advocate with notice of hearing and ultimately resulted in conviction of the accused without hearing his counsel, it was held that the accused was not given reasonable opportunity of being heard and that an application by him for rehearing of appeal in his presence deserved to be allowed.[119.]

An appeal can be decided on merits by the High Court in the absence of appellants. The counsel appeared and expressed his inability to argue the case as there was no response from the appellants despite repeated reminders to them. Thus, it could not be said that the notice of hearing of appeal was not served on them.[120.]

[s 385.2] "To such officer as the State Government may appoint in this behalf".—

In an appeal against a conviction, only the Government is entitled to be served with notice, and heard and once notice has been given to the State under this section, the complainant has no right of audience and ought not to be permitted to serve his own private ends.[121.] In private prosecutions, however, the Court in its discretion may allow the complainant to appear by an advocate, but it is not in any case bound to do so.[122.]

[s 385.3] "To the complainant".—

This is a new provision which gives a right to a private complainant to be heard in an appeal filed by the accused against his conviction at the instance of such complainant. It is obligatory upon the Court to issue notice to such complainant of the hearing of the appeal filed by the accused. He will also be entitled to be furnished with the copy of the grounds of appeal.

If in an appeal to the High Court against acquittal by the State, the High Court sets aside the acquittal without serving notice on the accused and at his back without hearing him, the order is illegal and the matter is remanded for reconsideration.[123.] In an appeal against conviction, the order acquittal was passed without waiting for the arrival of the records and without perusing the evidence of the prosecution. It was held by the Supreme Court that the order of acquittal was liable to be set aside.[124.]

[s 385.4] Disposal of appeal without sending for record [*Sub-section (2) Proviso*].—

Where an accused claims acquittal on the basis of the findings of the Sessions Court and neither the complainant nor the Advocate General raise any objection, non-summoning of the record is not fatal.[125.]

115. *Nafar v Emperor*, (1913) ILR 41 Cal 406 : AIR 1914 Cal 276 .

116. *Durga Dan*, (1959) Raj 155 .

117. *State of MP v Sangram*, AIR 2006 SC 48 : 2005 Cr LJ 4642 .

118. *Arun Bhusan Chakravarty v State of Assam*, 1990 Cr LJ 531 (Assam).

119. *Swarth Mahto v Dharmadeo*, AIR 1972 SC 1300 : 1972 Cr LJ 879 : (1972) 2 SCC 273 ; *G Raj Mallaiah v State of AP*, (1996) 5 SCC 123 , the advocate could not appear because the cause list carried the name of the advocate who had retired from the case, miscarriage of justice, order set aside. *R Balakrishna Pillai v State of Kerala*, AIR 2000 SC 2778 : (2000) 7 SCC 129 , the advocate withdrew his appearance on the date of hearing to get the matter adjourned. The Supreme Court said that this practice should be discouraged. The Court ordered the appellant who was on bail. This was held to be justified.

120. *Dharam Pal v State of UP*, AIR 2008 SC 920 : (2008) 17 SCC 337 : 2008 Cr LJ 1016 .

121. *K Veeranna v Mastan*, AIR 1960 AP 311 .

122. *Paragji v Bhagwanji*, AIR 1940 Bom 14 : (1939) 41 Bom LR 1231 ; *Emperor v Chunilal Bhagwanji*, (1942) 44 Bom LR 438 : (1942) Bom 530.

123. *Anwar Hussain v State of Uttar Pradesh*, 1981 Cr LJ 1700 : (1982) 1 SCC 491 : AIR 1981 SC 2072 .

124. *Biswanath Ghosh v State of West Bengal*, 1987 Cr LJ 1052 : AIR 1987 SC 1155 : (1987) 2 SCC 55 .

125. *Hanumant Das v Vinay Kumar*, 1982 Cr LJ 977 : AIR 1982 SC 1052 : (1982) 2 SCC 177 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 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.**

This section defines the powers of the appellate Courts in dealing with appeals. The powers enumerated are vested in all Courts, whether the High Court or subordinate Courts, except that clause (a) of the section is restricted to the powers of the High Court only since an appeal against an order of acquittal lies only to that Court, while clause (b) of the section is not so restricted and embraces all Courts.[126.] In exercise of

appellate power under section 386 the High Court has full power to reverse an order of acquittal and if the accused are found guilty they can be sentenced according to law.[127.]

There is no provision in the Code to permit withdrawal of an appeal once admitted for hearing.[128.] The Legislature did not contemplate any withdrawal of appeal once lodged, whether by the accused or by the Government, and if the appeal is not summarily dismissed but admitted for hearing, it is not in the power of the Court nor of the appellant to allow the appeal to be withdrawn.[129.]

The Code gives ample powers to the Courts to alter or amend a charge whether by the trial Court or by the appellate Court, provided that the accused is not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about the charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him.[130.]

There is no distinction as regards the powers of the High Court in dealing with an appeal from an order of acquittal and that from a conviction. However, under the 1898 Code, the corresponding section 423 was confined to cases of appeals against conviction and sentence only, and the appellate could not order re-trial when the accused was acquitted.[131.] The High Court has full power to review at large all the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed.[132.] While no doubt on such an appeal the High Court is entitled to go into the facts and arrive at its own estimate of the evidence, it is also settled law that where the case turns on oral evidence of witnesses, the estimate of such evidence by the trial Court is not to be lightly set aside.[133.]

The Court of appeal possesses full power to go into the entire evidence and all relevant circumstances to arrive at its own conclusion about the guilt or the innocence of the accused bearing in mind, however, that (1) there is the initial presumption of innocence of an accused and (2) the fact of his acquittal by the trial Court.[134.] When the High Court had not cared to examine the details of the eyewitnesses and had rejected their evidence on general grounds, whereas the trial Court had very closely considered the evidence of those eyewitnesses, it was held that the decision of the trial Court was worthy of being restored.[135.] If the trial Court's judgment verges on the perverse, the appellate Court has a duty to set the evaluation right and pass a proper order.[136.] For example, in case of an appeal against acquittal, rejection of prosecution version only on the ground that all witnesses to occurrence were not examined was not proper. It is also not proper to reject the case for want of corroboration by independent witness if the case made out is otherwise true.[137.] But if two views are reasonably possible, the appellate Court ought not to interfere with an order of acquittal.[138.] In a murder case, the Sessions Judge had acquitted the accused, but the High Court, taking a different view, convicted the accused, the Supreme Court set aside the conviction holding that where two views are possible on the evidence on record, and the trial Court has taken one of the views, it is not for the appellate Court to evaluate the evidence and take a different view.[139.]

[s 386.1] "After perusing such record".—

The Court is bound to peruse the record, and to hear the appellant or his pleader, if he appears, before disposing of the appeal. Even if the appellant or his pleader is not present, the Court is bound to go through the record itself and to decide the appeal on its merits. It cannot summarily dismiss the appeal.[140.]

[s 386.2] "The Public Prosecutor".—

In a criminal case, a complainant can also claim to be heard as a respondent in appeal. See section 385(1)(iii), whereunder a notice should be issued to him. The section does not prohibit the Court from hearing a pleader privately instructed to support the prosecution when the Public Prosecutor does not appear on behalf of the Government.

[s 386.3] "Dismiss the appeal".—

The appellate Court can dismiss the appeal only on the merits and has no power to dismiss it summarily. Even where the appellant and his counsel both absented themselves on the day fixed for hearing of the appeal, it was held that the Court was not bound to adjourn the hearing and had to dispose of the appeal on merits. The Code does not contemplate dismissal of appeal for non-prosecution.[141.]

In *KS Panduranga v State of Karnataka*,[142.] the Supreme Court culled out following principles –

(i) that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

(ii) that the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

(iii) that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

(iv) that it can dispose of the appeal after perusing the record and judgment of the trial court;

(v) that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

(vi) that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.

[s 386.4] "Appeal from an order of acquittal" [*Clause (a)*].—

An appeal from acquittal lies only to the High Court; see section 378, *supra*. A Sessions Judge has no power to set aside an order of acquittal.

In an appeal from acquittal, the Court has to keep in mind the following four matters— (1) The views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption not weakened by the fact that the accused has been acquitted at his trial. An acquitted accused should not be put in peril of conviction on appeal save where substantial and compelling grounds exist for adopting such a course, [143.](3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage seeing the witnesses.[144.] In an appeal against the order of acquittal, the High Court has full power to review all the evidence

and to reach a conclusion that upon the evidence the order of acquittal should be reversed.[145.]

[s 386.5] Extending the benefit of appellant judgment to non-appealing accused.—

In *Sahadevan v State of Tamil Nadu*,[146.] the Supreme Court held that it is permissible to extend the benefit of appellant judgment to non-appealing accused. Where the court finds that the prosecution evidence suffers from serious contradictions, is unreliable, is *ex facie* neither cogent nor true and the prosecution has failed to discharge the established onus of proving the guilt of the accused beyond reasonable doubt, the court will return the finding of acquittal and even *suo motu* extend the benefit to non-appealing accused as well, more so, where the court even disbelieves the very occurrence of the crime itself and the role of the non-appealing accused is identical to that of the others who have filed appeal. It was further held in the above case that the powers of the Supreme Court in terms of Articles. 136 and 142 on the one hand and the rights of an accused under Article 21 of the constitution on the other are wide enough to deliver complete justice to the parties.[147.]

[s 386.6] Difference between appeal against acquittal and conviction.—

The approach in dealing with an appeal against acquittal must be different from that in appeal against conviction. In an appeal against acquittal, the appellate Court has to proceed more cautiously and, unless there is an absolute assurance of the guilt of the accused on the basis of the evidence on record, the order of acquittal is not liable to be interfered with. The general principle of presumption of innocence of the accused and the benefit of doubt given by the trial Court should be kept in mind by the appellate Court while dealing with an appeal against acquittal.[148.]

[s 386.7] Where two views possible.—

Where two views are possible and the view taken by the trial Court being reasonable, it resulted in an order of acquittal, it was held by the Supreme Court that the High Court could not have interfered with such a finding. Where, however, there is an perverse finding based on an erroneous appreciation of evidence leading to serious miscarriage of justice, the High Courthas ample power to reverse such a finding.[149.] An order of acquittal cannot be lightly reversed and that too just only because the High Court could take a different view. Where the trial Court did not appreciate the evidence properly by keeping the broad probabilities of the case and the nature of the evidence produced, it was held that the High Court was fully justified in setting aside the order of acquittal recorded by the trial Court.[150.]

Where two views were possible, the view in favour of the accused was preferred. But, since the relevant material was not considered to arrive at a view by the trial Court, the High Court had a duty to arrive at a correct conclusion taking a view different from the one adopted by the trial Court.[151.]

[s 386.8] "Pass sentence on him according to law".—

While purporting to correct an error, if the appeal Court were to do something which was beyond the competence of the trying Court, it could not be said to have corrected an error of the trying Court. Therefore, the power of the appellate Court to pass a sentence on the accused according to law must be measured by the power of the Court from whose judgment an appeal has been brought.[152.] See the second proviso.

[s 386.9] "Appeal from conviction" [*Clause (b)*].—

In an appeal from a conviction, it is for the appellate Court as for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellant has been established beyond all reasonable doubt. It is not for the appellant to satisfy the appellate Court that the first Court had come to a wrong finding.[153.] In disposing of the appeal, the Court must examine the appeal record for itself, arrive at a view whether a further enquiry or taking of additional evidence is desirable or not, then come to its own conclusion on the entire material on record whether conviction of the condemned prisoner is justified and the sentence of death should be confirmed.[154.] In an appeal by some of the convicted persons, it is open to the High Court as an appellate Court to examine the entire evidence. The powers of the appellate Court under this section are the same as those of the trial Court. It is true that the trial Court being a primary Court of facts has the advantage of observing the witnesses. Therefore, the appreciation of evidence made by that court is entitled to every consideration while examining evidence but that is not a limitation of the powers of the High Court. If after examining the evidence, the High Court is in a position to say that the findings arrived at are erroneous, or contrary to evidence then not only there is no legal prohibition to do so but in the interest of justice, that must be done.[155.] Whatever may be the nature of the offence or the actions of the accused, as revealed by evidence, the accused are always entitled to a fair trial.[156.] Such a judgment of the High Court must contain an analysis and discussion of the evidence. In absence of this, the decision of the High Court cannot be valid.[157.] Where the High Court dismissed the appeal against conviction by merely recording "we broadly agree with the findings of the trial Court and find no substance in the appeal", it was held that the order caused grave miscarriage of justice to the accused appellant.[158.]

[s 386.10] "Reverse the finding and sentence".—

The word "reverse" means to make void, to set aside or annul, or turn into something completely opposite in character.[159.] The word "reverse" conveys a sense of obliteration or effacement which happens when conviction is set aside.[160.]

The word "finding" means the result of a judicial examination or inquiry, especially into some matter of fact. "Reverse the finding and sentence" mean reserve the finding upon which the conviction is based. "Reversal" connotes the complete annulment of a finding of guilt or innocence by the trial Court so as to convert a decision that a man is innocent into a finding of guilty or *vice versa*.[161.]

The appellate Court, while setting aside acquittal, must look at the reasoning of the trial Judge and satisfy itself by examining whether the reasoning is just and proper.[162.]

[s 386.11] "Order him to be re-tried".—

An order for re-trial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice, the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of remand for retrial was held to be improper when the only ground was that the case was transferred after the framing of charge. Even if a trial takes place in a wrong place where the Court has no territorial jurisdiction to try the case yet unless failure of justice is pleaded and proved, the trial cannot be quashed.[163.]

The appellate court has power to direct the lower court to hold "*de novo*" trial, but such trial should be the last resort and that too only when such a course becomes so desperately indispensable and it should be limited to the extreme exigency to avert "a failure of justice". Certain lapses either in the investigation or in the "conduct of trial" are not sufficient to direct retrial. The High Court is duty bound to examine the evidence and arrive at an independent finding based on appraisal of such evidence and examine whether such lapses actually affect the prosecution case; or such lapses have actually resulted in failure of justice. Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial.[164.]

An order of re-trial wipes out from the record the earlier proceeding and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.[165.] When a re-trial is ordered, the whole case is re-opened, and the accused must be tried again on all the charges originally framed.[166.] The appellate Court may itself try the offender if the offence is one within the ordinary jurisdiction of the appellate Court.[167.] The appellate Court can order limited re-trial.[168.] Where the records of a case were partially damaged during the course of the trial due to an accidental fire, the High Court directed the Court to reconstruct the record and then proceed with the trial holding that "re-trial" and "*de novo* trial" have practically no difference in meaning, and in such cases, "*de novo* trial" may be ordered.[169.]

It has been held by the Supreme Court that re-trial should not be ordered in every case where acquittal is for lack of evidence. For directing re-trial, the trial must be a farce. Where eyewitnesses and complainant failed to disclose genesis of occurrence, it was held that refusal to order re-trial was proper.[170.]

Though the word "retrial" is used under section 386(b)(i) of CrPC, the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.[171.]

A conviction on re-trial is a conviction in the same prosecution. It is neither the second prosecution nor second punishment. Re-trial is the continuance of the same prosecution. It is not a fresh trial. When acquittal takes place on account of technical

reasons, it may be very desirable that the person be prosecuted after removing the technical defects in procedure.[172.] Where no material was found on which it could be said that the substance recovered from the accused was *charas* (a narcotic drug), the Delhi High Court refused the prayer of the State Counsel for remand of the case as the accused had been in jail for the last seven years.[173.]

[s 386.12] "Or committed for trial".—

This section is not limited to cases triable exclusively by the Court of Session. An appellate Court has, under the section, the power to order an accused person to be committed for trial by the Court of Session in cases which are not exclusively triable by the Court of Session.[174.] The appellate Court can in exercise of power under section 386(b)(i) commit the accused for trial.[175.]

[s 386.13] "Alter the finding".—

That is, alter the conviction under a certain section to one under another, and for that purpose, the appellate Court may avail itself of the provisions of section 221(2).[176.] "Alter" means change in form, without changing the underlying character of the thing to be changed. "Alteration", while maintaining the essential character of the finding, envisages only a change in form, that is, in the case of a conviction in the degree of guilt.[177.] The appellate Court can, in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he has been acquitted by that Court.[178.] A Full Bench of the Allahabad High Court has held that a Court of appeal is empowered under the clause to alter a finding of acquittal into one of conviction.[179.] The finding cannot be altered so as to convict the accused of a graver offence than that with which he was charged, unless an opportunity be given to him of defending himself against a charge of such offence.[180.] Similarly, it is improper to alter the finding so as to convict the accused of an offence of an entirely different character. The power under (b)(ii) is confined to cases of appeals preferred against orders of conviction and sentence. The powers conferred under this clause cannot be exercised for the purpose of reversing an order of acquittal in respect of an offence charged while dealing with an appeal in respect of another offence charged and found proved.[181.]

The expression "alter the finding" contemplates only an alteration of the finding of conviction which was appealed against and which was the subject-matter of appeal.[182.]

[s 386.14] "Maintaining the sentence".—

The appellate Court is not competent to pass a fresh sentence. It can alter the finding maintaining the sentence. The powers of an appellate Court to vary a sentence must be measured by those of the Court of first instance.[183.] The Court can alter, modify or reduce the sentence after confirming the conviction if in its opinion the sentence is unduly harsh or heavy and requires to be modified.[184.] It is not open to the Appellate Court to quash the conviction on the ground that the trial had been inordinately delayed.[185.] In an appeal for enhancement of a sentence, the High Court must pass a speaking judgment.[186.]

Interference with the sentence imposed on the accused must be rare and only in exceptional cases.[187.]

[s 386.15] Setting aside sentence.—

Appellate Court cannot exercise its power under section 386(b)(iii) to alter the sentence of the imprisonment and fine into a sentence of only a fine, which is contrary to the Statutory Scheme. Further section 386 sub clause (b)(i) uses the phrase "reverse the finding and sentence, whereas sub-clause (iii) uses the phrase alter the nature or the extent or the nature and the extent of the sentence". There is a difference between the word "reverse" and "alter", both have been made, contemplating different consequences and circumstances. The Appellate Court taking into consideration the case can alter/reduce the sentence.[188.]

[s 386.16] "Not so as to enhance the same".—

The appellate Court cannot enhance any sentence on appeal. Such a power to enhance the sentence is conferred only upon the High Court as a Court of revision.[189.]

[s 386.17] Altering or reversing orders [*Clause* (*d*)].—

An order of acquittal is not to be set aside unless it is patently wrong and wholly unsustainable.[190.]

[s 386.18] Amending of order [*Clause (e)*].—

Under this clause, the High Court has jurisdiction to make any amendment or make any order that may be just or proper. It may be necessary to make consequential or incidental order, such as orders under sections 106, 107, 335, 452, 454 and 456. In case of an offence under section 302 wherein the minimum sentence awardable is life imprisonment, a Court cannot reduce the sentence.[191.]

[s 386.19] Opportunity to be heard and extent of enhancement [*Provisos*].—

The two provisos make it clear that (1) no sentence passed against the accused should be enhanced without giving him an opportunity to show cause against such enhancement; and (2) that an appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed than could have been passed by the trial Court for that offence.

[s 386.20] Appeal and revision compared.—

Appellate jurisdiction is co-extensive with the original Court's jurisdiction as for appraisal and appreciation of evidence and reaching conclusions on facts. The appellate Court is free to reach its own conclusion on evidence untrammelled by any

finding recorded by the trial Court. Revisional powers, on the other hand, belong to supervisory jurisdiction of a superior Court. While exercising revisional powers, the Court has to confine itself to the legality and propriety of the findings and also whether the subordinate Court has kept itself within the bounds of its jurisdiction including the question whether the Court has failed to exercise the jurisdiction vested in it. Though the difference between the two jurisdictions is subtle, it is quite real and has now become well recognised in legal provinces. When a trial Court had acquitted an accused due to non-appearance of the complainant, the appellate Court has the same powers as the trial Court to reach a fresh decision as to whether in the particular situation the Magistrate should have acquitted the accused. What the trial Court did not then ascertain and consider could, perhaps, be known to the appellate Court, and a decision different from the trial Court can be taken by the appellate Court, whether the order of acquittal should have been passed in the particular situation.[192.]

In *Shankar Ramchandra Abhyankar v Krishnaji Dattatraya Bajpai*,[193.] this Court observed that the right of appeal is one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below.

[s 386.21] Non-appearance of accused or his counsel.—

In case of non-appearance of the accused or his counsel, the appellate Court should dismiss the criminal appeal, but cannot dispose it of on merits without hearing the accused or his advocate.[194.]

[s 386.22] Difference of opinion, reference to third judge.—

An appeal was placed before a third judge in view of the difference of opinion between two judges of the High Court. The third judge referred to the respective conclusions of the judges and then agreed with one of them without independently appreciating evidence. It was held by the Supreme Court that the third judge failed to perform his duty as an appellate Court.[195.]

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126. *Damic Sethi v Udi Behera*, (1953) Cut 713.

127. *Sudha Renukaiah v State of AP*, AIR 2017 SC 2124 : (2017) 4 SCC (Cri) 558 : LNIND 2017 SC 197 .

128. *P Karumbaiah v State*, 1989 Cr LJ NOC 73 .

129. *Chhitar*, (1956) Raj 545 .

130. *Kantilal Chandulal Mehta v The State of Maharashtra*, (1969) 73 Bom LR 36 (SC) : 1970 AIR (SC) 359 : 1970 Cr LJ 510 : 1969 (3) SCC 166 .

131. *Thadi Narayan v State of Andhra Pradesh*, AIR 1962 SC 240 : (1962) 1 Cr LJ 207 .

132. *Gurbanchan Singh v Satyapal Singh*, 1990 Cr LJ 562 : AIR 1990 SC 209 ; *Salim Zia v State of Uttar Pradesh*, AIR 1979 SC 391 : 1979 Cr LJ 323 .

133. *Pala Singh v State of Punjab*, AIR 1972 SC 2679 : (1972) 2 SCC 640 : 1973 Cr LJ 59 ; *Narhari Khatei*, (1962) Cut 303; *Bhupendra Singh v State of Punjab*, AIR 1968 SC 1438 : 1969 Cr LJ 6 .

134. *Pala Singh v State of Punjab*, AIR 1972 SC 2679 , p 2682 : (1972) 2 SCC 640 : 1973 Cr LJ 59 ; *Bhim Singh Rup Singh v State of Maharashtra*, AIR 1974 SC 286 : (1974) 3 SCC 763 : 1974 Cr LJ 337 ; *Dharam Das v State of Uttar Pradesh*, AIR 1973 SC 2195 : 1973 Cr LJ 1181 .

135. *State of Uttar Pradesh v Sahai*, AIR 1981 SC 1442 : (1982) 1 SCC 352 : 1981 Cr LJ 1034 .

136. *Khem Karan v The State of UP*, AIR 1974 SC 1567 : (1974) 4 SCC 603 : 1974 Cr LJ 1033 ; *Pattipati Venkaiah v State of Andhra Pradesh*, AIR 1985 SC 1715 : 1985 Cr LJ 2012 : (1985) 4 SCC 80 .

137. *State of Uttar Pradesh v Anil Singh*, 1989 Cr LJ 88 : AIR 1988 SC 1998 .

138. *Balak Ram v State of UP*, AIR 1974 SC 2165 : (1975) 3 SCC 219 : (1974) Cr LJ 1486 ; *State of Orissa v Yasin Baig*, 1987 Cr LJ 1389 (Ori); *Dhan Kumar v Municipal Corp of Delhi*, AIR 1979 SC 1782 : 1979 Cr LJ 1343 ; *Kanbi Ladha v State of Gujarat*, AIR 1979 SC 1758 : 1979 Cr LJ 1332 : (1980) 1 SCC 578 ; *CA Dyavappa v State of Mysore*, AIR 1979 SC 1533 : (1980) 1 SCC 468 : 1979 Cr LJ 957 ; *UOI v Samarthmal*, 1990 Cr LJ 1153 (MP).

139. *Garsia Rathubha Hanubha v State of Gujarat*, 1995 Cr LJ 3607 (SC).

140. *Emperor v Kuldip Singh*, (1926) 6 Pat 16; *Trimbak Balwant v Emperor*, (1926) 28 Bom LR 1022 : 50 Bom 673; *Queen-Empress v Pohpi*, (1891) ILR 13 All 171 (FB).

141. *Bani Singh v State of UP*, AIR 1996 SC 2439 : 1996 Cr LJ 3491 . The Court **overruled** *Ram Naresh Yadav v State of Bihar*, AIR 1987 SC 1500 : 1987 Cr LJ 1856 , because it was in conflict with the earlier ruling in *Shyam Deo Pandey v State of Bihar*, AIR 1971 SC 1606 : (1971) 1 SCC 855 : 1971 Cr LJ 1177 . The matter was posed before the larger Bench.

142. *KS Panduranga v State of Karnataka*, (2013) 3 SCC 721 : AIR 2013 SC 2164 : 2013 Cr LJ 1665 : JT 2013 (3) SC 514 : 2013 (3) Scale 152 : (2013) 3 SCC 721 ; followed in *Surya Baksh Singh v State of Uttar Pradesh*, (2014) 14 SCC 222 : 2013 (12) Scale 492 .

143. *SS Bobade v State of Maharashtra*, AIR 1973 SC 2622 : (1973) 2 SCC 793 : 1973 Cr LJ 1783 ; *Wilayat Khan v State of Uttar Pradesh*, AIR 1953 SC 122 : 1953 Cr LJ 662 .

144. *Sheo Swarup v The King-Emperor*, AIR 1934 PC 227 ; *Hari*, (1956) 2 All 136 ; *Dappili Vema Reddy v State of Andhra Pradesh*, AIR 1973 SC 153 : 1973 Cr LJ 223 : (1973) 3 SCC 89 ; *SG Mohite v The State of Maharashtra*, AIR 1973 SC 55 : (1973) 3 SCC 219 : 1973 Cr LJ 159 ; *Roop Singh v The State of Punjab*, AIR 1973 SC 2617 : 1973 Cr LJ 1778 : (1974) 3 SCC 307 ; *Dargahi v The State of UP*, AIR 1973 SC 2695 : (1974) 3 SCC 302 : 1973 Cr LJ 1828 ; *Madan Mohan Singh v State of Uttar Pradesh*, AIR 1954 SC 637 : 1954 Cr LJ 1704 ; *Puran v State of Punjab*, AIR 1953 SC 459 : 1953 Cr LJ 1925 ; *CM Narayan v State of Travancore-Cochin*, AIR 1953 SC 478 : 1954 Cr LJ 102 ; *Zwinglee Ariel v State of Madhya Pradesh*, AIR 1954 SC 15 : 1954 Cr LJ 230 : 1957 Cr LJ 481 ; *Prandas v State*, AIR 1954 SC 36 : 1954 Cr LJ 331 ; *Balbir Singh v State of Punjab*, AIR 1957 SC 216 : 1957 Cr LJ 481 ; *K Gopal Reddy v State of Andhra Pradesh*, AIR 1979 SC 387 : (1979) 1 SCC 355 : 1980 Cr LJ 812 ; *Antar Singh v State of Madhya Pradesh*, AIR 1979 SC 1188 : (1979) 1 SCC 79 : 1979 Cr LJ 715 , acquittal reversed by the Supreme Court as the findings of the trial Court were based on sound and were not liable to be interfered with. *Tallurri Venkatah Naidu v Public Prosecutor*, (1996) 11 SCC 355 : 1996 Cr LJ 4432 (SC) : AIR 1997 SC 353 , where cogent and convincing reasons were given by the trial Court for disbelieving evidence of prosecution witnesses, reappreciation of the evidence by the High Court without considering the findings of the trial Court was held to be not justified. *Ramesh Babu Lal Doshi v Gujarat*, AIR 1996 SC 2035 : 1996 Cr LJ 2867 : (1996) 9 SCC 225 .

145. *Jadunath Singh v State of Uttar Pradesh*, AIR 1972 SC 116 : 1972 Cr LJ 29 : (1971) 3 SCC 577 , approvingof Privy Council decisions in *Sheo Swarup v The King-Emperor*, AIR 1934 PC 227 and *Mir Mohomed v Emperor*, AIR 1945 PC 151 at p 200.

146. *Sahadevan v State of Tamil Nadu*, AIR 2012 SC 2435 : (2012) 6 SCC 403 : (2012) 3 SCC (Cri) 146 .

147. *Ibid*

148. *Patel Hiralal Jottaram v State of Gujarat*, AIR 2001 SC 2944 : (2002) Guj LR 248 (2002) 1 SCC 22 .

149. *Shambhu v State of MP*, AIR 2002 SC 1307 : 2002 Cr LJ 1778 : (2002) 3 SCC 561 .

150. *Bharosi v State of MP*, (2002) 7 SCC 239 : 2002 SCC (Cri) 1686 .

151. *Bodharaj v State of J&K*, AIR 2002 SC 3164 : (2002) 8 SCC 45 , the order of acquittal was found to be proper.

152. *Jagat Bahadur Singh v State of Madhya Pradesh*, AIR 1966 SC 945 : 1966 Cr LJ 709 : LNIND 1965 SC 342 . *Shankar Kerba Jadhav v The State of Maharashtra*, (1969) 73 Bom LR 66 : AIR 1971 SC 840 : 1971 Cr LJ 693 : (1969) 2 SCC 793 , the Karnataka High Court set aside the acquittal of an accused by the Trial Judge but sentenced him to undergo one month's simple imprisonment and a fine of Rs 200 looking to the circumstances of the case *State of Karnataka v Shivappa*, 1992 Cr LJ 3264 (Kant). *Ranjit Singh v State of Bihar*, (2001) 9 SCC 528 : AIR 2001 SC 3853 : 2001 Cr LJ 4740 : JT 2001 (8) SC 521 : 2001 (7) Scale 148 , the High Court is required to arrive at an independent conclusion after reappraising the entire evidence.

153. *Kanchan Malik v Emperor*, (1914) 42 Cal 374 .

154. *Bhupendra Singh v The State of Punjab*, (1968) 3 SCR 404 : AIR 1968 SC 1438 : 1969 Cr LJ 6 . *Appasaheb v State of Maharashtra*, AIR 2007 SC 763 : (2007) 9 SCC 721 , demand for money on account of financial stringency or for meeting urgent domestic expenses, not a dowry demand, could not be convicted under section 304 B IPC.

155. *Nana Gangaram Dhorb v State of Maharashtra*, 1970 Cr LJ 621 ; *Surjan v State of Rajasthan*, AIR 1956 SC 425 : 1956 Cr LJ 815 .

156. *Raghunandan v State of UP*, AIR 1974 SC 463 , 468 : 1974 Cr LJ 453 : (1974) 4 SCC 186 .

157. *State of Uttar Pradesh v Jageshwar*, AIR 1983 SC 349 : (1983) 2 SCC 305 : 1983 Cr LJ 686 .

158. *Devi Singh v State of MP*, 2002 Cr LJ 2977 : AIR 2002 SC 2389 : (2002) 9 SCC 631 .

159. *Bawa Singh*, (1942) 23 Lah 129, 143 (FB).

160. *Fulo v State*, (1956) 35 Pat 144 : AIR 1956 Pat 170 : 1956 Cr LJ 762 ; *Parbat Laxman*, (1961) 3 GLR 96 .

161. *Bawa Singh*, (1942) 23 Lah 129, 143 (FB).

162. *Koti Chunnilal Savji v State of Gujarat*, AIR 1999 SC 3695 : 1999 Cr LJ 4582 : (1999) 9 SCC 562 .

163. *State of Karnataka v Kuppuswamy*, 1987 Cr LJ 1075 : AIR 1987 SC 1354 : (1987) 2 SCC 74 .

164. *Ajay Kumar Ghoshal v State of Bihar*, AIR 2017 SC 804 : 2017 (2) Scale 54 : LNIND 2017 SC 42 .

165. *Ukha Kolhe v The State of Maharashtra*, (1963) 65 Bom LR 793 : AIR 1963 SC 1531 : (1963) 3 Cr LJ 418 .

166. *Emperor v Trimbak Balvant*, (1926) 50 Bom 673 : 1926 28 Bom, LR 1022.

167. *The Public Prosecutor v Manikka Gramani*, (1906) ILR 30 Mad 228.

168. *L Sundram v State of Kerala*, 1990 Cr LJ 1800 (Ker).

169. *State of UP v Vinai Kumar Srivastava*, 1992 Cr LJ 3558 (All).

170. *Mary Pappa Jebamani v Ganesan*, (2014) 14 SCC 477 : 2014 Cr LJ 1012 (SC).

171. *Ajay Kumar Ghoshal v State of Bihar*; AIR 2017 SC 804 : 2017 (2) Scale 54 : LNIND 2017 SC 42 .

172. *Bishambhar Nath v State of Uttar Pradesh*, 1986 Cr LJ 1818 (All).

173. *Nizamuddin v State*, 1995 Cr LJ 661 (Del).

174. *Misri Lal v Lachmi Narain Bajpie*, (1895) 23 Cal 350 ; *Sukha*, (1885) 8 All 14 , dissented from *Abdul Rahiman*, (1891) 16 Bom 580, followed; *State of Uttar Pradesh v Shankar Lava*, AIR 1962 SC 1154 : (1962) 2 Cr LJ 261 .

175. *Narendra Narayan Kadu v State of Maharashtra*, 2002 Cr LJ 106 (Bom).

176. *Emperor v Ismail Khadirsab*, (1928) 30 Bom LR 330 : AIR 1928 Bom 130 .

177. *Bawa Singh*, (1942) 23 Lah 129 (FB); *Fulo v State*, (1956) 35 ^{P}at 144 : AIR 1956 Pat 170 : 1956 Cr LJ 762 ; *Parbat Laxman*, (1961) 3 GLR 96 .

178. *Queen-Empress v Jabanulla*, (1896) 23 Cal 975 ; *Hanuman Sarma v Emperor*, (1932) 60 Cal 179 ; *Emperor v Barka Jetha Majhi*, (1941) 20 Pat 881 : AIR 1942 Pat 190 ; *Lakhan Singh v King-Emperor*, (1934) 9 Luck 607 ; *Appanna v Pithani Mahalakshmi*, (1911) 34 Mad 545; *Re K Bali Reddi*, (1913) 37 Mad 119.

179. *Zamir Qasim v Emperor*, (1944) All 403 (FB) : AIR 1944 All 137 .

180. *Dwarka Manjhee*, (1880) 6 CLR 427 .

181. *Sely v State of Kerala*, 2002 Cr LJ 1207 .

182. *Parbat Laxman*, (1961) 3 GLR 96 .

183. *Emperor v Muhammad Yakub Ali*, (1923) ILR 45 All 594. *Rishi Nandan Pandit v State of Bihar*, AIR 1999 SC 3850 : (1999) 8 SCC 644 , the High Court disposed of appeal in the absence of the accused (appellant's) counsel and upheld conviction under section 395 and the sentence passed. The matter was returned back for disposal afresh after providing the accused with an advocate at the state cost if he was not able to arrange a lawyer for himself.

184. *Sadha Singh v State of Punjab*, 1985 Cr LJ 1361 : (1985) 3 SCC 225 : AIR 1985 SC 1130 : 1985 (2) Scale 1358 .

185. *State of Maharashtra v Champalal Punjaji Shah*, 1981 Cr LJ 1273 : AIR 1981 SC 1571 .

186. *Lingala Vijay Kumar v The Public Prosecutor*, 1978 Cr LJ 1527 : AIR 1978 SC 1485 : (1978) 4 SCC 196 .

187. *Ravindra Tukaram Hiwale v State of Maharashtra*, AIR 2010 SC 3492 : (2010) 13 SCC 253 .

188. *State of Himachal Pradesh v Nirmala Devi*, AIR 2017 SC 1981 : [2017] 3 MLJ (Crl) 70 : LNIND 2017 C 189 .

189. *Ram Sanjiwan Singh v State of Bihar*, AIR 1996 SC 3265 : 1996 Cr LJ 2528 : (1996) 8 SCC 552 ; *P Mazhar v State of AP*, 2003 Cr LJ 3269 , appellate Court cannot enhance the sentence. Remission of the case to the trial Court for sentence alone after confirming the conviction was held to be illegal.

190. *Rajayyan v State of Kerala*, AIR 1998 SC 1211 , 1212 : 1998 Cr LJ 1633 : (1998) 4 SCC 85 .

191. *Dori v State of Uttar Pradesh*, 1991 Cr LJ 3139 (All).

192. *Associated Cement Co Ltd v Keshavanand*, AIR 1998 SC 596 : (1998) 91 Comp Cases 361 : 1998 Cr LJ 856 : (1998) 1 Ker LT 179 : (1998) 1 SCC 687 .

193. *Shankar Ramchandra Abhyankar v Krishnaji Dattatraya Bajpai*, AIR 1970 SC 1 : (1969) 2 SCC 74 .

194. *Amratbhai Lilabhai v State of Gujarat*, 2002 Cr LJ 2765 (Guj).

195. *Padam Singh v State of UP*, AIR 2000 SC 361 : 2000 Cr LJ 489 : (2000) 1 SCC 621 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 387] Judgments of subordinate Appellate Court.—

The rules contained in Chapter XXVII as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment in appeal of a Court of Session or Chief Judicial Magistrate:

***Provided* that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.**

This section makes the provisions of section 353 applicable to the judgment of Courts of appeal, except when the appeal has been summarily rejected under section 384, *supra*. The High Court is not required, after pronouncing a judgment in open Court, to date and sign the same.[196.] Section 362 read with this section makes it clear that the appellate Court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical or arithmetical error. Inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing.[197.] Any error or mistake committed by the subordinate Courts can be corrected by the High Court either by exercising its revisional powers or its power of superintendence under Article 227 of the Constitution.[198.]

[s 387.1] Judgment in appeal.—

The judgment of an appellate Court should set out the cases for the prosecution and the defence, the point or points for determination, the decision thereon and the reasons for the decision.[199.]

An appellate Court, without going to the length of writing an elaborate judgment, should in deciding a criminal appeal notice briefly but clearly the objections urged on appeal, and how they were disposed of.[200.]

Omission to write the judgment is not an irregularity cured by section 464(1) of the Code.[201.]

In an appeal against acquittal, the powers of the Court are essentially the same as in appeal against conviction. The Court can come to its own conclusion about the credibility of a witness, except to the extent to which that credibility depends upon the demeanour of the witness. An acquittal should not be reversed if the view taken by the trial Court is not palpably wrong.[202.]

196. *Pragmadho Singh v Emperor*, (1933) ILR 55 All 132 : AIR 1933 All 40 ; *Dhanna v State of Rajasthan*, AIR 1963 Raj 104 : 1963 Cr LJ 615 .

197. *Sankatha Singh v State of UP*, AIR 1962 SC 1208 : (1962) 2 Supp SCR 817 : (1962) 2 Cr LJ 288 .

198. *Re Biyamma*, AIR 1963 Kant 326 : 1963 Cr LJ 656 .

199. *Abdul Gani Badukchi*, (1943) 1 Cal 423 ; *Bangali Mal v Bansidhar*, (1939) All 865 ; : AIR 1939 All 39 ; *Naimullah Khan v State of Hyderabad*, (1953) Hyd 318 : AIR 1953 AP 233 : 1953 Cr LJ 1388 .

200. *Ekcowri Mukerjee v Emperor*, (1904) 32 Cal 178 ; *Rash Behari Das v Balgopal Singh*, (1893) 21 Cal 92 ; *Rabindra Kumar Swain v State of Orissa*, 1992 Cr LJ 1868 (Ori).

201. *Emperor v Devendra Shivapa*, (1915) 17 Bom LR 1085 .

202. *Betal Singh v State of MP*, AIR 1996 SC 2770 : 1996 Cr LJ 4006 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 388] Order of High Court on appeal to be certified to lower Court.—

(1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed and if such Court is that of a Judicial Magistrate other than the Chief Judicial Magistrate, the High Court's judgment or order shall be sent through the Chief Judicial Magistrate; and if such Court is that of an Executive Magistrate, the High Court's judgment or order shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court; and, if necessary, the record shall be amended in accordance therewith.

A committal Magistrate complying with an order certified under this section only performs a ministerial and not a judicial or a protected executive function. If he negligently signs arrest warrants against acquitted persons, he is not protected by section 1 of the Judicial Officers' Protection Act, 1950.[203.]

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203. *State of Uttar Pradesh v Tulsi Ram*, AIR 1971 All 162 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 389] Suspension of sentence pending the appeal; release of appellant on bail.—

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

204. [*Provided* that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

***Provided further* that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.]**

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall—

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,

order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

[s 389.1] CrPC (Amendment) Act, 2005 [*Clause (33)*].—

This clause adds two provisos to sub-section (1) of section 389 of the Code to the effect that (i) the Appellate Court will give notice to the prosecution before releasing a convicted person on bail, if he was convicted of an offence punishable with death,

imprisonment for life or imprisonment for a term of not less than ten years; and (ii) the prosecution should be permitted to move an application for cancellation of bail granted by the Appellate Court (*Notes on Clauses*).

[s 389.2] Suspension of sentence [*Sub-section (1)*].—

It has been held by the Supreme Court that there is a marked difference between the procedure for consideration of bail under section 439, which is pre-conviction stage, and section 389 of CrPC, which is post-conviction stage. In case of section 439, the Code requires that only notice be given to the Public Prosecutor before granting bail to a person who is accused of an offence triable exclusively by Court of Sessions or where the punishment is imprisonment for life, whereas under section 389, in respect of a serious offence having punishment with death or life imprisonment, it is mandatory that the appellate Court gives an opportunity to the Public Prosecutor for showing cause in writing against such release. Thus, in a case where merely a copy of the memo of appeal and bail application was served on the Public Prosecutor, it was held by the Supreme Court that this would not satisfy the requirement of the first proviso to section 389.[205.]

In *State of Rajasthan v Salman Salim Khan*,[206.] the Supreme Court held that the power of suspension of conviction shall be used only in exceptional circumstances where failure to stay conviction would lead to injustice and irreversible consequences and thus of some foreign country is not granting permission to visit said country on the ground that accused has been convicted of an offence and has been sentenced under Indian Law, said order cannot be a ground to stay order of conviction.

The Supreme Court has laid down the guideline to be followed in exercising the discretion for suspension of conviction and sentence during the pendency of the appeal or revision. Certain Government servants were convicted for serious criminal offences (sections 392, 218 and 466 IPC). Suspension of conviction and sentence without taking into account the moral lapses of the convicts was held to be not a proper exercise of discretion.[207.]

The Supreme Court has also observed that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal to challenge his conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at all the aspects including the ramification of keeping such convictions in abeyance.[208.] The Supreme Court held on this case that the conviction of a public servant for corruption should not be suspended, though the sentence of imprisonment may be suspended till disposal of appeal.[209.]

[s 389.3] Grant of Bail during appeal [*Sub-section (3)*].—

This sub-section in contradistinction to sub-section (1) makes it obligatory upon the Court to grant bail to the person convicted pending presentation of an appeal, if he satisfies the conditions laid down in clauses (i) and (ii) of the said sub-section. If such conditions are fulfilled, the Court has no option but to grant bail. This section applies only to a case where there is a right of appeal. Article 136 of the Constitution confers no right of appeal; hence, this provision cannot be invoked in a case for grant of interim bail in a petition under this article against the conviction order in an appeal.[210.] It has been held that the power under section 389(3) CrPC is exercisable by the trial Court if

the convict intends to file an appeal against his conviction and the conditions under sub-section (3) are satisfied.[211.]

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204. Ins. by Act No. 25 of 2005, section 33 (w.e.f. 23-6-2006).

205. *Atul Tripathi v State of UP*, AIR 2014 SC 3062 : (2014) 9 SCC 177 : 2014 Cr LJ 3941 (SC).

206. *State of Rajasthan v Salman Salim Khan*, AIR 2015 SC 2443 : (2015) 15 SCC 666 : LNIND 2015 SC 32 .

207. *State of TN v A Jaganathan*, AIR 1996 SC 2449 : 1996 Cr LJ 3495 : (1996) 5 SCC 329 .

208. *KC Sareen v CBI*, (2001) 6 SCC 584 : 2001 SCC (Cri) 1186 . See also *N Ramamurthy v State*, AIR 2019 SC 2161 .

209. *Ibid*

210. *B Subbaiah v State of Karnataka*, 1992 Cr LJ 3740 (Knt).

211. *Dilip v State of Maharashtra*, 1996 Cr LJ 721 (Bom).

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 390] Arrest of accused in appeal from acquittal.—

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

In a capital case where an appeal against acquittal has been preferred, it is neither the practice nor is it desirable that the accused should be at large while his fate is being discussed in the Court. The order of acquittal passed does not alter his status as an accused against whom a capital charge is made.[212.] It is discretionary with the High Court to exercise this power; it is not meant for the protection of the accused, but to ensure that an accused against whom an appeal has been filed may not abscond during the pendency of the appeal.[213.]

A person acquitted is entitled to be set at liberty forthwith and without any fetter. The High Court order under section 482 requiring him to be released only on furnishing bail was held to be unconstitutional, illegal and void *abinitio*.[214.]

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212. *Badapalli*, (1955) Cut 589.

213. *AH Satranjiwala v The State of Maharashtra*, (1970) 74 Bom LR 742 .

214. *Omprakash Tekchand Batra v State of Gujarat*, 1999 Cr LJ 1 (Guj—FB).

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 391] Appellate Court may take further evidence or direct it to be taken.—

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

This section contemplates a further inquiry by taking additional evidence, when the conviction by the lower Court has been based upon some evidence which might legally support it, but which in the opinion of the appellate Court is not quite satisfactory.

[s 391.1] Object.—

The intention of the Legislature in enacting this section is to empower the appellate Court to see that justice is done between the prosecutor and the person prosecuted, and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding, it would be justified in taking action under this section.[215.] Where finding of the High Court was that the evidence of any witness was not necessary for a just decision of the case, it was held that, that was a finding of fact and unless there was some substantial error in the judgment of the High Court, the Supreme Court would not interfere with special leave.[216.] The section is not intended to remedy the negligence or laches of the prosecution.[217.] This section should not be invoked to give the prosecution a second chance of prosecution and a second chance of proving their case. Where, however, by some oversight or some difficulty, some evidence was not produced, an appellate Court might be asked to send the case back for taking such evidence. Where there was ample time for the prosecution to deal with every possible point in the case and it failed to establish the essential parts thereof, this section should not be utilised.[218.] Where an appellate Court cannot send back a case for re-trial to the Court below presumably under section 386(b)(i) of the CrPC because the prosecution evidence was wanting in some respect or other, it may itself take further evidence or direct it to be taken by the Court below under section 391 where it feels that such evidence will be in the interest of justice and for a proper decision.[219.]

The reception of additional evidence at the appellate stage should be exercised only when it is impossible to pronounce judgment.[220.]

The proviso was added to the section by the new Code. But for this proviso, the effect of section 429 of the old Code and section 392 of the present Code would have been the same.[221.]

The additional evidence in such cases is not intended to fill the gap in the prosecution and to cause prejudice to the accused. The purpose is only to see that justice of the situation prevails. The Supreme Court said in this case[222.]:

> There is available a very wide discretion in the matter of obtaining additional evidence in terms of s. 391 Cr.P.C. But this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It should not be a disguise for a re-trial or to change the nature of the case against the accused. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. However, it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard. Section 391 was introduced in the statute-book for the purpose of making it available to the Court, not to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer.

Additional evidence at appellate stage can be taken in exceptional circumstances to remove an irregularity where circumstances so warrant in public interest, but not in order to fill up lacunae in the prosecution case.[223.]

It has been held by the Supreme Court that in exceptional cases, the Constitutional Courts in exercise of their power under Articles 32 and 226 have the power to order fresh investigation/reinvestigation or further investigation.[224.]

Such additional evidence is taken in the manner prescribed by Chapter XXIII.

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215. *Dulla v Emperor*, (1926) 7 Lah 148 : AIR 1926 Lah 309 ; *Emperor v Luchmun Singh*, (1904) ILR 31 Cal 710.

216. *Abdul Latif v State of Uttar Pradesh*, AIR 1978 SC 472 : 1978 Cr LJ 639 : (1978) 1 SCC 466 .

217. *Jeremiah v Vas*, (1911) 36 Mad 457, 467; *Gopichand*, 1969 Cr LJ 1153 .

218. *Ganeshdas Mimani v The King*, (1950) ILR 1 Cal 462.

219. *Sad Ali Khan v The State*, 1989 Cr LJ NOC 34 (Cal).

220. *Shiva Balak Ravi v State of Bihar*, 1986 Cr LJ 1727 (Pat).

221. *Sajjan Singh v State of MP*, AIR 1998 SC 2756 : 1998 Cr LJ 4073 : (1999) 1 SCC 315 .

222. *Rambhau v State of Maharashtra*, AIR 2001 SC 2120 : 2001 Cr LJ 2343 : (2001) 4 SCC 759 .

223. *Ashok Tshering Bhutia v State of Sikkim*, AIR 2011 SC 1363 : (2011) 4 SCC 402 .

224. *Pooja Pal v UOI*, (2016) 3 SCC 135 : AIR 2016 SC 1345 : 2016 Cr LJ 2038 : 2016 (1) Scale 534 .

The Code of Criminal Procedure, 1973

CHAPTER XXIX APPEALS

[s 392] Procedure where Judges of Court of Appeal are equally divided.—

When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:

Provided **that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges.**

Where the Judges composing the Court of appeal are equally divided in opinion, the case of the accused is, under this section, laid before a third Judge whose duty it is to consider the whole case and all the points involved, and it will be according to the opinion of such Judge that the judgment will follow.[225.] Where there is disagreement among two Judges and the case is to be referred to a third Judge, it is only the case of the particular prisoner as to whom there is a difference of opinion which need be referred and not the whole case.[226.] The Supreme Court has laid down that it is for the third Judge under this section to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit.[227.] The opinion of the third Judge shall be placed before the original Bench. Final operative order should be passed by that Bench.[228.]

Where a case is referred to a third Judge under this section, the entire case is before him and it is his duty not merely to weigh the differing opinions, but to examine the whole evidence himself with a view to deliver the final judgment.[229.]

When a Full Bench is constituted for hearing an appeal, it was held the accused could not insist that the order constituting the Bench should be placed on record or shown to him. It was also held that it was perfectly competent for the Chief Justice by a special order to direct that a particular case be heard and disposed of by a Bench of two judges or more as he may in his discretion decide.[230.]

The Bombay High Court has held that this section overrules clause 36 of the Letters Patent which provides that the opinion of the senior Judge shall prevail.[231.] The Calcutta High Court has held that it does not apply to proceedings under section 145 which is outside section 397. On a difference of opinion, on revision of such a proceeding, the opinion of the senior Judge prevails under clause 36 of the Letters Patent.[232.]

The proviso makes it clear that if either the third Judge or any one of the Judges constituting the Bench hearing the appeal so desire, the appeal may be referred to a larger Bench.

In *Pankajakshi v Chandrika*,[233.] a Constitution Bench of the Supreme Court was seized of a reference as to applicability of a special or a local law or a general law like CPC or CrPC where the bench is equally divided in its opinion. In his concurring opinion,

Justice Kurian Joseph held that in case, a Division Bench of a High Court is divided in their opinion, the appeal with the opinions should be laid before another Judge of that Court and the appeal will be decided clearly on the basis of the opinion rendered by that Judge hearing the matter sitting alone. However, the proviso under section 392 of the CrPC enables any one of the Judges of the Division Bench or the third Judge to order the appeal to be heard by a larger Bench of Judges. It was further held that:

> If the purpose behind the requirement of a matter to be heard by a Bench of not less than two Judges is to be achieved, in the event of the two Judges being unable to agree either on facts or on law, the matters should be heard by a Bench of larger strength. Then only the members of the Bench of such larger strength would be able to exchange the views, discuss the law and together appreciate the various factual and legal positions. The conspectus of the various provisions, in my view, calls for a comprehensive legislation for handling such situations of a Bench being equally divided in its opinion, either on law or on facts, while hearing a case which is otherwise required to be heard by a Bench of not less than two Judges, both civil and criminal. It is for the High Court and the Legislature of the State concerned to take further steps in that regard.

Where one of the judges of the Division Bench was in favour of acquittal of the accused and the matter was referred to a third judge, it was held that the third judge as a rule of prudence or because of judicial etiquette was under no obligation to accept the view of the judge who was in favour of acquittal.[234.]

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225. *Sarat Chandra Mitra v Emperor*, (1911) ILR 38 Cal 202; *Hethubha v The State of Gujarat*, AIR 1970 SC 1266 : 1970 Cr LJ 1138 : (1970) 1 SCC 720 ; *UOI v BN Ananthapadmanabhiah*, AIR 1971 SC 1836 : (1971) 3 SCC 278 : 1971 Cr LJ 1287 .

226. *Chunna Singh*, (1943) All 82 .

227. *Babu v State of Uttar Pradesh*, AIR 1965 SC 1467 : (1965) 2 Cr LJ 539 .

228. *B Subbiah v State of Karnataka*, 1992 Cr LJ 3740 (Kant).

229. *Md Illias Mistri v The King*, (1949) 1 Cal 43 .

230. *Satwat Singh v State*, 1986 Cr LJ 135 (Del).

231. *Dada Anu*, (1889) 15 Bom 452.

232. *Mariam Bewa v Merajan Sardar*, (1919) 47 Cal 438 .

233. *Pankajakshi v Chandrika*, (2016) 6 SCC 157 : AIR 2016 SC 1213 : 2016 (2) Scale 674 .

234. *Tanviben Pankaj Kumar Divetia v State of Gujarat*, AIR 1997 SC 2193 : 1997 Cr LJ 2535 : (1997) 1 Guj LH 851 : (1997) 2 Guj LR 1346, the third judge has to consider the opinion of the two judges. But the judgment in appeal has to follow his opinion which is final in the matter. *State of UP v Dan Singh*, AIR 1997 SC 1654 : 1997 Cr LJ 1150 : 1997 All LJ 647, where a difference of opinion between judges a Division Bench is laid before a third judge, the order of the D B becomes *nonest*. The order which follows the opinion of the third judge is the final order. *Radha Mohan Singh v State of UP*, AIR 2006 SC 951 : (2006) 2 SCC 450 : 2006 Cr LJ 1121 , the Supreme Court has again reiterated that the third judge is under no obligation to accept the view of the judge or judges holding in favour of acquittal.

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CHAPTER XXIX APPEALS

[s 393] Finality of judgments and orders on appeal.—

Judgments and orders passed by an Appellate Court upon an appeal shall be final, except in the cases provided for in section 377, section 378, sub-section (4) of section 384 or Chapter XXX:

***Provided* that notwithstanding the final disposal of an appeal against conviction in any case, the Appellate Court may hear and dispose of, on the merits,—**

(a) an appeal against acquittal under section 378, arising out of the same case, or

(b) an appeal for the enhancement of sentence under section 377, arising out of the same case.

This section applies to all orders of an appellate Court upon the appeal. It is not necessary that the order should have been passed on the merits. This section enacts that judgments and orders passed by the appellate Court shall be final except in the cases provided for in sections 377, 378 and 384(4) or Chapter XXX. The right of review is a creature of statute, and in the absence of any provision in the Code, a judgment cannot be reviewed by the High Court.[235.] Where an appeal has been dismissed as not having been prosecuted within the time fixed by the law of limitation, it is not competent for the appellate Court to reconsider its order and hear the appeal.[236.]

[s 393.1] Revision.—

This section does not apply to judgments in revision applications, but the principle of finality of judgments laid down herein applies also to such judgments.[237.]

The orders of an appellate Court are open to revision (See Chapter XXX).

[s 393.2] Disposal on merits of Government appeal against acquittal or enhancement of sentence [*Proviso*].—

The proviso makes it clear that even though the appeal against conviction is finally disposed of, the appellate Court has still power to hear and dispose of an appeal filed by Government against the order of acquittal as well as against the inadequacy of sentence in the same case.

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235. *Public Prosector v Devireddi*, AIR 1962 AP 479 (FB) : AIR 1962 AP 479 (FB).
236. *Bhimappa*, (1894) 19 Bom 732.
237. *Emperor v Inderchand*, (1934) 36 Bom LR 954 : AIR 1934 Bom 471 .

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CHAPTER XXIX APPEALS

[s 394] Abatement of appeals.—

(1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided **that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.**

Explanation.**—In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.**

Every appeal, except an appeal against a sentence of fine, abates on the death of the appellant, because the sentence under appeal can no longer be executed. An appeal under this section can only abate on the death of the accused and not otherwise. When there were two accused and both of whom were acquitted by High Court on the death of the main accused, appeal against him abated. Appeal against the other accused who was a mere abettor was held to become infructuous.[238.] Once an appeal against the acquittal is entertained by the High Court, it becomes a duty of the High Court to decide the same irrespective of the fact that the applicant either does not choose to prosecute it or is unable to prosecute for one reason or the other.[239.] The death of the main accused during the pendency of the appeal would abate in respect of the deceased and not as a whole. Conviction recorded against the deceased would be valid. The appeal would not become infructuous with regard to other accused.[240.]

The principle of this section applies to matters in revision. A revisional application against a sentence of fine will not abate by reason of the death of the applicant.[241.] Appeal from a sentence of fine does not abate on the death of the appellant, and the proviso to the section enables any of the near relatives to obtain leave to continue the appeal.[242.] The section will apply in case of appeal against a composite order of sentence of imprisonment and fine. There is no word "only" appearing after the words "sentence of fine".[243.]

[s 394.1] Death of convict in pendency of appeal [*Proviso*].—

By this new proviso, the Legislature has given a right to the near relatives of the accused who is convicted and sentenced to death or imprisonment and who dies during the pendency of his appeal, to continue the appeal by making an application to the appellate Court within 30 days of the death of the appellant. When the legal representatives of the accused seeking leave to continue the appeal filed the application after ten years, it was rejected as neither any explanation nor sufficient

cause was given for the condonation of the delay.[244.] This proviso is made to cover those exceptional cases where the interest may, apart from being merely sentimental, be pecuniary also. The object in adding this proviso is to remove any stigma that may attach to the relatives of the accused by continuing the appeal.

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238. *State of Maharashtra v Eknath Pagar*, AIR 1981 SC 1571 : (1981) 2 SCC 299 .

239. *Khedu Mohton v State of Bihar*, AIR 1971 SC 66 : (1970) 2 SCC 450 : 1971 Cr LJ 20 .

240. *Ram Ishwar v State of Bihar*, 1986 Cr LJ 1366 (Pat).

241. *Sita Ram v Ram Dayal*, (1937) 13 Luck 306 .

242. *Om Prakash v State of Haryana*, AIR 1979 SC 1266 : 1979 Cr LJ 857 : (1979) 4 SCC 495 .

243. *Harnam Singh v The State of Himachal Pradesh*, AIR 1975 SC 236 , at p 238 : (1975) 3 SCC 343 : 1975 Cr LJ 276 .

244. *SV Kameswar Rao v The State (ACB Police, Karnool Dist., AP)*, 1992 Cr LJ 118 (AP); *Girja Prasad v State of MP*, AIR 2007 SC 3106 : (2007) 7 SCC 625 .

The Code of Criminal Procedure, 1973

CHAPTER XXX REFERENCE AND REVISION

This Chapter deals with two important jurisdictions, *viz.*, of (1) reference and (2) revision. The former jurisdiction can be invoked either by (a) any Court or (b) a Metropolitan Magistrate (section 395). In both cases, the reference can be made only on the validity of any Act or any provision thereof or on a question of law and must arise in the hearing of a case. The revisional jurisdiction can be exercised by the High Court and also the Sessions Judge (section 397). The record of the case is called for with a view to order further inquiry (section 398). Where the High Court exercises the jurisdiction either of itself or which otherwise comes to its knowledge, it can exercise any of the powers which are conferred on an appellate Court (section 401). The jurisdiction above referred to is described as the revisional jurisdiction of the High Court. There is another source of jurisdiction which the High Court has over the Criminal Courts beside its appellate jurisdiction. It is the power of superintendence which arises under Article 227 of the Constitution of India.

Under sub-section (1), reference can be made only by a Court of Session or of a Metropolitan Magistrate. A Judicial Magistrate can make reference only under sub-section (2).[1.] A Sessions Court is competent to make reference on a question of law under its original as well as appellate jurisdiction.[2.] Where a High Court referred a question of law involved in a bail application, but the bail application had already been disposed of, it was held that since there was no matter "pending before it", the Court was incompetent to make the reference and hence the High Court declined to entertain it.[3.]

[s 395] Reference to High Court.—

(1) Where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or Provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court.

Explanation.**—In this section "Regulation" means any Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State.**

(2) A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it or him to which the provisions of sub-section (1) do not apply, refer for the decision of the High Court any question of law arising in the hearing of such case.

(3) Any Court making a reference to the High Court under sub-section (1) or sub-section (2) may, pending the decision of the High Court thereon, either commit the accused to jail or release him on bail to appear when called upon.

Three things are required under sub-section (2). First, it is only a Court of Session or a Metropolitan Magistrate that can act under the section and no other Court. Secondly, the reference can be made only on a question of law and not on a question of fact.[4] Thirdly, the question referred must arise "in the hearing of a case"[5] A reference by the District and Sessions Judge to the High Court of a question whether inordinate delay in prosecution amounts to violation of fundamental right under Article 21 of the Constitution is not maintainable in terms of section 395.[6]

This section does not give the Metropolitan Magistrate power to refer points of law settled by decisions of the High Court, where the Magistrate doubts the correctness of those decisions.[7] The subordinate Court cannot make reference on the ground that a different view of law was taken by some other High Court. It must obey the law laid down by the High Court to which that Court is subordinate.[8]

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1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).
4. *Emperor v Molla Fuzla Karim*, (1906) ILR 33 Cal 193.
5. *Queen-Empress v Nanu*, (1899) 1 Bom LR 521 .
6. *State of Karnataka v Balawantrai Bhikabhai Parekh*, 1992 Cr LJ 1222 (Kant).
7. *Emperor v Ratan Singh*, (1948) ILR 2 Cal 117; *State of Orissa v Ram Chander Agarwala*, AIR 1979 SC 87 : 1979 Cr LJ 33 : (1979) 2 SCC 305 .
8. *Qazi Mohomed Hanif v Mumtaz Begam*, 1990 Cr LJ 171 (Bom).

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CHAPTER XXX REFERENCE AND REVISION

This Chapter deals with two important jurisdictions, *viz.*, of (1) reference and (2) revision. The former jurisdiction can be invoked either by (a) any Court or (b) a Metropolitan Magistrate (section 395). In both cases, the reference can be made only on the validity of any Act or any provision thereof or on a question of law and must arise in the hearing of a case. The revisional jurisdiction can be exercised by the High Court and also the Sessions Judge (section 397). The record of the case is called for with a view to order further inquiry (section 398). Where the High Court exercises the jurisdiction either of itself or which otherwise comes to its knowledge, it can exercise any of the powers which are conferred on an appellate Court (section 401). The jurisdiction above referred to is described as the revisional jurisdiction of the High Court. There is another source of jurisdiction which the High Court has over the Criminal Courts beside its appellate jurisdiction. It is the power of superintendence which arises under Article 227 of the Constitution of India.

Under sub-section (1), reference can be made only by a Court of Session or of a Metropolitan Magistrate. A Judicial Magistrate can make reference only under sub-section (2).[1.] A Sessions Court is competent to make reference on a question of law under its original as well as appellate jurisdiction.[2.] Where a High Court referred a question of law involved in a bail application, but the bail application had already been disposed of, it was held that since there was no matter "pending before it", the Court was incompetent to make the reference and hence the High Court declined to entertain it.[3.]

[s 396] Disposal of case according to decision of High Court.—

(1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Court by which the reference was made, which shall dispose of the case conformably to the said order.

(2) The High Court may direct by whom the costs of such reference shall be paid.

1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).

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[s 397] Calling for records to exercise powers of revision.—

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation. **—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.**

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the either of them.

[s 397.1] Power of revisional or Appellate Court.—

Sections 397 to 401 deal with what is known as the revisional jurisdiction of the High Court. The revisional jurisdiction is derived from three sources: (1) sections 397 to 401 of the Criminal Procedure Code; (2) Article 227 of the Constitution of India and (3) the power to issue the writ of *certiorari*.[9.] It will be noticed that the operative section is section 401. The scope of the revisional jurisdiction under the Code is limited and this jurisdiction is also discretionary.[10.]

In *Amit Kapoor v Ramesh Chander*,[11.] scope of section 397 has been succinctly considered and explained as follows:

> 27.1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases
>
> 27.2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.
>
> 27.3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge
>
> 27.9) Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.
>
> 27.13) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

The Supreme Court has held that at the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the Supreme Court has held that at the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with scheme of Code of Criminal Procedure accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with scheme of Code of Criminal Procedure.[12.]

The Calcutta High Court has held that more than one order can be challenged in a single revision under section 397 CrPC read with rule 118 of the Calcutta High Court Criminal Rules & Orders, Volume I.[13.]

The object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in the proceeding. The section vests the Court

with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case.[14.] The power to call for records of inferior criminal Courts is conferred on two kinds of Courts: (1) High Court and (2) Sessions Judge. The grounds on which the power can be exercised are two: (a) where the finding, sentence or order is illegal or improper[15.]; and (b) where the proceedings are irregular. However, where an order is amenable to revision, the order of the revisional Court should be interfered with very sparingly and that too only for the purposes envisaged by section 482.[16.]

[s 397.2] *Suo motu* exercise of power.—

Revision cannot be dismissed by the High Court on the technical ground of limitation. The High Court should exercise its *suo motu* power of revision and cannot allow illegality and miscarriage of justice to perpetuate.[17.] Sub-section (2) specifically bars revision of interlocutory orders.[18.] The *suo motu* power of revision does not extend to converting proceedings initiated in *suo motu* revision into an appeal against acquittal and then convict the accused. The High Court should have set aside the order of acquittal and remitted the matter for retrial. The Supreme Court set aside the order of conviction and remitted the case to the trial Court for disposal in accordance with the law. The appellant was permitted to seek bail.[19.]

[s 397.3] Application of mind.—

The question of error in exercise of jurisdiction may arise sometimes in criminal revisions as well. Be that as it may, the submissions made on behalf of the appellant could not be negated without examining them on merit. The order impugned however did not indicate any trace of application of mind to the facts or the pleas raised before the Court. The reasons, howsoever brief they might be, were to be indicated in an order disposing of any matter, more so when such orders are subject to appeal or review before the higher forum. It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of jurisdiction being exercised as to in what manner the reasons may be recorded, e.g., in an order of affirmance detailed reasons or discussion may not be necessary, but some brief indication by which application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merit of the matter or nature of pleas raised, does not meet the requirement of decision of a case judicially. It is a matter in which the High Court may consider the matter afresh and pass an appropriate order in accordance with law.[20.]

The dismissal of a criminal revision without assigning reasons is not sustainable. The matter was remitted.[21.]

[s 397.4] Revision against order of investigation.—

Revision against an order of Magistrate under section 156(3) directing the police to register the case and investigate is maintainable. Therefore, Sessions Judge committed no illegality in admitting the revision and staying the operation of the order.[22.]

[s 397.5] "Proceeding".—

This word would include a pending case. The High Court or the Sessions Judge possesses the power to interfere at any stage of the case, and when it is brought to its notice that a person has been subjected to harassment of an illegal prosecution, it is its bounden duty to interfere.[23.] The High Court will exercise its power where there is a material error or defect in law or procedure, misconception or misreading of evidence, failure to exercise or wrong exercise of jurisdiction, or where the facts admitted or proved do not disclose any offence.[24.] Cases for such interference "must be of an exceptional nature ... one safe practical test would be this, namely, that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince this court that it is a fit one for its interference at an intermediate stage".[25.] As a broad proposition, it can be stated that interference may be justified (a) where the decision is grossly erroneous; (b) where there is no compliance with the provisions of law; (c) where the finding of fact affecting the decision is not based on the evidence; (d) where material evidence of the parties is not considered; and (e) where judicial discretion is exercised arbitrarily or perversely.[26.] An order discharging the accused should not be interfered with unless it is perverse or on the face of the record incorrect or foolish or perfunctory or glaringly unreasonable or made without reasons.[27.]

[s 397.6] All Magistrates inferior to Sessions Judge for purposes of this section [*Explanation*].—

A District Magistrate for the purposes of this section is inferior to the Sessions Judge.[28.] An authority appointed under section 6C of the Essential Commodities Act, 1955, is not an inferior criminal Court.[29.]

[s 397.7] "Inferior Criminal Court".—

The words "inferior Criminal Court" mean judicially inferior to the High Court or the Sessions Judge.[30.] The jurisdiction can be exercised only over an inferior criminal Court. It does not include a civil or revenue Court acting under section 340 of the Code.[31.] The Sessions Judge functioning under section 13(1) and (3) of the Karnataka Silkworm Seeds Act, 1960, as an appellate authority was not an inferior criminal Court and hence was not subject to the revisional jurisdiction of the High Court under section 397 of the Code.[32.]

Full Bench of the Allahabad High Court has held that revision under section 397/401 of the Code is maintainable against judgment and order passed by Court of Sessions under section 29 of the Domestic Violence Act, 2005.[33.]

[s 397.8] No revision of interlocutory orders [*Sub-section (2)*].—

Revision applications against interlocutory orders have been in terms excluded.[34.] This provision is made with a view not only to avoid justice being delayed but sometimes justice being defeated because, by availing of the facilities to file revision applications to the High Court against interlocutory orders, the hearing of the case may be stayed for a long period.

The Supreme Court has laid down that an order passed during an interim stage is not the sole test. Where the objection raised by a party is such that it would result in culminating the proceeding, then the order passed on such objection would not be an interlocutory order. Where in a revision filed by the appellant against the Magistrate's order taking cognizance of offences alleged in respondent's complaint, appellant raised an objection that the complaint was barred by limitation under section 161 of Bombay Police Act, and the objection if upheld would have the effect of terminating the entire prosecution proceedings against the appellant, the Magistrate's order could not be treated as an interlocutory order. It was not be hit by section 397(2).[35.]

[s 397.9] No further applications for revision after one application [*Sub-section (3)*].—

The word "made" means made, entertained and decided. If an application is made to a Sessions Judge and he is of opinion that it should be made to the High Court, a fresh application to the High Court is competent.[36.] The sub-section specifically bars entertainment of application by the High Court from any person who has applied to the Sessions Judge and *vice versa*. [37.]

In *Dhariwal Tobacco Products Ltd v State of Maharashtra,*[38.] the Supreme Court had concurred with the proposition of law that availability of alternative remedy of criminal revision under section 397 of CrPC by itself cannot be a good ground to dismiss an application under section 482 of CrPC But in the case of *Mohit alias Sonu v State of Uttar Pradesh*,[39.] contrary view was taken that when an order under assail is not interlocutory in nature and is amenable to the revisional jurisdiction of the High Court, then there should be a bar in invoking the inherent jurisdiction of the High Court. In view of such conflict, these cases were directed to be placed before the Hon'ble Chief Justice for reference to a larger Bench.

A three-judge bench[40.] held that section 482 begins with a non-obstante clause, ie, "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

Since section 397 of CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under section 482 of CrPC only to petty interlocutory orders. It was held that the case of *Mohit alias Sonu*[41.] in respect of inherent power of the High Court in section 482 of the CrPC does not state the law correctly.

[s 397.10] Revision petition by private party against acquittal.—

Such a petition requires detailed scrutiny and evaluation of evidence particularly because no appeal against acquittal was filed by the State. A summary disposal by the High Court was not justified. The case was remitted to the High Court for disposal of revision afresh after considering merits.[42.]

[s 397.11] Revision at instance of State.—

The prohibition of second revision to the High Court under section 397(3) has been held to be not applicable when the state seeks revision under section 401. the High Court can entertain such a petition in cases of grave miscarriage of justice or abuse of process of Court by exercising inherent power and supervisory power under sections 482 and 483, respectively. The Supreme Court said that the word "person" in section 11 of IPC is not supposed to include a "State".[43.]

[s 397.12] Revision petition by third parties.—

The petitioner third parties had filed the revision petitions for rectification of the apparent error in the order of Magistrate. The High Court unsuited the petitioners on the ground that they were third parties who were unconnected with the case. It was held by the Supreme Court that the High Court had been conferred power to entertain the revision petitions and rectify the errors which were apparent. The petitioners could not have been treated as strangers, for they had brought it to the notice of the High Court and hence, it should have applied its mind with regard to the correctness of the order.[44.]

[s 397.13] Concurrent jurisdiction.—

The Sessions Court and High Court have concurrent revisional jurisdiction. Out of the two forums, a person can select any one of his choice. But on ground of propriety, the aggrieved party should ordinarily first approach the Sessions Court.[45.]

[s 397.14] Limitation and condonation of delay.—

The prescribed period of limitation for filing of a criminal revision application will be governed by Article 131 of the Limitation Act, and section 50 of that Act will enable the Court to admit the application after expiry of period of limitation on sufficient cause being shown for condonation of delay.[46.] Delay in this case was due to the advocate misplacing the certified copy in his office. The Court condoned it.

Though the law of limitation is same for citizens as well as the Government, the concept of public interest gets attracted when the Government is faced with pragmatic problems and situations in preferring appeal or revision.[47.]

[s 397.15] Application for quashing.—

Sub-section (3) provides that where an application for revision has been made to the High Court or to Session Judge, no further can be entertained by either of them. It has been held that even this bar does not prevent the High Court from entertaining application for quashing of proceedings under section 482.[48.]

1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).
9. *Annie Besant v Govt of Madras*, (1916) ILR 39 Mad 1164 : 32 Mad LJ 151.
10. *Badrilal v State of Madhya Pradesh*, 1989 Cr LJ NOC 16 (MP).
11. *Amit Kapoor v Ramesh Chander*, (2012) 9 SCC 460 : JT 2012 (9) SC 312 : JT 2012 (9) SC 329 : 2012 (9) Scale 58 . Followed and **relied on** in *State of Rajasthan v Fatehkaran Mehdu*, 2017 (2) Scale 251 , Criminal Appeal No. 216 of 2017 decided on 3-2-2017.
12. *State of Rajasthan v Fatehkaran Mehdu*, Criminal Appeal No. 216/2017 as decided on 3 February 2017 by the Supreme Court.
13. *Debendra Nath Das v Bibhuti Paul*, 1995 Cr LJ 2010 (Cal).
14. *State of Rajasthan v Fatehkaran Mehdu*, AIR 2017 SC 796 : [2017] 2 MLJ (Crl) 165 : LNIND 2017 SC 50 .
15. *Nobin Kristo Mookerjee v Russick Lall Laha*, (1884) ILR 10 Cal 268; *Maniklal Acharjee v State of Assam*, 1988 Cr LJ NOC 54 (Gau).
16. *Charanjit Singh v. G. Kaur*, 1990 CrLJ 1264 (P&H).
17. *MC, Delhi v Girdharilal Sapuru*, AIR 1981 SC 1169 : 1981 Cr LJ 632 : (1981) 2 SCC 758 .
18. *Thakur Ram v State of Bihar*, AIR 1966 SC 911 : 1966 Cr LJ 700 .
19. *Naresh Kumar v Registrar High Court of P&H*, (2001) 10 SCC 510 .
20. *Paul George v State*, AIR 2002 SC 657 : 2002 Cr LJ 996 .
21. *Iqbal Bano v State of UP*, AIR 2007 SC 2215 : (2007) 6 SCC 785 .
22. *Sabir v Jaswant*, 2002 Cr LJ 4563 (All).
23. *Chandi Pershad v Abdur Rahman*, (1894) 22 Cal 131 .
24. *Harbhajan Singh*, (1942) ILR Nag 494 : AIR 1942 Nag 38 ; *Sunil Kumar v Ajit Kumar*, 1969 Cr LJ 1234 : AIR 1969 Cal 492 ; *Anil Kumar v Ajai Butail*, 1992 Cr LJ 2282 (HP); *Kailash Sahu v Basanta Kumari Dei*, 1992 Cr LJ 1918 (Ori).
25. *Chou Lal Dass v Anant Pershad Misser*, (1897) 25 Cal 233 ; *Jagat Chandra Mozumdar v Queen-Empress*, (1899) 26 Cal 786 ; *Queen-Empress v Nageshappa*, (1895) 20 Bom 543; *Shripad Chandavarkar v Bombay High Court*, (1928) 52 Bom 151 : 1928 30 Bom LR 70 : AIR 1928 Bom 184 ; *Kuppuswami Aiyar v Unknown*, (1916) ILR 39 Mad 561 : AIR 1916 Mad 408 ; *Ramanathan Chettiyar v Subrahmanya Ayyar*, (1924) ILR 47 Mad 722 : AIR 1925 Mad 39 .
26. *Caetano Colaco v Joao Rodrigues*, AIR 1966 Goa 32 FB; *Kunu Mehrana v State of Orissa*, 1996 Cr LJ 170 (Ori).
27. *Rajaram Gupta v Dharmchand*, 1983 Cr LJ 612 (MP).
28. *Haji Abdus Subhan v Gajanan*, (1943) Nag 637 : AIR 1943 Nag 236 .
29. *State v Sriramulu Chettiar*, 1973 Cr LJ 732 ; *State of Gujarat v CM Shah*, 1974 Cr LJ 716 (Guj).
30. *Emperor v Krishnaji Vithal*, (1948) 50 Bom LR 293 : (1948) Bom 384 : AIR 1949 Bom 29 .
31. *Emperor v Har Prasad Das*, (1913) ILR 40 Cal 477 (FB); *Emperor v Udit Narain Dube*, (1912) 35 All 109 .
32. *State of Karnataka v Thimappa HS*, 1985 Cr LJ 1105 (Knt).
33. *Dinesh Kumar Yadav v State of UP*, (2016) 11 ADJ 29 : (2017) 1 CTC 337 .
34. *Murlidhar Revisionist v State of UP*, 1992 Cr LJ 2032 (All); *Bhaskar Industries Ltd v Bhiwani Denim & Apparels Ltd*, (2001) 7 SCC 401 : AIR 2001 SC 3625 : 2001 Cr LJ 4250 : JT 2001 (7) SC 127 : 2001 (5) Scale 503 , whether revisional power can be exercised by the High Court in relation to an interlocutory order was not raised before the High Court. The Supreme Court did decide the question.
35. *KK Patel v State of Gujarat*, (2000) 6 SCC 195 : 2000 Cr LJ 4592 .

36. *Appachi Goundan*, (1931) ILR 54 Mad 842 : AIR 1931 Mad 772 a.
37. *Preetpal Singh v Ishwari Devi*, 1991 Cr LJ 3015 (All).
38. *Dhariwal Tobacco Products Ltd v State of Maharashtra*, (2009) 2 SCC 370 : AIR 2009 SC 1032 : 2009 Cr LJ 974 .
39. *Mohit alias Sonu v State of Uttar Pradesh*, (2013) 7 SCC 789 : AIR 2013 SC 2248 : JT 2013 (9) SC 205 : 2013 (7) Scale 620 .
40. *Prabhu Chawla v State of Rajasthan*, AIR 2016 SC 4245 : 2016 (8) Scale 545 .
41. *Mohit alias Sonu v State of Uttar Pradesh*, (2013) 7 SCC 789 .
42. *Gurshinder Singh v Joga Singh*, 1999 SCC Cri 1311 ; *Sanjeev Misra v Manoj Jain*, 2002 Cr LJ 1704 , no revision by party who could have preferred an appeal, prosecution launched by private party, the complainant could file revision.
43. *Krishanan v Krishnaveni*, AIR 1997 SC 987 : 1997 Cr LJ 1519 : (1997) 1 Mad LJ 509 : (1997) 4 SCC 241 .
44. *Abdul Wahab K v State of Kerala*, AIR 2018 SC 4265 .
45. *Cerena D'souza v State of Maharashtra*, 2002 Cr LJ 4196 (Bom).
46. *Ramkrishna Jairam Damdar v Savita*, 2002 Cr LJ 1884 (Bom).
47. *State of MP v Mohd. Jabbar Khan*, 2002 Cr LJ 4812 (MP).
48. *Shakuntala Devi v Chamru Mahto*, AIR 2009 SC 2075 : (2009) 3 SCC 310 : 2009 Cr LJ 1770 .

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[s 398] Power to order inquiry.—

On examining any record under section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (4) of section 204, or into the case of any person accused of an offence who has been discharged:

***Provided* that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.**

This section deals with power to direct "further inquiry". Such power is also given by sections 367 and 386(a).

As regards dismissal of complaints under sections 203 and 204(4) and orders of discharge, there is no appeal as there is in cases of acquittal and conviction, and the Legislature has not thought it sufficient to leave these orders to be dealt with under the general revisional jurisdiction (*viz.*, sections 397, 400 and 401), but has conferred special powers in regard to these orders on the High Court itself as well as on the Sessions Judge. The effect of the order for further inquiry is of course to set aside the dismissal of the complaint and the order of discharge. But the Sessions Judge cannot in the exercise of the power to order further inquiry himself frame the charge or order the Magistrate to frame the charge or try the accused.

It will be noticed that the High Court or the Sessions Judge can act under the section; and further inquiry must be made either by the Chief Judicial Magistrate or any Magistrate subordinate to him. The Chief Judicial Magistrate may also act under the section and make further inquiry. The power of the Chief Judicial Magistrate, however, does not extend to the powers under section 397. Thus, the three Courts have concurrent jurisdiction only for the purposes of this section. But, in practice, the aggrieved party should first move the Chief Judicial Magistrate or the Sessions Judge as the case may be. But, where, however, the Chief Judicial Magistrate has once acted under the section, the Sessions Judge has no jurisdiction to review the order; but he may refer the matter to the High Court.[49.] Similarly, where the Sessions Judge has passed orders, it is not open to the Chief Judicial Magistrate to pass orders of a contrary kind, but he may submit the matter to the High Court through the medium of the Public Prosecutor.[50.] The Chief Judicial Magistrate has no jurisdiction under this section to order a retrial of a case; he can order further inquiry.[51.]

The High Court, the Court of Session and the Chief Judicial Magistrate all have powers as Courts of revision, to deal with an order of discharge, and to deal with it on merits as well as on other grounds. They have the power to interfere on the ground that the order is incorrect, that is, wrong on the merits, no less than on the ground of illegality or irregularity. The High Court or the Court of Session or the Chief Judicial Magistrate has jurisdiction on any sufficient ground to set aside an order of discharge, and direct either an additional investigation of the facts or reconsideration of the evidence, by the Magistrate whose order is set aside, or a new inquiry before another Magistrate; and among such sufficient grounds are the omission to take evidence which ought to have been taken, the discovery of fresh evidence, mistakes of law, illegality or irregularity in the proceedings, and the incorrectness of the first finding. However, the discretion thus conferred is a judicial discretion. No Court can properly set aside an order of discharge without having and assigning solid and sufficient reasons for doing so, and also without giving an opportunity to the accused of showing cause why such direction should not be made. In a case not triable only by the Court of Session, if the Sessions Judge or the Chief Judicial Magistrate is satisfied that on the evidence taken there is a clear case for charging and trying the accused, and there is no reason for desiring further magisterial examination, it is ordinarily his duty to refer the case to the High Court, which can make a suitable order, and not to direct further inquiry by a Magistrate.[52.]

[s 398.1] "Further inquiry".—

The term "inquiry" is not in its ordinary acceptation restricted to the mere taking of evidence, but it includes also a consideration of its effect in relation to the complaint forming the subject of the inquiry. This being so, it is not clear why the expression "further inquiry" should not signify as well as a fresh consideration of the effect of the evidence already recorded as a supplemental inquiry upon fresh evidence,[53.] and the conclusion to charge or discharge the accused.[54.] In directing "further inquiry", it should be left entirely to the inquiring Magistrate to determine whether or not the evidence justified the accused being charged and put on his trial,[55.] or committed to the Court of Session.[56.] An enquiry made by a Magistrate will not be vitiated, even though no notice was given to the accused in revision proceeding.[57.]

A matter was remanded to the Magistrate for holding further inquiry. It was held that such direction does not necessarily oblige the Magistrate to record any further evidence. But if a *prima facie* case is made out, recording of further evidence by the Magistrate would not vitiate proceedings.[58.]

[s 398.2] "Person accused of an offence".—

This expression makes it clear that discharge refers to a person who has been accused of an offence. It does not include a person proceeded against under section 109,[59.] section 110,[60.] section 133[61.] or section 145.[62.]

[s 398.3] "Discharged".—

This section applies where the accused has been "discharged", i.e., "discharged within the meaning of sections 245 and 249 of the Code".[63.] The section cannot be employed where the accused has been discharged under section 118[64.] or "acquitted".[65.]

[s 398.4] Opportunity of being heard before inquiry against person already discharged [*Proviso*].—

The proviso is imperative and enjoins that an opportunity should be given to the accused to show cause why further inquiry should not be ordered. A disregard of the proviso is an illegality, and, in any case, such an irregularity as seriously prejudices an accused person who is ordered to be proceeded against.[66.]

[s 398.5] Notice.—

Where a complaint has been dismissed under section 203[67.] or section 204,[68.] no notice need be given to an accused before a further inquiry is ordered under this section, according to the High Courts of Bombay and Allahabad; but the Calcutta[69.] and the Lahore[70.] High Courts have held that such notice should be given.

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1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).

49. *Darbari Mandar v Jagoo Lall*, (1895) 22 Cal 57 .
50. *Pirthi*, (1889) 12 All 434 .
51. *Muhammad Husain v Nanhi*, (1929) 52 All 257 ; *Hukmichand Devkisen Sarda v Ratanlal Rupchand Heda*, 1977 Cr LJ 1370 (Knt); *Bal Kishan Jain v Indian Overseas Bank*, 1981 Cr LJ 796 (Punj).
52. *Hari Dass Sanyal v Saritulla*, (1888) 15 Cal 608 , 619, 620 (FB); dissented from in *Narayanaswamy Naidu v Emperor*, (1909) ILR 32 Mad 220 (FB).
53. *Per* MUTTUSAMI AYYAR J, in *Queen-Empress v Batasinnatambi*, (1891) 14 Mad 334 (FB); *Venkata Subba Reddi v Ayyalu Reddi*, (1908) 32 Mad 214; *Hari Dass Sanyal v Saritulla*, (1888) 15

Cal 608 (FB); *Chotu*, (1886) 9 All 52 (FB); *Dorabji Hormasji*, (1885) 10 Bom 131; *Dhania v FL Clifford*, (1888) 13 Bom 376.

54. *Hari Dass Sanyal v Saritulla*, (1888) 15 Cal 608 , 620.

55. *Gajankhan*, (1900) 2 Bom LR 586 .

56. *Queen-Empress v Munisami*, (1891) 15 Mad 39.

57. *Kannan v RA Varadarajan*, 1988 Cr LJ 605 (Mad).

58. *Subrata Das v State of Jharkhand*, AIR 2011 SC 177 : (2010) 10 SCC 798 : (2011) 1 SCC (Cri) 134 .

59. *Emperor v Neur Ahir*, (1928) 51 All 408 .

60. *Queen-Empress v Iman Mondal*, (1900) 27 Cal 662 ; *Dayanath Taluqdar v Emperor*, (1905) 33 Cal 8 ; *Velu Tayi Ammal v Chidambaravelu Pillai*, (1909) 33 Mad 85; *Roshan Singh*, (1923) 46 All 235 ; *Maung Than*, (1923) 2 Ran 30.

61. *Srinath Roy v Ainaddi Halder*, (1897) 24 Cal 395 ; *Indra Nath Banerjee v Queen-Empress*, (1897) 25 Cal 425 .

62. *Chathu Rai v Niranjan Rai*, (1893) 20 Cal 729 .

63. *Velu Tayi Ammal v Chidambaravelu Pillai*, (1909) 33 Mad 85, 86.

64. *Ibid*; *Roshan Singh*, (1923) 46 All 235 .

65. *Queen v Erramreddi*, (1885) 8 Mad 296; *Sriramulu v Veerasalingam*, (1914) 38 Mad 585; *Baijanath Pandey v Gauri Kanta Mandal*, (1893) 20 Cal 633 .

66. *Emperor v Bhagwan Das*, (1933) 56 All 285 ; *Joymal Hussain v State*, (1950) 2 Assam 71.

67. *Emperor v Dhondu Bapu*, (1927) 29 Bom LR 713 .

68. *Emperor v Gajraj Singh*, (1925) 47 All 722 ; *Emperor v Liaqat Hussain*, (1917) 40 All 138 ; *Angan v Ram Pirbhan*, (1912) 35 All 78 .

69. *Ambar Ali v Anjab Ali*, (1911) 39 Cal 238 ; *Wahed Ali Sheikh*, (1905) 32 Cal 1090 .

70. *Nabi Bakhsh*, (1919) 1 Lah 216.

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CHAPTER XXX REFERENCE AND REVISION

This Chapter deals with two important jurisdictions, *viz.*, of (1) reference and (2) revision. The former jurisdiction can be invoked either by (a) any Court or (b) a Metropolitan Magistrate (section 395). In both cases, the reference can be made only on the validity of any Act or any provision thereof or on a question of law and must arise in the hearing of a case. The revisional jurisdiction can be exercised by the High Court and also the Sessions Judge (section 397). The record of the case is called for with a view to order further inquiry (section 398). Where the High Court exercises the jurisdiction either of itself or which otherwise comes to its knowledge, it can exercise any of the powers which are conferred on an appellate Court (section 401). The jurisdiction above referred to is described as the revisional jurisdiction of the High Court. There is another source of jurisdiction which the High Court has over the Criminal Courts beside its appellate jurisdiction. It is the power of superintendence which arises under Article 227 of the Constitution of India.

Under sub-section (1), reference can be made only by a Court of Session or of a Metropolitan Magistrate. A Judicial Magistrate can make reference only under sub-section (2).[1.] A Sessions Court is competent to make reference on a question of law under its original as well as appellate jurisdiction.[2.] Where a High Court referred a question of law involved in a bail application, but the bail application had already been disposed of, it was held that since there was no matter "pending before it", the Court was incompetent to make the reference and hence the High Court declined to entertain it.[3.]

[s 399] Sessions Judge's powers of revision.—

(1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said subsections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

The section deals with the powers of the Sessions Judge while hearing a case of which record has been called for by himself. The said powers are the same as that of the High Court under section 401.[71.]

The contention that the words "called for by himself" occurring in sub-section (1) mean "*suo motu*" only and not "on filing of a revision petition by an aggrieved party" cannot be accepted. There is no warrant or justification to attribute such a restricted meaning to the words.[72.] Where a Sessions Judge, in a revision against the order of an Executive Magistrate in a proceeding under section 145 of CrPC thoroughly appreciated evidence like that of an appellate Court and substituted his own judgment without making any reference to the illegality or perverse finding or miscarriage of justice, the High Court[73.] set aside the judgment and remanded the case back for deciding the revision in the light of the Supreme Court's decision in *Janta Dal v HS Choudhary*.[74.]

[s 399.1] Order of Sessions Judge final against person who sought revision [*Sub-section (3)*].—

The object of this sub-section is to stop multiplicity of proceedings. It makes final the decision of the Sessions Judge in revision and virtually prohibits a revision petitioner from filing any further proceedings by way of revision to the High Court or any other Court.

[s 399.2] Revision against acquittal by private party.—

The Court can exercise the power only in exceptional cases. An order was passed by the Sessions Court in its revisional jurisdiction in a case which was not an exceptional one directing the trial Court to secure evidence for prosecution after reversing order for acquittal. This was held to be without jurisdiction.[75.]

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1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).

71. *Vinod Kumar v Mohrawati*, 1990 Cr LJ 2068 (All).
72. *Baldev Singh v State of Haryana*, 1988 Cr LJ 534 (P&H).
73. *Seva Ram Das v Kashi Ram Das*, 1995 Cr LJ 3290 (Gau).
74. *Janta Dal v HS Choudhary*, (1992) 4 SCC 305 : AIR 1993 SC 892 : 1993 Cr LJ 600 .
75. *Unni v Kuttapan*, 2003 Cr LJ NOC 186 (Ker) : (2002) 2 Ker LJ 38 ; *Shingara Singh v State of Haryana*, AIR 2004 SC 124 : (2003) 12 SCC 758 : 2004 Cr LJ 828 , revision against acquittal, filed by private party, could not be converted into conviction.

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Under sub-section (1), reference can be made only by a Court of Session or of a Metropolitan Magistrate. A Judicial Magistrate can make reference only under sub-section (2).[1.] A Sessions Court is competent to make reference on a question of law under its original as well as appellate jurisdiction.[2.] Where a High Court referred a question of law involved in a bail application, but the bail application had already been disposed of, it was held that since there was no matter "pending before it", the Court was incompetent to make the reference and hence the High Court declined to entertain it.[3.]

[s 400] Power of Additional Sessions Judge.—

An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).

The Code of Criminal Procedure, 1973

CHAPTER XXX REFERENCE AND REVISION

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Under sub-section (1), reference can be made only by a Court of Session or of a Metropolitan Magistrate. A Judicial Magistrate can make reference only under sub-section (2).[1.] A Sessions Court is competent to make reference on a question of law under its original as well as appellate jurisdiction.[2.] Where a High Court referred a question of law involved in a bail application, but the bail application had already been disposed of, it was held that since there was no matter "pending before it", the Court was incompetent to make the reference and hence the High Court declined to entertain it.[3.]

[s 401] High Court's powers of revision.—

(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may

treat the application for revision as a petition of appeal and deal with the same accordingly.

Under this provision, when the record of any proceeding is called for by the High Court under section 397, it will exercise in its discretion any of the powers conferred on a Court of appeal by sections 386, 389 and 391 or on a Court of Session by section 307. This jurisdiction is very wide. Under it, the Court may interfere to test the correctness, legality or even the propriety of any finding, sentence or order. It can exercise all the powers of an appellate Court, and it may also direct tender of pardon. The limits placed on the revisional jurisdiction are (1) that finding of acquittal cannot be converted into a finding of conviction; and (2) the enhancement of sentence must be governed by the second proviso of section 386. The jurisdiction can be invoked either on its own initiative, i.e., acting *suo motu*, or by a person aggrieved making an application for revision.[76.] The High Court can even in the case of a discharge direct additional evidence being taken in the interests of justice and fairplay.[77.] But question as regards compliance with a particular section of a particular Act not being an absolute question of law is not allowed to be raised for the first time in revision.[78.] But when the objection is as to non-compliance of a mandatory provision of law, it can be raised for the first time in revision.[79.]

When an appeal against conviction is dismissed and the convicted person files a revision, rule 159 of the High Court of Jharkhand Rules, 2001, requires the convict to surrender to custody pending revision. The object of the rule is to ensure that the convict does not abscond. However, it does not affect the inherent power of High Court to exempt the requirement of surrender in exceptional cases. Thus, the rule was held to be not violative of Articles 41 and 21 of the Constitution.[80.]

The Supreme Court observed in this case:

> The High Court possesses a general power of superintendence over the actions of Courts subordinate to it. On its administrative side, the power is known as the power of superintendence. On the judicial side, it is known as the duty of revision. The High Court can at any stage even on its own motion, if it so desires, and certainly when illegalities or irregularities resulting in injustice are brought to its notice, call for the records and examine them. This right of the High Court is as much a part of the administration of justice as its duty to hear appeals and revisions and interlocutory applications—so also its right to exercise its powers of administrative superintendence. However, the jurisdictional sweep of the process of the High Court under the provisions of section 401 is very much circumscribed.

Although section 401 extends all the appellate powers of the High Court to its revisional jurisdiction, it is subject to express exceptions specified thereunder. These limitations are as follows: (i) In appeal, the High Court can convert an acquittal into a conviction and *vice versa*, but in its revision, it cannot convert a finding of acquittal into one of conviction; (ii) the power of revision is wider than that of appeal because under revisional jurisdiction, the High Court can correct even irregularities or improprieties of procedure; (iii) in case of appeal, the High Court will interfere if it is satisfied as to the guilt of the accused, but in revision, it will interfere only if it is brought to its notice that there has been miscarriage of justice[81.]; (iv) an appeal cannot be dismissed without affording the appellant or his pleader a reasonable opportunity of being heard. In revision, however, the accused or the other person must be heard either personally or through his pleader in case an order to his prejudice is to be passed. The High Court in exercise of its revisional jurisdiction cannot under ordinary circumstances go into the question of sufficiency or otherwise of the material upon which the Magistrate proceeded to take an action, yet it has the power to examine the admissibility of evidence, on the basis of which finding was arrived at by the trial Court.[82.] It has also

been held that the revisional powers against conviction could be exercised even after the death of the accused.[83.] As the Magistrate cannot enter into a detailed discussion of the merits or de-merits of the case at the stage of issuing the process, the High Court too cannot do so in its revisional jurisdiction.[84.]

[s 401.1] Scope of High Court revisional jurisdiction.—

The Supreme Court explained the position as follows:

> It has repeatedly been held that the High Court should not re-appreciate the evidence to reach a finding different from the trial Court. In the absence of manifest illegality resulting in grave miscarriage of justice, exercise of revisional jurisdiction is not warranted. When in view of sub-s. (3) of s. 401, the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. The High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an order of acquittal merely because the trial Court had taken a wrong view of the law or had erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of the Supreme Court have laid down the parameters of exercise of revisional jurisdiction by the High Court u/s. 401 in an appeal against acquittal by a private party."[85.]

[s 401.2] Revision against conviction, *ex parte* dismissal.—

A petition for revision against conviction was dismissed *ex parte* because of non-appearance of the counsel for the petitioner. The Supreme Court set aside the order and directed parties to appear before the High Court on the appointed date.[86.]

[s 401.3] Inferior Courts.—

The proceedings included within this jurisdiction are those of the inferior Courts.

The original side of the High Court in exercising criminal jurisdiction is not an inferior court to the Appellate Side of that Court. The powers under sections 397 and 401 cannot be invoked for the purpose of revising the order of a Judge sitting in Original Criminal Sessions of the High Court.[87.] With the establishment of the City Civil and Sessions Court, this situation will rarely occur.

Under section 401, the High Court cannot set aside an order of acquittal. The Court can however do so under its appellate jurisdiction under section 378 or its inherent jurisdiction under section 482.[88.]

[s 401.4] Discretionary power of revision without application *suo motu* [*Sub-section (1)*].—

The words "any proceeding" are confined to proceedings before an inferior criminal Court and do not include proceedings in respect of contempt of Court committed in the presence of the Court. The High Court has, therefore, no power under this section to revise an order of a revenue Court punishing a person for an offence of contempt of Court under section 345 before a revenue Court.[89.] Where the Magistrate found the revisionist was interfering with the peaceful possession of a lady over the disputed premises, the High Court not only confirmed the Magistrate's order restraining the

revisionist but also directed the Magistrate to get the premises vacated from the revisionist and put the lady in possession within ten days.[90.]

The Allahabad High Court has held that the appellate powers of the High Court under section 386 and its revisional powers under this section cannot be combined so as to enable it to alter the finding of acquittal into one of convictions in the exercise of its appellate powers and then to enhance the sentence in the exercise of its revisional powers.[91.]

[s 401.5] "Other person" [*Sub-section (2)*].—

The expression "other person" in sub-section (2) contemplates that "the person should be given an opportunity of being heard if he is likely to be affected by the order in revision."[92.] This sub-section should be read in consonance with the provisions of section 398.[93.]

Where the Magistrate took cognizance of offence against one accused on protest petition of the complainant and discharged other accused person, in the revision petition filed by the complainant against the order of discharge, the High Court allowed the revision and set aside the order of discharge without affording opportunity of hearing to the accused. It was held by the Supreme Court that the accused cannot be deprived of his right of hearing in the face of section 401(2) of the Code and held the order of High Court liable to be set aside and remitted the matter.[94.] It was held that in a revision petition preferred by the complainant before the High Court or the Sessions Judge challenging an order of the magistrate dismissing the complaint under section 203 at the stage under section 200 or after following the process contemplated under section 202 of the Code, the accused or a person who is suspected to have committed the crime is entitled to hearing by the Revisional Court. In other words, where the complaint has been dismissed by the magistrate under section 203, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of section 401(2.)

[s 401.6] Acquittal not to be converted into conviction in revision [*Sub-section (3)*].—

The High Court cannot convert a finding of acquittal into one of conviction.[95.]

The Supreme Court held that though sub-section (1) of this section authorises the High Court to exercise in its discretion any of the powers conferred on a Court of appeal by section 386, yet sub-section (3) specifically excluded the power to "convert a finding of acquittal into one of conviction." This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court can in the absence of any error on a point of law reappraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stops short of finding the accused guilty and passing sentence on him, by ordering a retrial.[96.]

The bar to convert the judgment of acquittal into of conviction under revisional powers does not in any way impede the revisional Court from setting aside acquittal in case where finding of acquittal is recorded on perverse appreciation of evidence. However, in

such a case, the revisional Court has to direct the trial court to hold fresh trial on merits.[97.]

[s 401.7] Party having right of appeal cannot apply for revision [*Sub-section (4)*].—

The High Court does not interfere in the exercise of its powers unless all other remedies provided by law have been exhausted.[98.] However, the Delhi High Court has held that where an *ex parte* order granting maintenance was passed, even when the procedure was illegal, the aggrieved person could file a revision petition without moving an application under section 126 before the Magistrate.[99.] When a party who could have appealed has not appealed, the High Court will not entertain his application in revision.[100.] The remedy of a complainant against an order of acquittal lies in filing of appeal, not in revision.[101.]

[s 401.8] Erroneous application for revision to be treated as appeal [*Sub-section (5)*].—

This sub-section vests a discretionary power in the High Court to convert a revision application to a petition of appeal. It comes into effect (1) when an appeal lies, (2) but a revision application has been made on the erroneous belief that the appeal does not lie; and (3) the High Court feels that it is necessary in the interests of justice to convert the revision to an appeal.

[s 401.9] Enhancement of sentence.—

Under section 386, the appellate Court possesses power under clause (c) of that section to enhance the sentence subject, of course, to the two proviso.[102.]

The High Court does not exercise the power of enhancing a sentence in every case in which the sentence passed is inadequate. The mere fact that the High Court would itself, if it had been trying the case, have passed a heavier sentence than that which the trial Court has passed is no reason for enhancing the sentence. The High Court will interfere only where the sentence passed is manifestly and grossly inadequate.[103.]

The Supreme Court has held that where an appeal or revisional application filed by the accused person is dismissed by the High Court summarily or *in limine* without issuing notice to the other side, and subsequently the High Court issues a notice to the accused, either *suo motu* or on application by the interested party, for enhancement of sentence, the accused in showing cause against the enhancement is also entitled to show cause against his conviction. When, however, the appeal or application in revision filed by the accused is heard and decided by the High Court after hearing both the accused and the other side, the judgment of the High Court replaces the judgment of the lower Court and becomes final under the provisions of sections 362 and 393, and the High Court has no power to move *suo motu*[104.] or to entertain a subsequent application for enhancement of the sentence.[105.]

Sub-section (2) of section 397 categorically prohibits exercise of powers of revision in relation to any interlocutory order passed because unnecessary revisional applications from such orders will impede the progress of cases.

Permission was granted by the trial Court for examination of two persons as defence witnesses. A revision petition was filed against the permission. The High Court directed suspension of the order and also for disposal of the matter by the trial Court within one month. The Supreme Court held that such order was not proper as it was passed examining the acceptability of the challenge.[106.]

The Supreme Court has held that the High court in its revisional jurisdiction cannot appraise the evidence. It is the trial court which has to decide whether evidence on record is sufficient to make out a *prima facie* case against the accused so as to frame a charge against him. But even the trial court, at the stage of framing of charge, cannot conduct a roving and fishing inquiry into evidence. It has only to consider whether evidence collected by the prosecution discloses a *prima facie* case against the accused or not. Thus, interference by the High Court in a revision against framing of charge, by entering into merits and forming an opinion that there was no *prima facie* case, was held to be improper.[107.]

[s 401.10] Revision against acquittal and principal of natural justice.—

In the trial of a case, the trial Judge at an earlier stage had rescued himself from hearing the case against the accused for personal reasons. By the time the revision was filed in the High Court, the said trial Judge had been elevated to the High Court and the revision came to the court of the same judge. The fact of earlier recusal by the judge was not brought to the notice of the said judge, and owing to inadvertence, the revision was heard by the same judge and was ultimately dismissed. It was held by the Supreme Court that the impugned order passed in the revision by the judge who had earlier recused himself at the trial stage for personal reasons is against the principles of natural justice and fair trial. It was held that the broad principle evolved by the Supreme Court is that a person trying a cause must not only act fairly but must be able to act above suspicion of unfairness and bias.[108.]

[s 401.11] Review.—

Under this section, the High Court has no power to review its judgment pronounced on revision in a criminal case.[109.] The case of the respondent was being tried by the Special Judge who framed charges against him, and the High Court dismissed the revision petition. A second revision was filed in the High Court against the order framing the charges in the light of a Supreme Court decision passed subsequent to the rejection of the first revision. It was held that the second revision in the High Court was in effect to review its previous judgment and therefore not maintainable.[110.]

[s 401.12] Revision application by third party.—

The High Court can exercise its revisional jurisdiction under this section at the instance of a person who is a total stranger to the proceedings. If the illegality of a proceeding is brought to the notice of the High Court, it is immaterial who does so—whether he be a party or a stranger—and the Court can take action of its own accord.[111.] A private party has no right to file an appeal or revision against acquittal in a case which was instituted on police report. Even a formal permission of the public prosecutor would not entitle him to such right.[112.]

[s 401.13] Party in contempt of Court.—

A party who is in contempt of Court cannot be heard in criminal revision, nor is his counsel entitled to an audience.[113.]

[s 401.14] Revision for claiming compensation.—

In a case before the Supreme Court, the High Court tagged the revision petition along with death sentence reference case as well as criminal appeal filed by the accused against conviction and sentence. The parties were aware of this position as arguments were addressed on this question. It was held that the technical objection regarding non-issuance of notice could not be entertained because no prejudice was caused to the accused on that Court. The contention of the complainant that the accused having not preferred any separate appeal before the Supreme Court against the High Court's judgment in the revision petitions, there was no challenge to that part of the judgment at all, was also too technical and because none of the parties were prejudiced. Hence, the accused's objection as regards grant of compensation had to be considered on merits.[114.]

[s 401.15] Revision against acquittal, appeal against acquittal, comparative scope of jurisdiction.—

The dismissal of State's appeal acquittal on the technical ground of limitation gives finality to the judgment of the trial Court. In such a case, the exercise of revisional jurisdiction by the Court against the order of acquittal at the instance of a private party would not be proper. The Supreme Court said[115.]:

> The High Court noticed the fact that the State had preferred an appeal against the acquittal of the appellants. That appeal was dismissed by the High Court on the ground of limitation. In principle that makes no difference, because the dismissal of the appeal even on the ground of limitation is a dismissal for all purposes. The jurisdiction of the High Court in dealing with an appeal against acquittal preferred u/s. 374 is much wider than the jurisdiction of the revisional Court exercising jurisdiction u/s. 401 against an order of acquittal at the instance of a private party. All grounds that may be urged in support of the revision petition may be urged in the appeal, but not *vice versa*. The dismissal of an appeal preferred by the State against the order of acquittal puts a seal of finality on the judgment of the trial Court. In such a case it may not be a proper exercise of discretion to exercise revisional jurisdiction u/s. 401 against the order of acquittal at the instance of a private party. Exercise of revisional jurisdiction in such a case may give rise to an incongrous situation where an accused tried and acquitted of an offence, and the order of acquittal upheld in appeal by its dismissal, may have to face a second trial for the same offence even after acquittal.

[s 401.16] Revision without notice to parties.—

A revision petition was disposed of without issuing notices to respondents and other parties. The Court said that the principle of natural justice as enshrined in Article 14 of the Constitution of India was violated. The matter was remitted to the High Court to consider afresh after issuance of notice to respondents.[116.]

[s 401.17] Dismissal for non-appearance of petitioner.—

A revision petition was dismissed because of non-appearance of the petitioner. The non-appearance was due to the appointment of the counsel of the petitioner as counsel of the State. This fact was not brought to the notice of the petitioner, otherwise he could have appointed another counsel. The dismissal of revision was therefore set aside. The matter was remitted with direction to dispose it of as early as possible.[117.]

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1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).
76. *R Jagadish Murty v Balaram Mohanty*, 1992 Cr LJ 996 (Ori).
77. *RB Mithani v Maharashtra*, AIR 1971 SC 1630 : (1971) 1 SCC 523 : 1971 Cr LJ 1188 .
78. *Sukura Behera v State of Orissa*, 1989 Cr LJ NOC 218 (Ori).
79. *Siraj v State of Karnataka*, 1992 Cr LJ 86 (Kant).
80. *Vivek Rai v High Court of Jharkhand, Through Registrar General*, AIR 2015 SC 1088 : 2015(2) Scale 190 : (2015) 12 SCC 86 .
81. *Kustu Balsu Kandnekar v State*, 1986 Cr LJ 662 (Bom).
82. *Vijay Kumar v Neeraj Kumar*, 1990 Cr LJ 21 (J&K).
83. *State of Kerala v Narayani Amma Kamala Devi*, AIR 1962 SC 1530 : (1962) 2 Cr LJ 506 .
84. *Nagawwa Smt. v Veeranna Shivalingappa Konjalgi*, AIR 1976 SC 1947 : 1976 Cr LJ 1533 : (1976) 3 SCC 736 .
85. *Bindeshwari Prasad Singh v State of Bihar*, AIR 2002 SC 2907 : (2002) 6 SCC 650 , the Court followed: *D Stephens v Nosibolla*, AIR 1951 SC 196 : 1951 Cr LJ 510 ; *K Chinnaswamy Reddy v State of AP*, AIR 1962 SC 1788 : (1963) 1 Cr LJ 8 ; *Mahendra Pratap Singh v Sarju Singh*, AIR 1968 SC 707 : 1968 Cr LJ 665 .
86. *Jagdish Bagri v Rajendra Kumar Luhariwala*, AIR 2009 SC 1395 : 2009 Cr LJ 1316 : (2009) 4 SCC 218 .
87. *Re Nookiah*, (1954) Mad 811.
88. *Ram Lochan v State of Madras*, 1978 Cr LJ 544 (All); *SK Grover v V Chandra Prakash*, 1986 Cr LJ 56 (Mad).
89. *YP Verma*, (1946) Nag 780.
90. *Manoj Kumar Yadav v Shobha Bos*, 1993 Cr LJ 1246 (All).
91. *Tajkhan*, (1953) 2 All 4 (FB).
92. *JK International v State of Delhi*, 2002 Cr LJ 2601 (Del).
93. *JK International v State*, 2002 Cr LJ 2601 (Del).
94. *Bal Manohar Jalan v Sunil Paswan*, (2014) 9 SCC 640 : 2014 Cr LJ 3881 (SC); *Manharibhai Mohanbhai Kakadia v Shaileshbhai Mohanbhai Patel*, (2012) 10 SCC 517 : 2013 Cr LJ 144 —Foll.
95. *Kishan Singh v Emperor*, (1928) 55 IA 390 : 30 Bom LR 1572 : 50 All 722, **overruling** *Re Bali Reddi*, 1913 37 Mad 119; *Emperor v Rameshwar*, (1929) 31 Bom LR 529 : 53 Bom 564. The Allahabad High Court has taken the same view as the Privy Council in *Kishan Singh's* case: *Mohammad Sharif*, (1951) 1 All 673 .
96. *Logendranath Jha v Shri Palailal Biswas*, (1951) SCR 676 : AIR 1951 SC 316 : 52 Cr LJ 1248.
97. *Ganesha v Sharanappa*, AIR 2014 SC 1198 : (2014) 1 SCC 87 .

98. *Queen-Empress v Ala Bakhsh*, (1884) 6 All 484 .

99. *Bhupinder Singh v N Kaur*, 1990 Cr LJ 2265 (Del).

100. *Dayal Singh*, (1936) 17 Lah 604; *Emperor v Jamnadas Nathji*, (1936) 39 Bom LR 82 : (1937) Bom 263; *Ali Hosain*, (1941) 1 Cal 417 ; *AN Singh*, (1953) 32 Pat 11; *Ashok Kumar v Manager, ESI Corp, Madras*, 1988 Cr LJ 1084 (Mad).

101. *Him Advances & Savings Pvt Ltd v Ravinder Kumar Gupta*, 2002 Cr LJ 4741 (HP).

102. The High Court cannot *suo motu* intervene to enhance a sentence. *V Sasi v State of Kerala*, AIR 1992 SC 122 : 1992 Cr LJ 106 .

103. *Emperor v Inderchand*, (1934) 36 Bom LR 954 ; *Sarjug Rai v State of Bihar*, AIR 1958 SC 127 : 1958 Cr LJ 268 ; *Kodavandi Moideen v State of Kerala*, AIR 1973 SC 467 : 1973 Cr LJ 671 .

104. *V Sasi v State of Kerala*, AIR 1992 SC 122 : 1992 Cr LJ 106 : (1992) 2 Supp SCC 499 .

105. *UJS Chopra v State of Bombay*, AIR 1956 SC 633 : 1955 Cr LJ 1410 .

106. *Sri Krishna Tyres v JK Industries Ltd*, AIR 2009 SC 2538 : (2009) 13 SCC 554 .

107. *Ashish Chadha v Smt Asha Kumari*, AIR 2012 SC 431 : (2012) 1 SCC 680 : (2012) 1 SCC (Cri) 744 .

108. *Narinder Singh Arora v State (Govt. of NCT of Delhi)*, AIR 2012 SC 1642 : (2012)1 SCC 561 : (2012) 1 SCC (Cri) 401 ; **See** *Manak Lal v Dr Prem Chand Singhvi*, AIR 1957 SC 425 ; *AK Kraipak v UOI*, AIR 1970 SC 150 : (1969) 2 SCC 262 .

109. *CP Fox*, (1885) 10 Bom 176 (FB); *Durga Charan*, (1885) 7 All 672 .

110. *State of Rajasthan v Gurcharandhas Chadha*, AIR 1979 SC 1895 : 1979 Cr LJ 1416 : (1980) 1 SCC 250 .

111. *Bisheshwar Prasad Sinha*, (1933) 56 All 158 (FB); *TN Dhakkal v James Basnett*, (2001) 10 SCC 469 .

112. *Kishan Sanroop v Govt of NCT of Delhi*, AIR 1998 SC 990 : (1998) 8 SCC 451 .

113. *Sheomandil v Emperor*, (1938) All 991 .

114. *Rachhpal Singh v State of Punjab*, AIR 2002 SC 2710 : (2002) 6 SCC 462 .

115. *Bindeshwari Pd Singh v State of Bihar*, AIR 2002 SC 2907 : (2002) 6 SCC 650 ; *TN Dhakhal v James Basnett*, (2001) 10 SCC 419 , exercise of revisional jurisdiction at the instance of a third party and not the state, the Court did not go into the propriety of this question.

116. *Uma Nath Pandey v State of UP*, AIR 2009 SC 2375 : (2009) 12 SCC 40 .

117. *Satin Chandra Pegu v State of Assam*, AIR 2007 SC 457 : (2006) 12 SCC 446 : 2007 Cr LJ 309 .

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CHAPTER XXX REFERENCE AND REVISION

This Chapter deals with two important jurisdictions, *viz.*, of (1) reference and (2) revision. The former jurisdiction can be invoked either by (a) any Court or (b) a Metropolitan Magistrate (section 395). In both cases, the reference can be made only on the validity of any Act or any provision thereof or on a question of law and must arise in the hearing of a case. The revisional jurisdiction can be exercised by the High Court and also the Sessions Judge (section 397). The record of the case is called for with a view to order further inquiry (section 398). Where the High Court exercises the jurisdiction either of itself or which otherwise comes to its knowledge, it can exercise any of the powers which are conferred on an appellate Court (section 401). The jurisdiction above referred to is described as the revisional jurisdiction of the High Court. There is another source of jurisdiction which the High Court has over the Criminal Courts beside its appellate jurisdiction. It is the power of superintendence which arises under Article 227 of the Constitution of India.

Under sub-section (1), reference can be made only by a Court of Session or of a Metropolitan Magistrate. A Judicial Magistrate can make reference only under sub-section (2).[1.] A Sessions Court is competent to make reference on a question of law under its original as well as appellate jurisdiction.[2.] Where a High Court referred a question of law involved in a bail application, but the bail application had already been disposed of, it was held that since there was no matter "pending before it", the Court was incompetent to make the reference and hence the High Court declined to entertain it.[3.]

[s 402] Power of High Court to withdraw or transfer revision cases.—

(1) Whenever one or more persons convicted at the same trial makes or make application to a High Court for revision and any other person convicted at the same trial makes an application to the Sessions Judge for revision, the High Court shall decide, having regard to the general convenience of the parties and the importance of the questions involved, which of the two Courts should finally dispose of the applications for revision and when the High Court decides that all the applications for revision should be disposed of by itself, the High Court shall direct that the applications for revision pending before the Sessions Judge be transferred to itself and where the High Court decides that it is not necessary for it to dispose of the applications for revision, it shall direct that the applications for revision made to it be transferred to the Sessions Judge.

(2) Whenever any application for revision is transferred to the High Court,that Court shall deal with the same as if it were an application duly made before itself.

(3) Whenever any application for revision is transferred to the Sessions Judge, that Judge shall deal with the same as if it were an application duly made before himself.

(4) Where an application for revision is transferred by the High Court to the Sessions Judge, no further application for revision shall lie to the High Court or

to any other Court at the instance of the person or persons whose applications for revision have been disposed of by the Sessions Judge.

As both High Court and the Sessions Judge possess revisional power, it may well happen that in case of joint trial some accused may come in revision before the High Court and others before the Sessions Judge. A conflict of jurisdiction is avoided by reposing in the High Court the power initially to decide whether all of them should be decided by itself or all of them should be decided by the Sessions Judge keeping in view the general convenience of the parties and the importance of the question involved.

Once the High Court transfers the revision application to the Sessions Judge and it is disposed of by him, no further revision will lie to the High Court.

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1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).

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[s 403] Option of Court to hear parties.—

Save as otherwise expressly provided by this Code, no party has any right to be heard either personally or by pleader before any Court exercising its powers of revision; but the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader.

In revisional jurisdiction, a party cannot insist upon being heard by the Court. The Court has a discretion to hear a party. This rule applies to an accused as well as to a complainant.[118.] It was held that the discretion given by section 403 to the Courts was not violative of the principles of natural justice.[119.]

In the trial Court, an accused person "may of right be defended by pleader" (section 303). In the appeal Court, the appellant or his pleader must have "a reasonable opportunity of being heard in support of his appeal" (section 384). When a case comes up by way of reference, there are no express provisions in the Code entitling the parties to appear as of right; and in one case, the Bombay High Court[120.] denied the right to the accused. Coming to revisional jurisdiction, before an order to make further inquiry is passed against a person who has been discharged, such person should have "an opportunity of showing cause" (section 398). Similarly, no order can be passed under section 401 to the prejudice of an accused, "unless he has had an opportunity of being heard either personally or by pleader in his own defence."[121.]

In the High Court, it is the practice to hear pleaders in revision.[122] But a counsel has not got any general right of being heard at all in revision.[123]

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1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).

118. *Shamdasani v Unknown*, (1929) 31 Bom LR 1144 .
119. *Kerala Transport Co v DS Soma Shekar*, 1982 Cr LJ 1065 (Knt).
120. *Reg v Devama*, (1875) 1 Bom 64.
121. *Ambu Kisan v Venubai*, AIR 1961 Bom 261 : 62 Bom LR 869.
122. *Ram Niharo Umar*, (1911) 8 ALJR 237.
123. *Satnarain Lal v Emperor*, (1940) All 539 .

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[s 404] Statement by Metropolitan Magistrate of grounds of his decision to be considered by High Court.—

When the record of any trial held by a Metropolitan Magistrate is called for by the High Court or Court of Session under section 397, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before overruling or setting aside the said decision or order.

1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).
2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).

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[s 405] High Court's order to be certified to lower Court.—

When a case is revised under this Chapter by the High Court or a Sessions Judge, it or he shall, in the manner provided by section 388, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

[s 405.1] Duty of Court to pass consequential orders.—

When High Court reverses conviction and sentence in appeal or revision and its order has been certified to the concerned Court without specific direction for refund of fine, it is the duty of the Magistrate to pass consequential orders in conformity with the order of the revising Court.[124.]

1. *Kanshi Ram v Lachman*, 1984 Cr LJ NOC 80 (HP).

2. *Re* an accused *Petitioner v State of Kerala*, 1964 Cr LJ 743 (Ker).
3. *Mahesh Chand v Raj*, 1985 Cr LJ 301 (Raj).
124. *VK Karunkaran Nair v State*, 1981 Cr LJ 1161 (Ker).

The Code of Criminal Procedure, 1973

CHAPTER XXXI TRANSFER OF CRIMINAL CASES

This Chapter refers to five classes of transfer: (1) section 406 deals with the powers of the Supreme Court to transfer cases or appeals from one State to another at the instance of the Attorney General of India or a party interested; (2) section 407 covers any inquiry or trial of a case or appeal or class of cases or appeals of which transfer may be made by the High Court from one Court to another Court of equal or superior jurisdiction, including the High Court itself; (3) sections 408 and 409 permit a Sessions Judge to transfer cases or appeals from one criminal Court to another in his sessions division and also recall any case or appeal made over by him to an Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate (CJM); (4) section 410 allows (a) a CJM to withdraw or recall a case from any Magistrate subordinate to him and (b) allows any Judicial Magistrate to recall a case made over by him to any other Magistrate under section 192(2) of the Code; and last, (5) section 411 empowers a District or Sub-Divisional Magistrate to transfer or withdraw any case from a Magistrate subordinate to him and either try the same himself or refer it for disposal to any other Magistrate.

The power to withdraw a pending case from one Court to the High Court if it involves the question of interpretation of the Constitution vests in the High Court by virtue of Article 228 of the Constitution of India. The Code also contains other provisions dealing with transfer of cases, e.g., sections 185, 191, 192, 322, 352 and 479.

[s 406] Power of Supreme Court to transfer cases and appeals —

(1) **Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.**

(2) **The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.**

(3) **Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.**

COMMENTS

The jurisdiction under the present section arises in the interests of justice only on (1) an application by the Attorney-General or (2) of a party interested.

Under this section, the Supreme Court will transfer a case if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. But a mere allegation of apprehension does not suffice; the Court has to see whether the apprehension is reasonable.[1.] Where, however, a Magistrate in whose Court the case of which transfer is sought is pending makes an affidavit on behalf of the administration and puts in a strong plea opposing the transfer, it is expedient for the ends of justice without considering the merits of the contentions raised by the petitioner to transfer the case. Because in such a case all essential attributes of a fair and impartial criminal trial are put in jeopardy.[2.] Where the petitioner was poor and the complainant the only witness to be examined, transfer of the case from Cuttack to Chandigarh was ordered.[3.] The Supreme Court allowed a transfer application where the circumstances brought on record showed every likelihood of physical harm being caused to the petitioner.[4.] Vague apprehension that the accused might transfer the witnesses of the prosecution was not sufficient to oppose the transfer.[5.]

In *Captain Amarinder Singh v Parkash Singh Badal,*[6.] while dealing with an application for transfer petition preferred under section 406 CrPC, a three-Judge Bench has opined that for transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It has also been observed therein that mere an allegation that there is an apprehension that justice will not be done in a given case alone does not suffice. It is also required on the part of the Court to see whether the apprehension alleged is reasonable or not, for the apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension.

The Supreme Court can, in exercise of its jurisdiction and power under this section, transfer a case from a Special Judge subordinate to one High Court to another Special Judge subordinate to another High Court. The provisions of section 7(1) of the Criminal Law Amendment Act, 1952, do not stand in the way of such a transfer.[7.] It was held that section 7 of the Special Courts Act, 1979 [now repealed], by providing for automatic transfer of cases from High Court to the Supreme Court did not take away the Supreme Court's power under section 406 of the Code. There was no inconsistency between the two provisions. Section 7 of the Special Courts Act, 1979 was a legislative decision, whereas decision under section 406 had to be a judicial decision.[8.] It was held by the Supreme Court that for any sound and reputable system of administration, justice should appear to be done as that it is in fact done. Thus, where an accused appeals from his conviction for an attempt to murder the Chief Justice of a State High Court and applies for transfer of his appeal to some other High Court on the ground that he will not have fair and impartial hearing of appeal in the State High Court which is presided over by the complainant, it is a fit case for transfer.[9.]

Where transfer of a case from Court of Session was sought on the ground that the Judge did not allow the accused to sit down during the trial, the Court held that there was no substance in the allegation of unfairness or impartiality, and therefore the transfer application could not be granted.[10.] Transfer may be ordered on the ground of poverty of the petitioner.[11.] Assurance of fair trial is the first imperative of the dispensation of justice, and the Court has to consider not the relative convenience of a party but something more substantial and impending which necessitates the Court to exercise the power of transfer. It was observed by the Supreme Court that the complainant had a right to choose the forum and the accused could not dictate where the case should be tried.[12.] Section 406 contemplates transfer of cases but not transfer of investigation from one police station to another. If the accused is directed to

appear in a far-off Court during investigatory stage, he may move the Court for appropriate order.[13.]

By a 2:1 majority, the Supreme Court[14.] has held that the observations made by the trial court while discharging the accused persons under the SC/ST Act about the alleged misuse of provisions of the said Act were a ground for transfer of the case, although the High Court had set aside the discharge order with a direction to decide the matter afresh.

[s 406.1] Transfer for protection of accused —

In a case arising out of kidnapping and murder, out of the kidnapped persons, those belonging to one ethnicity only were killed and others released. The accused was a member of a terrorist organisation belonging to the other ethnicity. The incident took place in an area where opinions were sharply divided about causes espoused by terrorist organisations. There was real possibility of attack on the accused which could lead to friction with threats to witnesses affecting trial. The case was transferred from Court of CJM, Manipur, to a designated Central Bureau of Investigation (CBI) Court in Delhi. The investigating agencies and the Government of Manipur were directed to render full assistance to the victim's legal heirs to ensure their participation in the trial.[15.]

[s 406.2] Transfer on application by AG or party interested [*Sub-section (2)*].—

The Court does not examine witnesses in support of allegations of fact made by either side. Ordinarily, the Supreme Court acts upon the affidavit of one side or the other. But if one side omits to make an affidavit in reply, the affidavit of the other side which remains uncontroverted can be acted upon.[16.]

The words "party interested" occurring in section 406 are not defined in the Code. They are of a wide import and can mean person interested. The petitioner was a political opponent, and not a party to the proceedings. He had *locus standi* to move a transfer petition. His petition was not liable to be dismissed on the allegation of political vendetta. The political opponent was vitally interested in running the Government and also in the administration of criminal justice. The case was pending against the Chief Minister of the State and her close relatives alleging accumulation of wealth to disproportionate to income. As many as 76 prosecution witnesses were recalled for cross-examination. The Public Prosecutor neither objected nor gave any consent. Sixty-four of them resiled from their previous statements-in-chief. No attempt was made by the Public Prosecutor to declare them as hostile and to cross-examine them by resorting to section 154 of the Indian Evidence Act, 1872. There was the general apprehension in the public mind and real likelihood of bias in the conduct of prosecution appointed by the Government of the accused Chief Minister. The process of justice was subverted. Transfer of the case to the State of Karnataka was directed.[17.]

Exercising its extra ordinary power under Article 142 of the Constitution, the Supreme Court transferred notable gangster and criminal Mohd. Shahabuddin from Bihar to Tihar Jail, Delhi and ordered all his pending trials shall be conducted by video conferencing by the concerned trial court.[18.]

A petition was filed by the Seer of Kanchi Mutt who was charged with murder conspiracy. The Chief Minister made the press statement that investigation revealed involvement of the petitioner Shankaraman murder case. The petitioner had already been arrested and that fact created a lot of publicity. The statement of the Chief

Minister on the floor of the House was held as not amounting to condemnation of the petitioner. It could not be a ground for transfer of the case. But other causes creating the need for transfer were found to be there. One of them was the conduct of the prosecution machinery in prompting a witness to make totally false allegations against the senior defence counsel which would have made it impossible for him to function fearlessly and in proper manner. A false and fabricated case was also lodged against junior defence lawyers. The second cause necessitating transfer was the action of the special investigation team in issuing direction for freezing the accounts of the Mutt in banks merely because the accused was the head of Mutt. It was a clear pointer to the fact that the State machinery anyhow wanted to paralyse the entire working of the Mutt and associated trusts and endowments, thereby creating a fear of psychosis in public mind as well as in the minds of the accused persons. The third cause, which justified transfer was that soon after grant of bail by the Supreme Court to the Seer, a detention order was passed against 16 co-accused. This was a clear pointer to the fact that the State wanted to put them under complications. Prosecution was also launched against prominent politicians and journalists merely because they had spoken against the arrest of the Seer, thus violating Article 19 of the Constitution. The case was transferred to Pondicherry to overcome any language problem.[19.]

In *Sujatha Ravi Kiran v State of Kerala,*[20.] in a prayer to transfer criminal proceedings to Delhi High Court and submit the investigation to CBI, it was held that the Supreme Court will transfer a case from one state to another state only if there is a reasonable apprehension on the part of a party to a case that justice will not be done and mere apprehension that the accused are influential may not be sufficient to transfer the case.

A Constitution Bench of the Supreme Court in *Anita Kushwaha v Pushap Sudan*[21.] was seized of a very interesting question of law in a batch of 13 petitions (11 civil, 2 criminal) pertaining to powers of the Supreme Court to transfer a civil or criminal case from the State of Jammu and Kashmir outside the state and vice versa. The main challenge was that provisions of section 25 of the CPC and section 406 of the Code, which empower the Supreme Court to direct transfer of civil and criminal cases, respectively, from one State to the other, did not extend to the State of Jammu and Kashmir and cannot, therefore, be invoked to direct any such transfer. It was also contended that Jammu and Kashmir Code of Civil Procedure, 1977, and the Jammu and Kashmir Code of Criminal Procedure, 1989, did not contain any provision empowering the Supreme Court to direct transfer of any case from that State to a Court outside the State or vice versa. The bench held that absence of an enabling provision cannot be construed as a prohibition against transfer of cases to or from the State of Jammu and Kashmir. At any rate, a prohibition simpliciter is not enough. What is equally important is to see whether there is any fundamental principle of public policy underlying any such prohibition. No such prohibition nor any public policy can be seen in the cases at hand much less a public policy based on any fundamental principle. The extraordinary power available to this Court under Article 142 of the Constitution can, therefore, be usefully invoked in a situation where the Court is satisfied that denial of an order of transfer from or to the Court in the State of Jammu and Kashmir will deny the citizen his/her right of access to justice. The provisions of Articles 32, 136 and 142 are, therefore, wide enough to empower the Supreme Court to direct such transfer in appropriate situations, no matter Central Code of Civil and Criminal Procedures do not extend to the State nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers this court to transfer cases.

The power of transfer is to be exercised sparingly and with great circumspection. There must be no apprehension that justice would not be dispensed impartially, objectively and without any bias. Criminal trial is capable of depriving a person of his life or liberty and, therefore, it is necessary that it should be free, fair and unbiased. An impartial and free of influence trial is a fundamental requirement. In this case the Court said that generally it is no ground to refuse transfer for the reason that the Court is already

heavily burdened with work. It is open to the High Court to request to the State to create another Court of Special Judge.[22.]

Refusal to transfer should be shown to be seriously capable of undermining public confidence in fair trial. Convenience of the parties, witnesses and larger interest of the society are also relevant considerations. Wild allegation of the existence of communally surcharged atmosphere by itself is not enough. It has to be considered in the light of accusations made and nature of crime committed by the person seeking the transfer.[23.]

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1. *Gurcharan Das v State of Rajasthan,* AIR 1966 SC 1418 : 1966 Cr LJ 1071 .
2. *Kaushalya Devi v Mool Raj*, (1964) 1 Cr LJ 233 : (1964) 4 SCR 884 .
3. *Inder Singh v Kartar Singh*, AIR 1979 SC 1720 : 1979 Cr LJ NOC 201 : (1979) 4 SCC 192 .
4. *Sesamma Phillip v P Phillip*, AIR 1973 SC 875 : 1973 Cr LJ 648 : (1973) 1 SCC 405 ; *Ranjit Singh v Popat Rambhaji Sonavane*, 1983 Cr LJ 436 : AIR 1983 SC 291 : (1983) 1 SCC 390 .
5. *AKK Nambiar v Desraj (DS.P)*, AIR 197 3 SC 203 : 1973 Cr LJ 270 : (1973) 3 SCC 873 .
6. *Captain Amarinder Singh v Parkash Singh Badal,* (2009) 6 SCC 260 : JT 2009 (7) SC 187 : 2009 (7) Scale 382 . **See also** *Usmangani Adambhai Vahora v State of Gujarat*, (2016) 3 SCC 370 : AIR 2016 SC 336 .
7. *Gurcharan Das v State of Rajasthan*, AIR 1966 SC 1418 : 1966 Cr LJ 1071 .
8. *State v VC Shukla*, 1980 Cr LJ 965 : AIR 1980 SC 1382 : (1980) Supp SCC 249 .
9. *LS Raju v State of Mysore*, AIR 1953 SC 435 : 1953 Cr LJ 1833 .
10. *Avtar Singh v State of MP*, 1982 Cr LJ 1740 : AIR 1982 SC 1260 : (1982) 1 SCC 438 .
11. *Inder Singh v Kartar Singh*, 1979 Cr LJ NOC 201 : AIR 1979 SC 1720 : (1979) 4 SCC 192 .
12. *Maneka Sanjay Gandhi v Rani Jethmalani*, 1979 Cr LJ 458 : AIR 1979 SC 468 : (1979) 4 SCC 167 .
13. *Ram Chander Singh Sagar v State of TN*, 1978 Cr LJ 640 : AIR 1978 SC 475 : (1978) 2 SCC 35 .
14. *Kanaklata v State of (NCT) of Delhi,* (2015) 6 SCC 617 : 2015 (2) Scale 182 .
15. *CBI v Hereson Ningshen*, AIR 2010 SC 1617 : (2010) 5 SCC 115 .
16. *Hazara Singh v The State of Punjab*, AIR 1965 SC 720 : (1965) 1 Cr LJ 639 .
17. *K Anbazhagan v Superintendent of Police*, AIR 2004 SC 524 : (2004) 3 SCC 767 : 2004 Cr LJ 583 .
18. *Asha Ranjan v State of Bihar*, Writ Petition (Criminal) No. 132/2016 as decided on 15th February 2017 by the Supreme Court.
19. *Jayendra Saraswathy Swamigal v State of TN*, AIR 2006 SC 6 : (2005) 8 SCC 771 : 2005 Cr LJ 4626 .
20. *Sujatha Ravi Kiran v State of Kerala,* (2016) 7 SCC 597 : AIR 2016 SC 2277 : 2016 (5) Scale 188 [Three-Judge Bench].
21. *Anita Kushwaha v Pushap Sudan,* (2016) 8 SCC 509 : AIR 2016 SC 3506 : 2016 (7) Scale 235 .

22. *Nahar Singh Yadav v UOI*, AIR 2011 SC 1549 : 2011 Cr LJ 997 : (2011) 1 SCC 307 (Three-Judge Bench).

23. *Abdul Nazar Madani v State of Tamil Nadu,* AIR 2000 SC 2293 : 2000 Cr LJ 3480 : (2000) 6 SCC 204 .

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CHAPTER XXXI TRANSFER OF CRIMINAL CASES

This Chapter refers to five classes of transfer: (1) section 406 deals with the powers of the Supreme Court to transfer cases or appeals from one State to another at the instance of the Attorney General of India or a party interested; (2) section 407 covers any inquiry or trial of a case or appeal or class of cases or appeals of which transfer may be made by the High Court from one Court to another Court of equal or superior jurisdiction, including the High Court itself; (3) sections 408 and 409 permit a Sessions Judge to transfer cases or appeals from one criminal Court to another in his sessions division and also recall any case or appeal made over by him to an Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate (CJM); (4) section 410 allows (a) a CJM to withdraw or recall a case from any Magistrate subordinate to him and (b) allows any Judicial Magistrate to recall a case made over by him to any other Magistrate under section 192(2) of the Code; and last, (5) section 411 empowers a District or Sub-Divisional Magistrate to transfer or withdraw any case from a Magistrate subordinate to him and either try the same himself or refer it for disposal to any other Magistrate.

The power to withdraw a pending case from one Court to the High Court if it involves the question of interpretation of the Constitution vests in the High Court by virtue of Article 228 of the Constitution of India. The Code also contains other provisions dealing with transfer of cases, e.g., sections 185, 191, 192, 322, 352 and 479.

[s 407] Power of High Court to transfer cases and appeals —

(1) **Whenever it is made to appear to the High Court—**

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice;

it may order—

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) **The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:**

Provided **that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.**

(3) **Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.**

(4) **When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).**

(5) **Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.**

(6) **Where the application is for the transfer of a case of appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:**

Provided **that such stay shall not affect the subordinate Court's power of remand under section 309.**

(7) **Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.**

(8) **When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.**

(9) **Nothing in this section shall be deemed to affect any order of Government under section 197.**

COMMENT

It was held that section 407 could not be challenged as being violative of Article 14 of the Constitution because it was based on reasonable classification having relation to be object sought to be achieved.[24.] In the same case, it was held by the Supreme Court that provisions of section 407 did not override provisions of the Criminal Law Amendment Act 46 of 1952.[25.] This section contains an important provision of law,

and one that is frequently resorted to. It can be brought into action in any of three ways, namely—

(1) The High Court can act *suo motu*,

(2) The lower Court may apply or

(3) The party may apply

only when one or more of the following five conditions are fulfilled.

In the same case, it was held by the Supreme Court that provisions of section 407 did not override provisions of the Criminal Law Amendment Act 46 of 1952[26.]:

(a) a fair and impartial inquiry or trial cannot be had;

(b) some question of law of unusual difficulty is likely to arise;

(c) an order under this section is required by any provision of this Code;

(d) it will tend to the general convenience of the parties or witnesses;

(e) it is expedient for the ends of justice.

It is the High Court alone that has jurisdiction to transfer a case under the section. It may pass any of the following four orders:

(i) that any offence be inquired into or tried by a Court otherwise competent, though not empowered under sections 177 to 185;

(ii) that any case or appeal be transferred to another criminal Court or order stay of proceedings;

(iii) that any case be committed to a Court of Session; or

(iv) that any case or appeal be transferred to itself.

The High Court may order the applicant to execute a bond for the costs of the opponent; and if the application is frivolous or vexatious, the costs of the opponent may be ordered to be paid by the applicant.

The application for transfer should be supported by an affidavit, and the Public Prosecutor is entitled to have notice of it at least twenty-four hours in advance.

Where an application for transfer is made to the High Court, it can order stay of proceedings before the subordinate Court, pending disposal of the transfer application. The High Court may impose such terms as it thinks fit. But the subordinate Court's power of remand under section 309 is not affected because of stay order.

Under the old Code, subordinate Courts were bound to stop all proceedings on the intimation of a party that he intended to file a transfer application before a higher Court. It led to abuse of authority; therefore, the power is now given to the High Court and, by the next section, to the Sessions Judge to order stay of proceedings.

The Madras High Court has held that the order for transfer must operate from the date on which that order is passed and therefore any Court which continues to do any act after the order is passed—even though a copy of the order has not been received by it—is acting without jurisdiction. A case pending before a Bench of Magistrates was ordered to be transferred to the Court of Stationary Sub-Magistrate. Before, however, that order had been communicated to the Bench Magistrates' Court, the case came up

before the Bench and on the accused's plea he was convicted and sentenced. It was held that the Bench Court, when it took up the case of the accused and disposed of it, had no jurisdiction to do so.[27.] In a Full Bench case, the Lahore High Court has held that an order staying further proceedings in the lower Court on an application for transfer under this section can only be deemed to take effect when it is communicated to the lower Court concerned and is not operative immediately it is made by the High Court so as to render null and void any proceedings taken between its making and its communication to the lower Court.[28.]

A Full Bench of the Madras High Court has held that where an offence consists of several acts done in different local areas, the High Court, when it is made to appear to it that circumstances contemplated under clause (a), (b) or (c) of sub-section (1) exist, may order the case to be enquired into or tried by a Court having jurisdiction over any of such local areas.[29.] A case pending before a Magistrate can be transferred to the Court of Session by the High Court.[30.] In an old case, arguments were partly heard and four adjournments were granted. A date was fixed for arguments when an application for transfer of the proceedings was made which was liable to be rejected.[31.]

[s 407.1] Transfer to prevent failure of justice [*Sub-section (1)(a)*].—

As a rule, the High Court is reluctant to interfere under this section. It demands the postulation of exceptional reasons before it elects to stand in the way of the progress of a pending trial. Yet in acting under clause (a) what is required is not whether in fact "a fair and impartial inquiry or trial" cannot be had, but whether there is "a reasonable apprehension" in the mind of the party about it. "Of course it is not every apprehension of this sort that should be taken into consideration; but where the apprehension is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the fact of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer."[32.] "The law... has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigating parties."[33.]

The transfer of a case from one Sessions Court to another without giving notice to the accused or affording him an opportunity to oppose was held to be not sustainable. Some of the accused showed that they had difficulties in facing trial in that other Court.[34.]

[s 407.2] Any particular case [***Sub-section (1)(c)(ii)***].—This term means a case which is pending before a Court competent to receive and try it.[35.] It does not include a transfer application,[36.] or a proceeding under section 145.[37.] Proceedings under Chapter VIII are included in the term.

[s 407.3] "Equal...jurisdiction" —

The High Court can transfer a case from the file of the Chief Metropolitan Magistrate to that of another Metropolitan Magistrate.[38.] Under sub-section (1)(ii), the High Court is competent to transfer a case from the Court of a Magistrate to the Court of the Sessions Judge.[39.]

[s 407.4] Application to be by motion on affidavit [*Sub-section (3)*].—

Where an application was moved under section 482 CrPC read with section 407 CrPC without an affidavit, it was held to be legally competent and maintainable as section 482 CrPC does not require the support of an affidavit or affirmation. But an affidavit will be required where the application is only under section 407 CrPC. It was also held that brother of the deceased woman had *locus standi* to file such an application.[40.]

[s 407.5] Government right to costs against frivolous applications [*Sub-section (7)*].—

The word 'person' includes State Government, and therefore the State Government opposing the application is entitled to recover its costs.[41.]

[s 407.6] Affidavit —

An accused person is competent to make an affidavit in support of his application for transfer.[42.]

[s 407.7] Power of High Court to transfer a case involving point of Constitution —

Under Article 228 of the Indian Constitution, if the High Court is satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may (a) either dispose of the case itself, or (b) determine the said question of law and return the case to the Court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said Court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

[s 407.8] Special Courts —

Special Courts are not subordinate to the High Court. Transfer of a case from one judge to another such judge cannot be ordered by the High Court under section 407.[43.]

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24. *AR Autulay v Nayak*, AIR 1988 SC 1531 : (1988) 2 SCC 602 : 1988 Cr LJ 1661 .
25. *Manindra Kumar v State of Rajasthan*, 1992 Cr LJ 1392 (Raj).
26. *Manindra Kumar v State of Rajasthan*, 1992 Cr LJ 1392 (Raj).
27. *Borai Gouder v Commissioner, Ootacamund Municipality*, (1938) Mad 1003 : AIR 1938 Mad 832 .
28. *Mahmood Hussain v The Crown*, (1943) 24 Lah 331 (FB).

29. *Employees' State Insurance Corp v M Haji Muhammad*, (1960) ILR Mad 1 (FB).

30. *PC Gulati v Lajya Ram*, AIR 1966 SC 595 : 1966 Cr LJ 465 .

31. *Ram Bilas v State of Uttar Pradesh*, 1990 Cr LJ 677 (All).

32. *Dupeyron v Driver*, (1896) 23 Cal 495 , 498; *Legal Remembrancer v Bhairab Chandra Chuckerbutty*, (1897) 25 Cal 727 ; *Baktu Singh v Kali Prasad*, (1900) 28 Cal 297 ; *Kali Charan Ghose v Emperor*, (1906) ILR 33 Cal 1183; *Re Pandurang Govind*, (1900) 2 Bom LR 755 : 25 Bom 179; *Farzand Ali v Hanuman Prasad*, (1896) 19 All 465 ; *Emperor v Ram Kishan Das*, (1913) 35 All 5 ; *Emperor v Jaggan*, (1914) ILR 36 All 239.

33. *Per* LUSH J, in *Serjeant v Dale*, (1877) 2 QBD 558 , 567; *Ramesh Chandu v State of J&K*, 1992 Cr LJ 1411 (J&K); *M Mohan Shet v State of Karnataka*, 1992 Cr LJ 1403 (Knt).

34. *Naib Singh and Guljar Singh v State of Haryana*, AIR 1996 SC 2759 : 1996 Cr LJ 3998 . *Vijay Pal v State of Haryana*, (1999) 9 SCC 67 : (1998) 7 JT 438 , transfer ordered without hearing the opposite party and without observing requisite formalities set aside.

35. *Queen-Empress v Mangal Tekchand*, (1886) 10 Bom 274; following *Peary Lall Mozoomdar v Komal Kishore Dassia*, (1880) 6 Cal 30 .

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice." (w.e.f. 23-6-2006).

36. *Muhammad Sharif v Rai Hari Prasad Lal*, (1925) 5 Pat 229.

37. *Loka Mahton v Kali Singh*, (1927) ILR 6 Pat 553 : AIR 1927 Pat 351 .

38. *Re Venkateswara Sastri*, (1911) 35 Mad 739.

39. *Gulati v Lajya Ram*, AIR 1966 SC 595 : 1966 Cr LJ 465 .

40. *Radhesh Chandra v State of Rajasthan*, 1995 Cr LJ 3394 (Raj).

41. *Kanwer Sen*, (1929) 52 All 263 (FB).

42. *Ghulam Muhammad v Emperor*, (1922) ILR 3 Lah 46; contra *Matan*, (1910) 33 All 163 ; *Subbayya*, (1889) 12 Mad 451.

43. *Dhyan Investments & Trading Co Ltd v CBI*, AIR 2001 SC 2456 : 2001 Cr LJ 3952 : (2001) 6 SCC 607 , the Court was constituted under the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992.

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The power to withdraw a pending case from one Court to the High Court if it involves the question of interpretation of the Constitution vests in the High Court by virtue of Article 228 of the Constitution of India. The Code also contains other provisions dealing with transfer of cases, e.g., sections 185, 191, 192, 322, 352 and 479.

[s 408] Power of Sessions Judge to transfer cases and appeals —

(1) **Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.**

(2) **The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested, or on his own initiative.**

(3) **The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section** (1) **as they apply in relation to an application to the High Court for an order under sub-section (1) of section 407, except that sub-section (7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted.**

COMMENT

This section defines the power of the Sessions Judge to transfer cases and appeals. It can be brought into effect in any of the following three ways:

(1) On a report made by the lower Court;

(2) On an application of the party interested; or

(3) *Suo motu* by the Sessions Judge.

The order will be made only when it is expedient for the ends of justice.[44.]

The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 407 become applicable in case of application to the Sessions Judge also, with this difference that for frivolous or vexatious application for transfer, he can award maximum compensation of Rs 250 only. Where the Sessions Judge had transferred the case under section 408 to the Court of the Additional Sessions Judge, who had already begun the trial, subsequent trial of the same case before the Sessions Judge was illegal and beyond his jurisdiction.[45.]

The Supreme Court ordered in affirmative the question that whether a High Court has power under Article 227 to direct a Sessions Court to transfer a case to another Sessions Court under section 408. However, the Court rejected the justification in that particular case to do so.[46.]

[s 408.1] Manner of disposal of counter case, cross cases —

The Supreme Court has laid down that such cases should be disposed of by the same Court and the judgment should be pronounced in the same day. The Court proceeded as follows:

It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same Court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter-case" by some High Courts and "cross-cases" by some other High Courts.

Where one of the offences is triable exclusively by the sessions Court but not the other, the Magistrate can commit both of them to be tried by the Session Court [section 323].

"Section 323 does not make an inroad into section 209 because the former is intended to cover cases to which section 209 does not apply. When a Magistrate has committed a case on account of the legislative compulsion by section 209, its cross-case, having no offence exclusively triable by the Sessions Court, must appear to the Magistrate as one which ought to be tried by the same Court of session."

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44. *Pijush Banerjee v Pratima Banerjee*, 2002 Cr LJ 4771 (Cal), transfer application of maintenance case sought by the husband on ground of threat given by some people with dire consequences when he went to attend the Court was held to be not maintainable. The Court observed that to allow a petition like this on such a ground, even assuming that it has been proved to be true will set the dangerous trend.

45. *State of West Bengal v Gangadhar Dawn*, 1989 Cr LJ 563 (Cal).

46. *Usmangani Adambhai Vahora v State of Gujarat,* (2016) 3 SCC 370 : AIR 2016 SC 336 : 2016 (1) Scale 228 .

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The power to withdraw a pending case from one Court to the High Court if it involves the question of interpretation of the Constitution vests in the High Court by virtue of Article 228 of the Constitution of India. The Code also contains other provisions dealing with transfer of cases, e.g., sections 185, 191, 192, 322, 352 and 479.

[s 409] Withdrawal of cases and appeals by Sessions Judge —

(1) **A Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.**

(2) **At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.**

(3) **Where a Sessions Judge withdraws or recalls a case or appeal under sub-section (1) or sub-section (2), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.**

COMMENT

[s 409.1] *Sub-section (2).*—

It lays down that the Sessions Judge can recall any case or appeal made over by him to any Additional Sessions Judge before the actual trial of the case or the hearing of the appeal has started. Therefore, once the trial or hearing of the appeal made over to the Additional Sessions Judge has commenced, the Sessions Judge cannot act under this section. There is no such restriction under sub-section (1).

A Sessions Judge cannot withdraw or recall a case or appeal pending before a Judge which has been partly heard by him.[47.] A case cannot be withdrawn and proceeded with under section 409(1) after the trial has commenced.[48.] Recital of a wrong section does not invalidate an order which is otherwise within the power of the authority making it.[49.] A case at the pre-charge stage pending before the Additional Sessions Judge could be recalled by the Sessions Judge, which he might have earlier assigned to him under section 194.[50.]

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47. *Smt Gulzar v Nizam*, 1981 Cr LJ NOC 22 (All).
48. *Amrithappa v State of Karnataka*, 1982 Cr LJ 1336 (Knt).
49. *State of Karnataka v Muniyalla*, 1985 Cr LJ 751 : AIR 1985 SC 470 : (1985) 1 SCC 196 .
50. *State of HP v YV Mehra*, 1988 Cr LJ 1488 (HP).

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CHAPTER XXXI TRANSFER OF CRIMINAL CASES

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The power to withdraw a pending case from one Court to the High Court if it involves the question of interpretation of the Constitution vests in the High Court by virtue of Article 228 of the Constitution of India. The Code also contains other provisions dealing with transfer of cases, e.g., sections 185, 191, 192, 322, 352 and 479.

[s 410] Withdrawal of cases by Judicial Magistrates —

(1) **Any Chief Judicial Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.**

(2) **Any Judicial Magistrate may recall any case made over by him under sub-section (2) of section 192 to any other Magistrate and may inquire into or try such case himself.**

COMMENT

After considering the plea of not guilty of the accused, the Magistrate posted the case for trial. Consequently, on re-organisation of the jurisdiction of the Courts, the case was transferred to another Magistrate under section 410. The transferee Magistrate is bound by the order of his predecessor and cannot go behind the pre-cognizance stage.[51.]

51. *Food Inspector v KP Alavikutty*, 1987 Cr LJ 1298 (Ker).

The Code of Criminal Procedure, 1973

CHAPTER XXXI TRANSFER OF CRIMINAL CASES

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The power to withdraw a pending case from one Court to the High Court if it involves the question of interpretation of the Constitution vests in the High Court by virtue of Article 228 of the Constitution of India. The Code also contains other provisions dealing with transfer of cases, e.g., sections 185, 191, 192, 322, 352 and 479.

[s 411] Making over or withdrawal of cases by Executive Magistrates —

Any District Magistrate or Sub-divisional Magistrate may—

(a) make over for disposal, any proceeding which has been started before him, to any Magistrate subordinate to him;

(b) withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and dispose of such proceeding himself or refer it for disposal to any other Magistrate.

COMMENT

Any District Magistrate or Sub-Divisional Magistrate has, under this section, right to transfer for disposal any proceeding which has been started before him to any subordinate Magistrate. He can also withdraw or recall any case which might have been made over by him to any subordinate Magistrate, and thereafter he can either dispose of the same himself or send it for disposal to any other Magistrate. The powers given by this section are very large, and for that very reason, they should be most carefully exercised. Magistrates of the district should use the extensive discretion given to them to divert the course of procedure from its ordinary channel only when it is absolutely necessary for the interests of justice that they should do so.[52.] Where a case is pending before a Sub-Divisional Magistrate, an application for transfer of proceedings cannot be entertained and heard by the Sessions Judge. The Sessions Judge is also not authorised to pass or pronounce any interim orders staying further

proceedings. Such power can be exercised only by the District Magistrate under section 411.[53.]

52. *Umrao Singh v Fakir Chand*, (1881) 3 All 746 , 749.
53. *The State of Gujarat v Ratilal Uttamchand Morabia*, 1992 Cr LJ 9 (Guj).

The Code of Criminal Procedure, 1973

CHAPTER XXXI TRANSFER OF CRIMINAL CASES

This Chapter refers to five classes of transfer: (1) section 406 deals with the powers of the Supreme Court to transfer cases or appeals from one State to another at the instance of the Attorney General of India or a party interested; (2) section 407 covers any inquiry or trial of a case or appeal or class of cases or appeals of which transfer may be made by the High Court from one Court to another Court of equal or superior jurisdiction, including the High Court itself; (3) sections 408 and 409 permit a Sessions Judge to transfer cases or appeals from one criminal Court to another in his sessions division and also recall any case or appeal made over by him to an Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate (CJM); (4) section 410 allows (a) a CJM to withdraw or recall a case from any Magistrate subordinate to him and (b) allows any Judicial Magistrate to recall a case made over by him to any other Magistrate under section 192(2) of the Code; and last, (5) section 411 empowers a District or Sub-Divisional Magistrate to transfer or withdraw any case from a Magistrate subordinate to him and either try the same himself or refer it for disposal to any other Magistrate.

The power to withdraw a pending case from one Court to the High Court if it involves the question of interpretation of the Constitution vests in the High Court by virtue of Article 228 of the Constitution of India. The Code also contains other provisions dealing with transfer of cases, e.g., sections 185, 191, 192, 322, 352 and 479.

[s 412] Reasons to be recorded —

A Sessions Judge or Magistrate making an order under section 408, section 409, section 410 or section 411 shall record his reasons for making it.

COMMENT

This section makes it incumbent on a Sessions Judge or a Magistrate to record reasons for passing an order for transfer or recalling of the case or appeal under the preceding sections.

[s 412.1] Notice —

It has, however, been held that an order of transfer without notice to the complainant,[54.] or the accused[55.] and without record of reasons is not illegal but merely irregular and not invalid. At the same time, it has also been held in the cases set out below that it is imperative that notices must be given to the other side before a transfer is ordered.[56.] The latter view seems to be sound.

54. *Chotamiya v Asrafmiya*, (1936) ILR Nag 87 : AIR 1936 Nag 181 .

55. *Kamni Begam v Emperor*, (1938) All 738 : AIR 1938 All 517 .

56. *Umrao Singh v Fakir Chand*, (1881) 3 All 746 ; *Re Teacotta Shekdar*, (1882) 8 Cal 393 ; *Imperatrix v Sadashiv*, (1896) 22 Bom 549; *Re Hawaji Sakharam*, (1918) 21 Bom LR 276 : AIR 1919 Bom 161 .

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

A.—Death sentences.

[s 413] Execution of order passed under section 368 —

When in a case submitted to the High Court for the confirmation of a sentence of death, the Court of Session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

COMMENT

If in a case submitted for confirmation under section 366, the High Court confirms the death sentence, a warrant is addressed to the officer-in-charge of the jail in which the accused is confined in Form No. 42 of the Second Schedule by the Sessions Judge authorising him to carry out the order of the High Court.

Where the execution of death sentence could not be carried out at the appointed time due to the last-minute physical disability of the executioner, it was held that it could not be treated as a sole sufficient ground for substituting the death sentence. It was further held that the Sessions Court was competent to issue second Black Warrant fixing fresh date and time for execution of the death sentence.[1.]

1. *Shrimoni Akali Dal (Mann) v State of J&K*, 1993 Cr LJ 927 (J&K), the case is on analogous provision, section 381 of J&K CrPC.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

A.—Death sentences.

[s 414] Execution of sentence of death passed by High Court —

When a sentence of death is passed by High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant.

COMMENT

This provision lays down the procedure to be followed when a High Court in its appellate or revisional jurisdiction passes a sentence of death. The former section deals with the case of confirmation of death sentence.

In *Peoples' Union for Democratic Rights (PUDR) v UOI*,[2.] the Supreme Court laid down essential safeguards for execution of death warrants under sections 413 and 414:

> Essential safeguards must be observed. Firstly, the principles of natural justice must be read into the provisions of Sections 413 and 414 of Cr.P.C. and sufficient notice ought to be given to the convict before the issuance of a warrant of death by the sessions court that would enable the convict to consult his advocates and to be represented in the proceedings. Secondly, the warrant must specify the exact date and time for execution and not a range of dates which places a prisoner in a state of uncertainty. Thirdly, a reasonable period of time must elapse between the date of the order on the execution warrant and the date fixed or appointed in the warrant for the execution so that the convict will have a reasonable opportunity to pursue legal recourse against the warrant and to have a final meeting with the members of his family before the date fixed for execution. Fourthly, a copy of the execution warrant must be immediately supplied to the convict. Fifthly, in those cases, where a convict is not in a position to offer a legal assistance, legal aid must be provided. These are essential procedural safeguards which must be observed if the right to life under Article 21 is not to be denuded of its meaning and content.

In Shabnam v UOI,[3.] a three-judge bench of the Supreme Court pronounced judgment confirming the death sentence on 15 May 2015. On 21 May 2015, the Sessions Judge issued death warrants. It was challenged before the Supreme Court that the warrants were issued in haste and without letting the convict exhaust all remedies available like review and mercy petitions. The Supreme Court[4.] quashed the death warrants on this ground and affirmed the view making the rule absolute as taken in *Peoples' Union for Democratic Rights (PUDR) v UOI.*[5.]

In *Yakub Abdul Razak Menon v State of Maharashtra,*[6.] the Supreme Court confirmed death sentence to the petitioner and subsequently his review petition was also dismissed.[7.] Later on, his second review petition and curative petitions were also dismissed. His mercy petitions were also rejected by the President and the Governor of Maharashtra. Another writ petition was filed before the Supreme Court under Article 142 praying that the curative had been dismissed on an erroneous ground as the composition was incorrect. Due to a split decision between Justice Dave and Kurian Joseph, the matter was referred to a three-judge bench. *Shabnam v UOI*[8.] was sought to

be used by the petitioner, but the Supreme Court[9] held that as in the instant case the accused had availed all legal remedies available, the death warrants could not be quashed.

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2. *Peoples' Union for Democratic Rights (PUDR) v UOI,* 2015 SCC Online All 143 : 2015 Cr LJ 4141 .
3. *Shabnam v UOI,* (2015) 6 SCC 632 : 2015 (6) Scale 433 .
4. *Shabnam v UOI,* (2015) 6 SCC 702 : AIR 2015 SC 3648 : 2015 Cr LJ 3274 : 2015 (7) Scale 1 .
5. *Peoples' Union for Democratic Rights (PUDR) v UOI,* 2015 SCC Online All 143 : 2015 Cr LJ 4141 .
6. *Yakub Abdul Razak Menon v State of Maharashtra,* (2013) 13 SCC 1 : JT 2013 (5) SC 142 : 2013 (4) Scale 565 .
7. (2014) 14 SCC 242 .
8. *Shabnam v UOI,* (2015) 6 SCC 632 : 2015 (6) Scale 433 .
9. *Yakub Abdul Razak Memon v State of Maharashtra,* (2015) 9 SCC 552 : 2015 (8) Scale 354 .

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

A.—Death sentences.

[s 415] Postponement of execution of sentence of death in case of appeal to Supreme Court —

(1) **Where a person is sentenced to death by the High Court and an appeal from its judgment lies to the Supreme Court under sub-clause (a) or sub-clause (b) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired or, if an appeal is preferred within that period, until such appeal is disposed of.**

(2) **Where a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of a certificate under Article 132 or under sub-clause (c) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court on such certificate has expired.**

(3) **Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition.**

COMMENT

This provision, provides for postponement of execution of a death sentence passed by the High Court where an appeal against the judgment of the High Court passing or confirming the death sentence can be preferred to the Supreme Court under the Constitution. Such appeal lies (1) as of right under Article 134(1)(a) or (b); or (2) when High Court on application of the accused issues a certificate of fitness under Article 132 or 134(1)(c) and (3) when the Supreme Court is approached for grant of a special leave under Article 136 of the Constitution. This new provision is made in order that the appeal to the Supreme Court, if preferred, is not rendered infructuous and to safeguard the interests of the condemned prisoner who may ultimately be acquitted, or his sentence reduced by the Supreme Court.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

A.—Death sentences.

[s 416] Postponement of capital sentence on pregnant woman —

If a woman sentenced to death is found to be pregnant, the High Court shall [10].[***] commute the sentence to imprisonment for life.

COMMENT

The High Court is the only judicial tribunal in which the law has vested the powers of postponing the execution of a sentence of death confirmed by it.[11.] This is an instance of a case contemplated by section 362 in which the High Court, after signing or passing judgment, may alter or review the same.

For form of warrant after a commutation of sentence, see Second Schedule, Form No. 41.

10. The words "order the execution of the sentence to be postponed, and may, if it thinks fit," omitted by Act No. 5 of 2009, section 30 (w.e.f. 31-12-2009).

11. 2 Weir 441.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

B.—Imprisonment.

[s 417] Power to appoint place of imprisonment —

(1) **Except when otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.**

(2) **If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.**

(3) **When a person is removed to a criminal jail under sub-section (2), he shall, on being released therefrom, be sent back to the civil jail, unless either—**

(a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been released from the civil jail under section 58 of the Code of Civil Procedure, 1908 (5 of 1908), or section 23 of the Provincial Insolvency Act, 1920 (5 of 1920), as the case may be; or

(b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be released under section 58 of the Code of Civil Procedure, 1908 (5 of 1908), or under section 23 of the Provincial Insolvency Act, 1920 (5 of 1920), as the case may be.

COMMENT

The power of the State Government to take action under sub-section (1) is restricted to those rare cases where no provision has yet been made (as may happen, e.g., in a newly acquired territory or newly constituted district) for the confinement of unconvicted or convicted prisoners.[12.] It can come into operation only when there is no other law providing for the custody in question.

12. *Kundan Lal v Emperor*, (1931) 12 Lah 604.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

B.—Imprisonment.

[s 418] Execution of sentence of imprisonment —

(1) **Where the accused is sentenced to imprisonment for life or to imprisonment for a term in cases other than those provided for by section 413, the Court passing the sentence shall forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and, unless the accused is already confined in such jail or other place, shall forward him to such jail or other place, with the warrant:**

Provided that where the accused is sentenced to imprisonment till the rising of the Court, it shall not be necessary to prepare or forward a warrant to a jail, and the accused may be confined in such place as the Court may direct.

(2) **Where the accused is not present in Court when he is sentenced to such imprisonment as is mentioned in sub-section (1), the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined; and in such case, the sentence shall commence on the date of his arrest.**

COMMENT

The proviso to sub-section (1) is applicable to a case where the Court passes a sentence of imprisonment till the rising of the Court. Even in the absence of this proviso, the Courts detained persons, so sentenced, in Court premises without preparing any warrant. The proviso regularises this mode of detention.

A three-judge bench of the Supreme Court[13.] held that section 418 deals with execution of sentence of imprisonment and *inter alia* empowers and obliges the court passing the sentence to forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and, unless the accused is otherwise confined in such jail or other place to forward him to such jail or other place with a warrant. In terms of sub-section (2) of section 418, where the accused is not present in the Court when sentence of imprisonment as is mentioned in sub-section (1) is pronounced, the Court is required to issue a warrant for his arrest for the purpose of forwarding him to jail or other place in which he is to be confined, and in such cases, the sentence shall commence on the date of his arrest. Upon conviction of an accused and sentence of imprisonment awarded to him, the Court concerned is expected to commit him to jail in terms of a warrant that would authorise his confinement for the period he is to undergo such imprisonment.

[s 418.1] Warrant of arrest where accused not present at time of sentence [*Sub-section (2)*].—

This sub-section applies to a case where the accused is absent from Court at the time when sentence is pronounced; in such a case, the Court issues a warrant of arrest against the accused, and it is only on such arrest being made that the sentence begins to run.

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13. *Lallan Singh v State of Uttar Pradesh*, (2015) 13 SCC 362 .

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

B.—Imprisonment.

[s 419] Direction of warrant for execution —

Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined.

COMMENT

A separate warrant should be issued in the case of each prisoner, and a definite period of imprisonment should be stated.[14.]

A sentence of imprisonment must be made to operate from the date of conviction and not from a date prior to the date on which the sentence is passed. Where, therefore, the Magistrate ordered that the period already undergone in custody during trial be counted towards sentence, it was held that the order was illegal.[15.] But now see section 428.

14. *Re Horace Lyall*, (1902) 29 Cal 286 (FB) : (1901) ILR 29 Cal 286.
15. *Jernal Singh,* (1954) Raj 438 .

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

B.—Imprisonment.

[s 420] Warrant with whom to be lodged —

When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

C.—Levy of fine.

[s 421] Warrant for levy of fine —

(1) **When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—**

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:

***Provided* that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.**

(2) **The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.**

(3) **Where the Court issues a warrant to the Collector under clause (b) of subsection (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:**

***Provided* that no such warrant shall be executed by the arrest or detention in prison of the offender.**

COMMENTS

This section applies when an offender is sentenced to pay a fine under the Indian Penal Code (IPC) (see sections 63-70 of the IPC). Fine should be recovered by distress and sale of both moveable and immoveable properties, and the recovery should be as arrears of land revenue and not by following the lengthy procedure laid down by the Civil Procedure Code. But a Court is not to issue a warrant of distress, if the offender has undergone the imprisonment in default of payment of fine, unless for special reasons to be recorded in writing or in cases where the Court has ordered payment of expenses or compensation out of the fine.

In general, an offender ought not to be required both to pay the fine and to serve the sentence in default.[16.]

[s 421.1] "Belonging to the offender" —

The words do not mean belonging exclusively to the offender. According to the Bombay High Court, the share of the accused in the movable property of a joint Hindu family of which he is a member can be attached.[17.] The Patna and the Calcutta High Courts have held that such a share cannot be attached.[18.] The Patna High Court has subsequently held that an application by the members of a joint Hindu family for a refund of money belonging to the joint family and attached under sub-section (1)(a) for the levy of a fine imposed upon an individual member of the family is not maintainable after the money realised is credited to the Government.[19.]

An undivided interest in movable properties could not be attached, seized and sold under this section.[20.] The Chief Judicial Magistrate was not competent for attachment or sale of an immovable property under section 421 of the Code of Criminal Procedure (CrPC). For that purpose, he could issue a warrant to the Collector of the District as provided therein.[21.]

The Delhi High Court has held that once a revision petition is admitted and heard, it is impermissible to withdraw it with the liberty to take all pleas before the lower Court.[22.]

[s 421.2] Future Salary —

Future salary was not tangible corporeal property and it did not belong to the husband because he could not be said to have earned his future salary, so it is not attachable even for realisation of maintenance amount under section 125 of the Code.[23.]

For recovery of compensation awarded, recourse should be taken to sections 421 and 431. Otherwise, the default clause imposed by the Sessions Judge, i.e., to undergo imprisonment for 6 months in case of default in payment of compensation awarded, cannot be sustained.[24.]

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16. *Digambar Bhavarthi v Emperor*, (1934) 37 Bom LR 99 : 59 Bom 350 : AIR 1935 Bom 160 .
17. *Shivlingappa v Gurlingappa*, (1925) 27 Bom LR 1366 : 49 Bom 906.
18. *Rajendra Prasad Missir v Emperor*, (1932) 12 Pat 29 (FB) : AIR 1932 Pat 292 ; *Pramathabhooshan Ray*, (1933) 60 Cal 932 .
19. *Suraj Narain Prasad Singh v Emperor*, (1933) 13 Pat 317 (SB) : AIR 1934 Pat 181 .
20. *Bellamkonda Buchi Ramiah v Bellamkonda Rukkamma*, (1961) Andhra 81 : AIR 1961 AP 43 .
21. *Rashan Lal v Kishan Lal*, 1991 Cr LJ 428 (P&H).
22. *Sajjan Kumar v State*, 1996 Cr LJ 623 (Del).
23. *Mohd Jahangir Khan v Manoara Bibi*, 1992 Cr LJ 83 (Cal).
24. *Rajendran v Jose*, 2002 Cr LJ 3911 (Ker).

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

C.—Levy of fine.

[s 422] Effect of such warrant.—

A warrant issued under clause (a) of sub-section (1) of section 421 by any Court may be executed within the local jurisdiction of such Court, and it shall authorise the attachment and sale of any such property outside such jurisdiction, when it is endorsed by the District Magistrate within whose local jurisdiction such property is found.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

C.—Levy of fine.

[s 423] Warrant for levy of fine issued by a Court in any territory to which this Code does not extend —

Notwithstanding anything contained in this Code or in any other law for the time being in force, when an offender has been sentenced to pay a fine by a Criminal Court in any territory to which this Code does not extend and the Court passing the sentence issues a warrant to the Collector of a district in the territories to which this Code extends, authorising him to realise the amount as if it were an arrear of land revenue, such warrant shall be deemed to be a warrant issued under clause (b) of sub-section (1) of section 421 by a Court in the territories to which this Code extends, and the provisions of sub-section (3) of the said section as to the execution of such warrant shall apply accordingly.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

C.—Levy of fine.

[s 424] Suspension of execution of sentence of imprisonment —

(1) **When an offender has been sentenced to fine only and to imprisonment in the default of payment of the fine, and the fine is not paid forthwith, the Court may —**

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days;

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) **The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.**

COMMENT

Sub-section (1) empowers the Court to give time, not exceeding thirty days, to an offender who has been sentenced to pay a fine. If the fine is not paid within the time fixed, the Court directs the sentence of imprisonment to be carried into execution. The Court may grant payment by instalments also.

When a Court passes a sentence of the fine upon an accused and in default to suffer imprisonment, the fine is to be paid forthwith, that is to say, on the sentence being pronounced. It is, however, open to a Court to proceed under this section, and if a Court does act under its provisions, it can suspend the execution of the sentence of imprisonment and release the offender on the execution by him of a bond. But it is not mandatory upon the Court to do so.[25.]

25. *Kantlal*, (1954) 33 Pat 674.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

D.—General provisions regarding execution.

[s 425] Who may issue warrant —

Every warrant for the execution of a sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor-in-officer.

COMMENT

When the warrant does not mention that the sentences shall run concurrently, the jail authorities are justified in assuming that the sentences shall run consecutively.[26.]

26. *Hamid Raza v Supdt, Central Jail, Rewa*, 1985 Cr LJ 642 (MP—DB).

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

D.—General provisions regarding execution.

[s 426] Sentence on escaped convict when to take effect —

(1) **When a sentence of death, imprisonment for life or fine is passed under this Code on an escaped convict, such sentence shall, subject to the provisions hereinbefore contained, take effect immediately.**

(2) **When a sentence of imprisonment for a term is passed under this Code on an escaped convict,—**

(a) if such sentence is severer in kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately;

(b) if such sentence is not severer in kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

(3) **For the purposes of sub-section (2), a sentence of rigorous imprisonment shall be deemed to be severer in kind than a sentence of simple imprisonment.**

COMMENT

The object of this section is to provide that the severer sentence must be undergone first.

There is no reference to solitary confinement as no such sentences are awarded by Courts.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

D.—General provisions regarding execution.

[s 427] Sentence on offender already sentenced for another offence —

(1) **When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:**

Provided **that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.**

(2) **When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.**

[s 427.1] **State Amendment**

Tamil Nadu.—*The following amendment were made by Tamil Nadu Act No. 28 of 1993, Section 6.*

S. 427.—In section 427 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) Notwithstanding anything contained in sub-section (1), when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment under sub-section (2) of Section 380 of the Indian Penal Code (Central Act XLV of 1860), for an offence of theft of any idol or icon in any building used as a place of worship, such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced."

COMMENT

This section fixes the time from which a sentence passed on an offender who is already undergoing another sentence should run.

[s 427.2] "Imprisonment" —

The word "imprisonment" includes imprisonment in default of payment of fine.[27.] Imprisonment in default of payment of fine cannot be concurrent with a substantive sentence of imprisonment whether the sentence of imprisonment in default of payment of fine and the substantive sentence of imprisonment are passed in the same proceeding or in different cases at different times, as where an accused is already undergoing a sentence of imprisonment in default of payment of fine and a substantive sentence of imprisonment is passed subsequently in a different case.[28.]

[s 427.3] "Undergoing a sentence of imprisonment" —

Where the accused was sentenced to different terms of imprisonment in two separate cases relating to separate transactions on the same day, it was held that section 427 CrPC could be applied and the sentences could be ordered to run concurrently. It was observed that normally where several sentences are passed, such sentences should run one after the other, i.e., consecutively, unless the Court directs otherwise, i.e., concurrently. The expression "undergoing a sentence of imprisonment" was held to mean that the person sentenced must be deemed to be undergoing sentence from the very moment the sentence is passed in the earlier case, though the accused may be on bail or in custody at the time of passing subsequent sentence.[29.]

Where the accused was sentenced in two cases on the same day, one after the other, the Court was competent to exercise its discretion in directing that the subsequent sentence shall run concurrently with the earlier sentence. Though the Magistrate had not exercised his discretion in this regard but having regard to the facts and circumstances of the case, the High Court held that the ends of justice would be fully met in case the sentences were ordered to run concurrently.[30.]

[s 427.4] "At the expiration of the imprisonment to which he has been previously sentenced" —

Where two sentences are passed on an accused, the second to commence on the expiration of the first, and the first is subsequently set aside, the second sentence commences from the date of conviction, and the period of imprisonment already undergone in respect of the first sentence will be deemed to have been in respect of the second sentence.[31.] Where accused was convicted for various offences by different Courts in Delhi and outside Delhi, the High Court can issue direction in respect of the sentences awarded by the Courts within its jurisdiction but not outside its jurisdiction to run concurrently.[32.] Where several sentences were inflicted and direction was given that they shall run concurrently, and the convict prisoner while undergoing the imprisonment jumped the bail and was re-arrested, tried and convicted of the offence, his prayer to make the sentence imposed concurrent with the sentences which he was undergoing was allowed.[33.]

The Bombay High Court refused to order the running of the sentences concurrently, which were awarded to the accused in separate cases of offences in different transactions.[34.]

[s 427.5] Proviso —

The proviso says that if a person who is imprisoned under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such an order, the latter sentence is to commence immediately.

[s 427.6] CASES —

In the first charge sheet in respect of first offence, the trial court, while imposing sentence of life imprisonment, put a cap of 30 years thereby clearly stating that no remission would be permissible before them. Again, while inflicting life imprisonment in the second case, it stated that the sentence would be for whole life and would start only after completion of the sentence in the first offence. When both the cases were tried together and conviction was recorded by one common judgment and likewise sentences were also recorded by one common order, there was no question of giving consecutive sentences and sentences were held to be concurrent.[35.] Separate convictions and separate sentences were awarded in two distinct and different offences. Appeals to the High Court and Special leave petitions were also dismissed. The provision of section 427 was invoked neither in the original cases nor in appeals. An application was then made to the High Court under sections 482 and 427, praying that the sentences imposed in both cases be directed to run concurrently. This was held to be not maintainable. The Court said that the inherent jurisdiction was not the appropriate remedy when neither the trial Court nor the High Court had exercised jurisdiction under section 427 while passing judgments.[36.]

In *VK Bansal v State of Haryana,*[37.] it was stated by the Supreme Court:

It is manifest from Section 427(1) that the Court has the power and the discretion to issue a direction but in the very nature of the power so conferred upon the Court the discretionary power shall have to be exercised along the judicial lines and not in a mechanical, wooden or pedantic manner. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. There is no cut and dried formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of Section 427(1). Whether or not a direction ought to be issued in a given case would depend upon the nature of the offence or offences committed, and the fact situation in which the question of concurrent running of the sentences arises.

> The Supreme Court then went on to club various crimes in respect of which sentences were imposed upon the appellant therein in three groups: (i) the first having 12 cases, (ii) the second having 2 cases and (iii) the third having a single case. This Court directed that substantive sentences within first two groups would run *inter se* concurrently, and the substantive sentences in first two groups and that in respect of the case in the third group would run consecutively. The benefit was confined only in respect of substantive sentences and *no qua* sentences in default. In *Benson v State of Kerala,*[38.] the Supreme Court having regard to the duration of his incarceration and the remission earned by the accused directed that the sentences awarded to him in those cases would run concurrently. It was noticeably recorded that the offences in the cases under scrutiny had been committed on the same day. The benefit of the discretion was accorded to the appellant therein referring as well to the observation in *VK Bansal*[39.] that it is difficult to lay down any straightjacket approach in the matter and that a direction that the subsequent sentence would run concurrently or not would essentially depend on the nature of the offence or offences and the overall fact situation.

27. *Punjaji Lalaji*, (1938) 41 Bom LR 277 : (1939) Bom 160.

28. *Punjaji Lalaji, ibid.; Sk Abdul Raza alias Raja v Supdt, Central Prison, Visa*, 1992 Cr LJ 1261 (AP); *Jady alias Jadya Bhoi v State of Orissa*, 1992 Cr LJ 2117 (Ori).

29. *Sadashiv Chhokha Sable v State of Maharashtra*, 1993 Cr LJ 1469 (Bom). *Anty v State of Kerala*, 2003 Cr LJ 299 (Ker), consecutive running of sentences imposed in different cases is the normal rule, though the Court has the special power to direct that they shall be concurrent.

30. *Jai Kishan v State of Haryana*, 2002 Cr LJ 412 (P&H).

31. *Emperor v Babibai*, (1942) 44 Bom LR 807 : (1943) Bom 82 : AIR 1942 Bom 342 .

32. *Azad Singh v State (Admn Delhi)*, 1991 Cr LJ 438 (Del).

33. *Grahari v State of Kerala*, 1988 Cr LJ 1351 (Ker).

34. *Ramesh Krishna Savant v State of Maharashtra*, 1995 Cr LJ 1702 (Bom); *Mohd Akhtar Husain v Astt Collector*, AIR 1988 SC 2143 : 1989 Cr LJ 283 : (1988) 4 SCC 183 —Relied on.; See also *Mukhtiar Singh v State of J&K*, 1995 Cr LJ 2057 (J&K).

35. *Jitendra v State of Govt of NCT of Delhi,* AIR 2018 SC 5253 : 2018 (14) Scale 305 : LNIND 2018 SC 537 .

36. *MR Kudva v State of AP*, AIR 2007 SC 568 : (2007) 2 SCC 772 : 2007 Cr LJ 763 .

37. *VK Bansal v State of Haryana,* (2013) 7 SCC 211 : AIR 201 3 SC 3447 : 2013 Cr LJ 3986 : JT 2013 (10) SC 4 : JT 2013 (9) SC 313 : 2013 (8) Scale 405 .

38. *Benson v State of Kerala,* 2016 (9) Scale 670 : (2016) 10 SCC 307 .

39. *VK Bansal, Supra*.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

D.—General provisions regarding execution.

[s 428] Period of detention undergone by the accused to be set-off against the sentence of imprisonment —

Where an accused person has, on conviction, been sentenced to imprisonment for a term, [40][, not being imprisonment in default of payment of fine,] the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

[41][*Provided* that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section.]

[s 428.1] CrPC (Amendment) Act, 2005 [*Clause* (34)].—

The provision of section 433A adversely affects the reformation of lifer, whose case inspite of good conduct in jail cannot be referred to the Advisory Board for recommending his premature release to the State Government, unless he has completed 14 years of actual imprisonment. Proposed amendment to section 428 is intended to provide that the period for which the life convict remained in detention during investigation, inquiry or trial shall be set off against the period of 14 years of actual imprisonment prescribed in section 433A (*Notes on Clauses*).

COMMENTS

This provision was made on the recommendation of the Joint Committee of Parliament which was of the view that in many cases an accused person is made to suffer jail life for a period out of all proportion to the gravity of the offence, or to the punishment provided by a statute, or imposed on him. In some cases, the sentence imposed is a fraction of the time spent by the accused as under-trial prisoner. A large number of persons in the overcrowded jails are under-trial prisoners. This provision, allowing setting-off of the period of detention undergone as an under-trial prisoner against the sentence of imprisonment, is meant to mitigate the evils referred to above. The Amendment Act of 1978 amended section 428 with a view to making clear that it did not apply to imprisonment in default of payment of fine.

The only qualification laid down in the section for entitling a person to its benefit is that he should stand sentenced to imprisonment on the date on which the section comes into operation; there is no further condition laid down that the conviction must have been under the present Code. Therefore, the benefit of the provisions of this section is available to persons convicted under the Code of Criminal Procedure, 1898.[42] In order to claim benefit of set off under this section, two essential conditions are required to be fulfilled—

(i) the accused-claimant has on conviction been sentenced to imprisonment for a term and

(ii) the claimant-accused has undergone detention during investigation, inquiry or trial before the date of conviction.

An accused is entitled to claim this statutory benefit subject to above conditions.[43.]

In *Boucher Pierre Andre v Superintendent, Central Jail*,[44.] the Supreme Court has laid down as follows:

1. The section applies to a fact situation described by the clause "where an accused person has, on conviction, been sentenced to imprisonment for a term". The clause does not, either expressly or by necessary implication, suggest that the conviction and sentence must be after the coming into force of the new Code of Criminal Procedure.
2. The fact situation necessary for attracting the applicability of the section would be equally satisfied whether an accused person has been convicted and sentenced before or after the coming into force of the new Code.
3. Even though the conviction might have been under the old Code but if the sentence is still running, the provisions of the section will be attracted.
4. If the term has already run out, no question of set-off can arise.
5. Applying section 484(2)(b), which creates a legal fiction that sentences passed under the old Code which are in force immediately before the commencement of the new Code shall be deemed to have been passed under the corresponding provision of the new Code, the same result will follow. Because if the sentences are deemed to have been passed under the new Code, all consequences and incidents are to be worked out on that basis.
6. Having regard to the object of the section, no differentiation can be made between a substantive sentence of imprisonment and a sentence of imprisonment in default of payment of fine; in both cases the section is applicable. Section 421, however, is not thereby affected.
7. The argument that pre-conviction detention has already been taken into account while imposing the term of imprisonment cannot be accepted *inter alia* on the ground that the Legislature itself has not made any provisions for such an exception; it is dangerous to introduce such an exception by judicial interpretation and do violence to the language of the section; and because factors which weigh with the Court in imposing sentence are not often articulated and are matters of speculation.[45.] A person convicted by the Court Martial is not entitled to a set off in respect of the period of detention in the custody during trial under section 428.[46.] Expression 'trial' in section 428 includes also proceedings in appeal. Detention of an accused during the pendency of the appeal against acquittal can be set off against the sentence of imprisonment.[47.] Where an accused was convicted prior to the coming into force of the Code but the appeal was filed after the Code came into force, the accused was entitled to the benefit of set off under section 428.[48.]

Where a person is on furlough for a certain period and does not surrender to the jail authorities on the expiry of such period, his sentence starts running on his surrendering or on his arrest and will not come to an end merely because the term of his imprisonment has already expired.[49.] Such setoff is, however, subject to the provision under section 433A which prescribes minimum punishment of 14 years imprisonment

for persons convicted of an offence punishable with death but sentenced to life imprisonment or whose death sentence has been commuted to imprisonment for life.[50.] Where a person was in preventive detention after his acquittal by the High Court in a criminal case but whose acquittal was converted into conviction later on by the Supreme Court in an appeal by Special Leave, it was held that the period of detention could not be set off under section 328.[51.] Section 428 provides only for set off but does not equate under-trial detention with "imprisonment on conviction" for the purpose of sections 3(5) and 59(5) of the Prisons Act, 1894. Therefore, it does not entitle the prisoner to claim remission by counting such period as period of imprisonment.[52.] Where an accused was convicted in two different cases for murder and also in a prohibition case, his detention was in connection with the murder case. He could not claim set-of-against his conviction in the Prohibition case.[53.] Where a convict who was on parole was arrested for another offence and put in jail, he was held to be entitled to count that period in jail against the sentence he was already undergoing.[54.] Where an accused is convicted of three offences and their sentences are to run concurrently, the setoff can be claimed in all the offences.[55.]

When a person is undergoing the sentence of imprisonment imposed by the Court on being convicted of an offence in one case during the period of investigation, inquiry or trial of some other case, he then cannot claim that the period occupied by such investigation, inquiry or trial should be set off against the sentence of imprisonment to be imposed in the latter case even though he was under detention during such period.[56.]

The words "same case" used in section 428 CrPC are of significance, and if an accused person remains in detention in more than one case, he will be entitled to set off the period of his detention, but in a case where the accused is released on bail, and thereafter, he is arrested in another case and remains in detention in the other case, he will not be entitled to set off the period of his detention under the subsequent case, so far as his detention in first case is concerned.[57.]

The accused was already in prison for a period of 200 days during investigation and trial. The term of imprisonment was only six months. Held, the accused had already undergone the term of imprisonment.[58.]

A *preventive detention* order was served on petitioners while they were in judicial custody pending trial for punitive offence. Subsequently, the petitioners were sentenced to imprisonment for punitive offence. Period during which they were in remand during investigation as under-trial prisoners was set off against the term of imprisonment. It was held that the period of detention under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) could also be setoff under section 428, when the order of detention was quashed.[59.]

In another case under the same Act, the Supreme Court held that detention under preventive detention laws is not of punitive nature. It is essentially a precautionary measure for preventing and intercepting a person from committing an interactive act which he had committed earlier. The Court said that the period of preventive detention cannot be setoff under section 428, against the term of imprisonment imposed on the detinue for the offence under the Customs Act. Section 428 refers to detention during investigation, inquiry or trial.[60.]

Following the Supreme Court's decision in *State of Maharashtra v Najakat Ali Mubarak Ali*,[61.] it was held that where the accused was arrested in two criminal cases and remained in jail as an under-trial in both the cases and was also convicted in both the cases, he would be entitled to set off the period during which he remained in custody in

both the cases, while calculating the total period of sentence, for which he was required to remain in judicial custody.[62.]

When imprisonment is imposed in default of payment of fine, it cannot be subjected to a set off by the period of detention undergone by the convict during investigation, inquiry or trial in the case. On the failure of the convict to deposit the fine imposed, he is liable to undergo imprisonment imposed upon him in default of such payment.[63.]

[s 428.1] Purpose and conditions for applicability of set off —

It was held by a majority that the period of imprisonment undergone by an accused as an under-trial during investigation, inquiry or trail of a particular case, irrespective of whether it was in connection with that very case or any other case, can be set off against the sentence of imprisonment imposed on conviction in that particular case. Words "same case" do not suggest that setoff would be available only if the period undergone as an under-trial prisoner is in connection with the same case in which he was later convicted and sentenced to a term of imprisonment. Those words merely denote pre-sentence period of detention undergone by an accused and nothing more.[64.]

The accused would be entitled to the benefit of setoff from the date on which it was directed that the accused to be produced by issuance of a body warrant even if for any reasons the accused could not be produced on that date. A deemed custody is to be inferred from the date of order for prosecution of the accused whether or not produced before the Court on that date.[65.]

[s 428.2] Court Martial —

Provision of setoff was not applicable to persons sentenced by a Court Martial. However, section 169A of the Army Act, 1950, which was introduced in 1992, will mitigate the hardship of the persons sentenced by the Court Martial after 1992.[66.]

[s 428.3] Life imprisonment —

The period of detention undergone by the accused persons as under-trial prisoners shall be set off against the sentence of life imprisonment imposed, subject to section 433A CrPC and provided that orders have been passed by the appropriate authority under section 432 or section 433 CrPC.[67.]

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40. Ins. by Act No. 45 of 1978, section 31 (w.e.f. 18-12-1978).
41. Added by Act No. 25 of 2005, section 34 (w.e.f. 23-6-2006).

42. *Narayanan Nambeesan v The State of Maharastra*, (1974) 76 Bom LR 690 ; approved in *Boucher Pierre Andre v Superintendent, Central Jail, Tihar, New Delhi,* (1975) 1 SCC 192 : AIR 1975 SC 164 : (1975) 1 SCC 192 ; *Hardev Singh v The State of Punjab*, AIR 1975 SC 179 : 1975 Cr LJ 243 ; *Mer Dhana Sida v State of Gujarat*, 1985 Cr LJ 660 : AIR 1985 SC 386 : (1985) 1 SCC 200 .

43. *Abu Backer v State of Kerala*, 1995 Cr LJ 1157 (Ker).

44. *Boucher Pierre Andre v Superintendent, Central Jail,* (1975) 1 SCC 192 : AIR 1975 SC 164 .

45. *Suraj Bhan v Om Prakash*, 1976 Cr LJ 577 : AIR 1976 SC 648 : (1976) 1 SCC 886 .

46. *Kasmer Singh v UOI*, 1990 Cr LJ 1417 ; *Kartar Singh v State of Haryana,* 1988 Cr LJ 417 : AIR 1982 SC 1439 : (1982) 3 SCC 1 .

47. *State of Madhya Pradesh v Mohandas*, 1992 Cr LJ 101 (MP).

48. *Mer Dhana Sida v State of Gujarat*, AIR 1985 SC 386 : (1985) 1 SCC 200 .

49. *Gurucharan Kaur v State of Punjab*, 1983 Cr LJ 722 (P&H).

50. *Bhagirathi v Delhi Admn*, 1985 Cr LJ 1179 : AIR 1985 SC 1050 : (1985) 2 SCC 580 .

51. *Champalal Pomjaji Shah v State of Maharashtra*, 1982 Cr LJ 612 : AIR 1982 SC 791 : (1982) 1 SCC 507 .

52. *Govt of AP v Anne Venkateswara Rao*, 1977 Cr LJ 935 : AIR 1977 SC 1096 : (1977) 3 SCC 298 .

53. *Rafiq Abdul Rehman v State of Maharashtra*, 1978 Cr LJ 214 (Bom); *Jagwantlal Harjivandas Dholakia v State of Maharashtra*, 1979 Cr LJ 971 (Bom).

54. *Onkar Singh v Police Officers, Prashasan*, 1979 Cr LJ 1098 (All).

55. *Chinnasamy v State of Tamil Nadu*, 1984 Cr LJ 447 (Mad): AIR 1986 Mad 168 .

56. *Raghbir Singh v State of Haryana*, AIR 1984 SC 1796 : (1984) 4 SCC 348 .

57. *Ghulam Mustafa v State of Rajasthan*, 1995 Cr LJ 266 (Raj).

58. *Mamood Khan v State of Madhya Pradesh*, 1988 Cr LJ 635 (MP).

59. *Kuanhaniff DJ Kisirdeen v State of Kerala*, 1988 NOC 75 (Ker). *Mohd Aslam v State of Maharashtra*, (2001) 9 SCC 362 : JT 2000 (8) SC 104 : 2004 (2) Scale 242 , set-off, the accused was sentenced to 10 years' RI in a TADA case (now repealed).

60. *Maliyakhal Abdul Azeez v Asst Collector*, AIR 2003 SC 928 : (2003) 2 SCC 439 .

61. *State of Maharashtra v Najakat Ali Mubarak Ali,* 2001 Cr LJ 2588 : AIR 2001 SC 2255 : (2001) 6 SCC 311 .

62. *Jai Kishan v State of Haryana*, 2002 Cr LJ 412 (P&H).

63. *Bagdaram v State of Rajasthan*, 1989 Cr LJ 414 (Raj).

64. *State of Maharashtra v Najakat Ali Mubarak Ali*, AIR 2001 SC 2255 : 2001 Cr LJ 2588 : (2001) 6 SCC 311 .

65. *Nagappa Dundappa Patil v State of Karnataka*, 2002 Cr LJ 3861 (Kant).

66. *Bhuwaneshwar Singh v UOI*, 1993 AIR SCW 2971 : 1993 Cr LJ 3454 : (1992) 4 SCC 327 .

67. *Abubacker v State of Kerala*, 1995 Cr LJ 1157 (Ker); relying upon *Bhagirath v Delhi Administration*, AIR 1985 SC 1285 : 1985 Cr LJ 1179 : (1985) 2 SCC 537 and *Ashok Kumar v UOI*, AIR 1991 SC 1792 : 1991 Cr LJ 2483 : (1991) 3 SCC 498 .

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CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

D.—General provisions regarding execution.

[s 429] Saving —

(1) **Nothing in section 426 or section 427 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.**

(2) **When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment and the person undergoing the sentence is after its execution to undergo a further substantive sentence or further substantive sentences of imprisonment, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.**

COMMENT

An order directing the sentences of imprisonment in default of payment of fine to run concurrently with the substantive sentence of imprisonment passed for a different offence either at the same trial or different trials would be illegal.[68.]

68. *Emperor v Hazi,* AIR 1941 Lah 209 (210) : 42 Cr LJ 642.

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

D.—General provisions regarding execution.

[s 430] Return of warrant on execution of sentence —

When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it is issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

COMMENT

Where an accused was released by mistake, issuance of warrant of arrest on the ground of premature release is improper. In the absence of the person with whom he convinced or colluded, no action can be taken.[69.]

69. *Mohd Harun v State of UP*, 1991 Cr LJ 1083 , 1085 (All).

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CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

D.—General provisions regarding execution.

[s 431] Money ordered to be paid recoverable as a fine —

Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:

Provided **that section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of section 421, after the words and figures "under section 357", the words and figures "or an order for payment of costs under section 359" had been inserted.**

COMMENT

When the Supreme Court in *Hari Singh v Sukhbir Singh*[70.] had declared that a Court may enforce an order to pay compensation by imposing a sentence in default, the Single Judge of the Kerala High

Court in *Rajendran v Jose*[71.] committed an impropriety by expressing the opinion that the said legal direction of the Supreme Court should not be followed by subordinate Courts in Kerala.[72.]

70. *Hari Singh v Sukhbir Singh,* AIR 1988 SC 2127 : (1988) 4 SCC 551 : 1989 Cr LJ 116 .

71. *Rajendran v Jose,* (2001) 3 Ker LT 431 (Ker).

72. *Suganthi Suresh Kumer v Jadgeeshan*, 2002 Cr LJ 1003 (SC): AIR 2002 SC 681 : JT 2002 (1) SC 220 : 2002 (1) Scale 269 : (2002) 2 SCC 420 .

The Code of Criminal Procedure, 1973

CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

E.—Suspension, remission and commutation of sentences.

[s 432] Power to suspend or remit sentences —

(1) **When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.**

(2) **Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.**

(3) **If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.**

(4) **The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.**

(5) **The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:**

***Provided* that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,—**

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) **The provisions of the above sub-sections shall also apply to any order passed**

by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) **In this section and in section 433, the expression "appropriate Government" means,—**

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

COMMENTS

This section applies to any punishment for an offence. An order of unconditional remission of sentence under this section cannot be rescinded except in cases of fraud or mistake. The powers exercisable under this section vest in the Government and not in an individual Minister. All the formalities which are, therefore, necessary for the release of a prisoner or the remission of his sentence are equally necessary for the cancellation of the order of the remission of sentence.[73.]

This section empowers the Government to remit wholly or in part the sentence of fine which is a substantive sentence but not the sentence of imprisonment in default of payment of fine. The imprisonment which a person is ordered to suffer for non-payment of fine is only a contingent imprisonment. It can be avoided by the payment of fine before the substantive term of imprisonment comes to an end. It cannot, therefore, be tacked on to the substantive sentence of imprisonment, at any rate, not till the substantive sentence comes to an end.[74.]

The power to grant pardon is in essence an executive function to be exercised by the Head of the State after taking into consideration various matters which may not be germane for consideration before a Court of law inquiring into the offence. In republican countries like India where, under a written Constitution, the Head of the State is given authority to tender pardons and reprieves by means of executive acts, those functions can be exercised even before conviction. The release of prisoners condemned to death by the general amnesty granted by the Government of a State, in exercise of the powers conferred under this section and Article 161 of the Constitution of India, does not amount to interference with the due and proper course of justice as the power of the High Court to pronounce upon the validity, propriety and correctness of the conviction and sentence still remains unaffected.[75.]

In *UOI v Sriharan alias Murugan,*[76.] a Constitution Bench of the Supreme Court was seized of four notable important questions—

- "Whether the Appropriate Government is permitted to grant remission under Sections 432/433 Code of Criminal Procedure after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its Constitutional power(s) under Article 32?
- Whether Union or the State has primacy for the exercise of power under Section

432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission?

- Whether there can be two Appropriate Governments under Section 432(7) of the Code?
- Whether the power under Section 432(1) can be exercised suo motu, if yes, whether the procedure prescribed under Section 432(2) is mandatory or not?"

It was held that the exercise of power under sections 432 and 433 of CrPC will be available to the Appropriate Government even if such consideration was made earlier and exercised under Article 72 by the President or under Article 161 by the Governor. As far as the application of Article 32 of the Constitution by this court is concerned, it is held that the powers under sections 432 and 433 are to be exercised by the Appropriate Government statutorily and it is not for this Court to exercise the said power, and it is always left to be decided by the Appropriate Government. It was further held that the status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in GV Ramanaiah[77.] should be applied. In other words, cases which fall within the four corners of section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling under section 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government.

The legal position is that if a person is sentenced to imprisonment for life, he may be detained in prison for life. The Court cannot interfere on the ground of earning of remission.[78.] Life imprisonment implies a minimum term of imprisonment for 14 years. It is not to be interpreted as being imprisonment for whole of the convict's natural life. Even with remissions earned, the sentence of life imprisonment cannot be reduced to below 14 years.[79.]

The accused was convicted for murder having caused the death of his wife, and the conviction was confirmed by the Supreme Court. The Resolution of the Government of Maharashtra requires accused to serve a period of minimum 20 years of imprisonment with remission. Thus, where the accused has already suffered 16 years of sentence without remission, the Supreme Court directed the State Government to consider the case of the accused whether he had satisfied the requirement of the Resolution.[80.]

[s 432.1] "Remit".—

"The word "remit" as used in section 432, is not a term of art. Some of the meanings of the word "remit" are "to pardon, to refrain from inflicting, to give up". It is, therefore, no obstacle in the way of the President or Governor, as the case may be, in remitting the sentence of death. A remission of sentence does not mean acquittal" (PER ARIJIT PASYAT J).[81.]

In *KM Nanavati v The State of Bombay*,[82.] the Supreme Court laid down that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in

Supreme Court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the Court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. The power is essentially vested in the Head of the Executive because the judiciary has no such "mercy jurisdiction". It was held that the distinction made between the lifers and the non-lifers was not violative of Article 14 of the Constitution with respect to the grant of remission of sentence.[83.] Denial of remission of sentence to persons who happened to be on bail on the date when the order of remission was made operative was held to be violative of Article 14 of the Constitution of India.[84.] The accused was convicted under section 320 and sentenced to life imprisonment. Conviction and sentence were affirmed by the High Court in appeal. The accused sought direction from the High Court to the State Government for some remission of the sentence. It was held that the accused could apply before the State Government in that regard.[85.] Where a case of premature release of a prisoner was deferred for want of requisite information without indicating as to what information was required, but the reports of the police, the probation officer and the Jail Superintendent were favourable to the prisoner and all those authorities recommended his premature release and his conduct in jail was certified to be good, the prisoner was directed to be released forthwith.[86.] Robbery with the help of deadly weapons was committed, and minimum sentence of seven years imprisonment was imposed. It was held by the Supreme Court that mitigating circumstances warranting recommendation for exercise of power of clemency under section 432 existed, and therefore, the punishment was reduced.[87.]

On 18 February 2014, a three-Judge Bench of the Supreme Court commuted the death sentence of convicts in the Rajiv Gandhi Assassination case.[88.] Soon thereafter, the Tamil Nadu Government issued a letter to Government of India proposing to remit the sentence of life imprisonment of the convicts in pursuance of the commutation of their death sentence. The Union of India filed a writ petition in the Supreme Court praying for quashing of the letter dated 19 February 2014 issued by the Tamil Nadu Government. In the writ questions relating to powers of the Appropriate Government under section 432 of the Code was involved. In the course of hearing, the Bench felt that the questions involved in the case are of great importance and therefore after framing seven questions, referred the case to Constitution Bench.[89.]

It has been held by the Supreme Court that an order awarding a sentence in a capital offence for 20 years or 30 years of imprisonment without remission is in effect an injunction against the appropriate Government from exercising its power of remission for the specified period. This is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for remission in his sentence, whatever the reason may be.[90.]

The Bombay High Court recommended the remission of the sentence of the boy of the young age of 18 years who was convicted of murder.[91.] Where a provision granting remission only to certain castes was found to be discriminatory and therefore violative of the Constitution, the Court could not extend the benefit to others.[92.]

Even where the sentence of death imposed upon an accused person is confirmed by the Supreme Court, he is not remediless. He can still seek benefit under sections 432, 433 and 433A. The Court said:[93.]

> The power to commute a sentence of death is independent of section 433A. The restriction under section 433-A of the Code comes into operation only after power under section 433 is exercised. Section 433-A is applicable to two categories of convicts: (*a*) those who could have been punished with sentence of death, and (*b*) those whose sentence has been converted into imprisonment for life under section 433.

In a subsequent case,[94.] the Supreme Court observed as follows:

> A sentence of imprisonment for life does not automatically expire at the end of 20 years of imprisonment including remission, as a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence. Therefore, a positive order of release has to be passed by the Government after due consideration.
>
> Sub-rules (4) and (29) of Rule 591 of the West Bengal Rules for the Superintendence and Management of Jails do not provide for automatic release of a life convict after he has completed 20 years of detention including remission. Under these sub-rules the only right which a life convict can be said to have acquired is a right to have his case put up by the prison authorities in time to the State Government for consideration for premature release and in doing so the Government would follow the guidelines mentioned in sub-rule (4).
>
> The Explanation to section 61 of the West Bengal Correctional Services Act is only for the purpose of calculation of the total period of imprisonment of a life convict under section 61, which shall be taken to be equivalent to the period of imprisonment for 20 years and a life convict would not be entitled to automatic release under this provision of law.

The convict becomes entitled to be released only when the appropriate Government passes an order remitting the balance period of the sentence.[95.]

[s 432.2] Guidelines for premature release of life convict —

In its decision in *Laxman Naskar v UOI,*[96.] the Supreme Court laid down the Guidelines. This decision was applied in *Laxman Naskar v State of WB;*[97.] in this case, the report of the jail authorities was in favour of the petitioner. But review committee constituted by the Government recommended for rejection of the application for premature release for the following reasons: (1) that the police report had revealed that the two witnesses who had deposed before the trial Court and the people of the locality were all apprehensive of acute breach of peace in the locality in case of premature release of the petitioner; (2) that the petitioner was a person of about 43 years and hence he had the potential of committing crime; and (3) that the incident in relation to which the crime had occurred was the sequel of the political feud affecting the society at large.

The Supreme Court held as follows:

> The long time lag which elapsed subsequent to the date of offence and the fact that the prosecutrix got married and is well settled in life and that she is now mother of children—all these things which happened during the intervening period, may be factors for consideration by the executive or Constitutional authorities if they have to decide whether remission of the sentence can be allowed to the accused. It is made clear that the enhanced sentence has been imposed on the accused without prejudice to any motion he may make for such remission of the sentence before the authorities concerned.[98.]

Where the matter fell just short of rarest of rare case, it was held that the Court could sentence the accused to imprisonment for the rest of his life or a term excepting 14 years. Remission granted by executive orders to a life convict has no legal basis.[99.]

In *State of Gujarat v Lal Singh alias Manjit Singh,*[100.] a two-Judge Bench of the Supreme Court was seized of matter wherein the respondent was convicted and sentenced to life imprisonment under section 3(3) of TADA, for 10 years RI under section 120B IPC and 7 years RI under section 25 of Arms Act; all sentences were to be run concurrently. As the Government refused premature release, the High Court invoked its writ jurisdiction and ordered the Government to take a fresh decision. The Supreme Court in view of the decision in *V Sriharan*[101.] held that as the only surviving sentence in the instant case was under TADA Act, a law pertaining to Union Government, only Central Government was empowered to consider remission of sentence.

[s 432.3] Exclusion of bail period —

The Supreme Court has laid down that the period during a person remain enlarged on bail must be excluded from the period of remission granted under any remission notification.[102.]

[s 432.4] Period of parole —

By virtue of the statutory rules framed under section 432(5), *viz.*, Rule 18 of the AP Suspension of Sentence on Parole Rues, 1981, the period spent on parole is not to be counted as part of the period of sentence.[103.]

[s 432.5] Study leave —

It was a matter of release on probation of a life convict, and for that purpose, the period of sentence already undergone had to be computed. Study leave was enjoyed by the prisoner as per rule 280A of the Kerala Prison Rules, 1958. That was not to be reckoned because during study leave, sentence remains suspended.[104.]

[s 432.6] Conditions for eligibility —

The State Government cannot exercise the power under this section in an arbitrary manner. But no prisoner has an absolute right to seek remission. The Government can prescribe eligibility conditions for grant of remission. The Government can exclude prisoners convicted for certain specified offences. The Supreme Court approved the circular issued by the State of Haryana under section 432 which provided for remission to all convicts who had been in jail undergoing sentences including even those on parole or furlough from the jail on 6 July 1987. But the circular did not permit remission to the prisoners convicted of rape or dowry deaths. The Supreme Court upheld the validity of the circular. The specific provisions for applicability of the circular declared that remission under the circular was not available to the prisoners on bail as also prisoners convicted for rape. Merely because when bail was granted to the convict by the appellate Court during pendency of his appeal, and his conviction was not suspended, the convict would not become entitled to remission under the circular for the period he was on bail.[105.]

The Supreme Court held it to be not arbitrary that there should be classification of convicts based on the nature of the offence committed by them. The gravity of the offence can form the basis of valid classification of the object of such classification is selection of convicts for granting remission. It was not arbitrary or unreasonable or violative of Article 14 of the Constitution.[106.]

[s 432.7] Administrative function —

It is not the function of the Court to order release of the accused on remission as it is the administrative function of the executive.[107.]

[s 432.8] "At any time" —

These words emphasise that the power under that section can be exercised without limit of time, but they do not necessarily lead to the inference that this power can also be exercised while the Court is seized of the same matter under section 389 of the Code.[108.]

[s 432.9] Application of provisions to other Criminal Court orders [*Sub-section (6)*].—

The object of this sub-section is to make it clear that the power to remit sentences conferred by this section can be exercised in the case of orders of a penal nature, e.g., orders under section 356 of the Code. Section 32A of the Narcotic Drugs and Psychotropic Substances Act has overriding effect on powers of suspension, commutation and remission contained in the Criminal Procedure Code.[109.]

[s 432.10] Role of Government in clemency powers —

A prisoner was convicted by Courts situated outside the State of AP but was serving sentence in AP jails. A Government order of the AP Government excluded such prisoners from the benefit of remission. It was held to be constitutionally valid. Exclusion was a matter of Government policy. The Courts cannot modify a Government order and extend the benefit to prisoners specifically excluded.[110.]

Where the Central Government set out certain criteria in the form of a circular for deciding the mercy petitions filed by convicts, the Supreme Court recommended that in view of the recent jurisprudential development with regard to delay in execution, another criteria may be added so as to require consideration of delay in disposal of mercy petition. Thus, where the mercy petition of death row convicts was rejected after a delay of 11 years, it was held by the Supreme Court that their death sentence be commuted to imprisonment for life, subject to any remission granted by the appropriate Government under section 432, which, in turn, is subject to the procedural check mentioned in the provision and further substantive check in section 433A of the Code.[111.]

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73. *Venkatesh Yeshwant Deshpande v Emperor*, (1940) Nag 1 : AIR 1938 Nag 513 .

74. *Bhai Abdul Gani*, (1951) Nag 760; *Paras Nath v State*, AIR 1969 All 116 : 1969 Cr LJ 350 .

75. *Chennugadu*, (1955) Mad 92; *Ram Deo Chauhan v State of Assam,* AIR 2001 SC 2231 : 2001 Cr LJ 2902 : (2001) 5 SCC 714 ; *Devender Pal Singh v State of (NCT of Delhi),* 2002 Cr LJ 2034 : AIR 2002 SC 1661 : (2002) 5 SCC 234 .

76. *UOI v Sriharan alias Murugan,* (2016) 7 SCC 1 : 2016 Cr LJ 845 : 2015 (13) Scale 165 [Five-judge Constitution Bench].

77. *GV Ramanaiah v The Superintendent of Central Jail, Rajahmundry,* (1974) 3 SCC 531 : AIR 1974 SC 31 : 1974 Cr LJ 150 .

78. *Shambha Ji v State of Maharashtra*, (1974) 1 SCC 196 : AIR 1974 SC 147 : 1974 Cr LJ 302 .

79. *Ramraj v State of Chhattisgarh*, AIR 2010 SC 420 : (2010) 1 SCC 575 : 2010 Cr LJ 2062 .

80. *Bhagwan Tukaram Dange v State of Maharashtra*, (2014) 4 SCC 270 : 2014 Cr LJ 1875 (SC).

81. *Devender Pal Singh v State NCT of Delhi*, 2002 Cr LJ 2034 : AIR 2002 SC 1661 : (2002) 5 SCC 234 .

82. *KM Nanavati v State of Bombay,* (1960) 63 Bom LR 221 (SC); *Bhramar v State of Orissa*, 1981 Cr LJ 1057 . *Reddy Sampath Kumar v State of AP*, AIR 2005 SC 3478 : (2005) 7 SCC 603 : 2005 Cr LJ 4131 , not entitled to benefit of remission obtained in suspicious circumstances. The accused (doctor) had killed the whole family by a pretended injection for treatment of cancer.

83. *Satish Kr Gupta v State of Bihar*, 1991 Cr LJ 726 (Pat).

84. *Ibid*

85. *Dori v State of Uttar Pradesh*, 1991 Cr LJ 3139 (All).

86. *Shriniwas v Delhi Admn*, AIR 1982 SC 1391 : (1982) 3 SCC 209 .

87. *Ram Shankar v State of Madhya Pradesh*, AIR 1981 SC 644 : 1981 Cr LJ 162 : (1980) Supp SCC 470 .

88. *V Sriharan v UOI*, AIR 2014 SC 1368 : 2014 (2) Scale 505 : (2014) 4 SCC 242 (Three-Judge Bench).

89. *UOI v V Sriharan*, (2014) 11 SCC 1 : 2014 Cr LJ 2724 (SC) (Three-Judge Bench).

90. *Sangeet v State of Haryana*, AIR 2013 SC 447 : (2013) 2 SCC 452 .

91. *Balu v State of Maharashtra*, 1993 Cr LJ 3621 (Bom). *Ashok Kumar Barik v State of Orissa,* (1998) 8 SCC 539 : 1998 SCC (Cr) 1520, the High Court recommended that the State Government should grant some remission or reprieve to the young convict who was sentenced to imprisonment for life for committing murder of a young girl out of frustration in love. The Supreme Court refused to interfere.

92. *State of MP v Mohan Singh*, AIR 1996 SC 2106 : 1996 Cr LJ 2878 : (1995) 6 SCC 321 .

93. *Ramdeo Chauhan v State of Assam,* AIR 2001 SC 2231 : 2001 Cr LJ 2902 : (2001) 5 SCC 714 .

94. *Zabid Hussein v State of WB*, AIR 2001 SC 1312 : 2001 Cr LJ 1692 : (2001) 3 SCC 750 .

95. *Laxman Naskar v State of WB,* AIR 2000 SC 2762 : 2000 Cr LJ 4017 : (2000) 7 SCC 626 .

96. *Laxman Naskar v UOI,* (2000) 2 SCC 595 : AIR 2000 SC 986 : 2000 Cr LJ 1471 .

97. *Laxman Naskar v State of WB,* AIR 2000 SC 2762 : 2000 Cr LJ 4017 : (2000) 7 SCC 626 .

98. *Kamal Kishore v State of HP,* AIR 2000 SC 1920 : 2000 Cr LJ 2292 : (2000) 4 SCC 502 .

99. *Swamy Shraddananda v State of Karnataka*, AIR 2008 SC 3040 : (2008) 13 SCC 767 . See also *Vijay Kumar v State of Jammu & Kashmir*, AIR 2019 SC 298 .

100. *State of Gujarat v Lal Singh alias Manjit Singh,* (2016) 8 SCC 370 : AIR 2016 SC 3197 : 2016 (6) Scale 105 .

101. *Union of India (UOI) v V Sriharan,* (2016) 7 SCC 1 : 2016 Cr LJ 845 : 2015 (13) Scale 165 .

102. *Joginder Singh v State of Punjab,* (2001) 8 SCC 306 : 2001 SCC (Cri) 1541 ; Also to the same effect, *NA Ravikumar v S Suresh Kumar,* 2002 Cr LJ 3820 (Mad).

103. *State of AP v Gandham Jaya*, 2002 Cr LJ 3810 (AP).

104. *CA Pious v State of Kerala*, AIR 2007 SC 3221 : (2007) 8 SCC 312 : 2007 Cr LJ 4697 .

105. *State of Haryana v Mohinder Singh,* AIR 2000 SC 890 : 2000 Cr LJ 1408 : (2000) 3 SCC 394 . *State of Haryana v Naurattan Singh,* AIR 2000 SC 1179 : 2000 Cr LJ 1710 : (2000) 3 SCC 514 , the accused was acquitted by the trial Court of offence under sections 302/34 IPC. He was granted bail during pendency of appeals before the High Court and Supreme Court. The High Court

convicted him and the Supreme Court upheld the conviction. In such circumstances, although the conviction by the Supreme Court related back to the date of judgment of the trial Court which was anterior to the date of enactment of section 433A of CrPC, grant of remission in respect of the period of enlargement of bail was held to be impermissible. The State Government's instructions enabling the grant of remission of the period of "parole or furlough" were held to be not applicable to the period of enlargement on bail.

106. *State of Haryana v Jai Singh,* AIR 2003 SC 1696 : (2003) 9 SCC 114 .

107. *NA Ravikumar v S. Suresh Kumar*, 2002 Cr LJ 3820 (Mad).

108. *KM Nanavati v State of Maharashtra*, (1960) 63 Bom LR 221 : AIR 1961 SC 112 : (1961) 1 Cr LJ 173 .

109. *Maktool Singh v State of Punjab,* AIR 1999 SC 1131 : 1999 Cr LJ 1825 : (1999) 3 SCC 321 .

110. *Govt of AP v MT Khan*, AIR 2004 SC 428 : (2004) 1 SCC 616 : 2004 Cr LJ 815 .

111. *V Sriharan v UOI*, AIR 2014 SC 1368 : (2014) 4 SCC 242 : 2014 Cr LJ 1681 (SC).

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CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

E.—Suspension, remission and commutation of sentences.

[s 433] Power to commute sentence —

The appropriate Government may, without the consent of the person sentenced commute—

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

COMMENTS

Compare sections 54, 55 and 55A of the IPC which confer similar powers on the Central Government or the State Government within whose jurisdiction the offender is sentenced.

Under this section, the Governor can commute a sentence of death.[112.] The accused was sentenced to imprisonment for life. A direction by the Government that he shall in no case be released unless he has undergone minimum 25 years imprisonment was held to be bad in law.[113.] Remission cannot be granted to persons because of their caste. Thus, remission in sentence on an occasion of public rejoicing given to prisoners belonging to Scheduled Castes and Scheduled Tribes only and not to others was held to be violative of Articles 14 and 15(1) of the Constitution.[114.]

Unless an order under clause (b) is issued, a convict cannot be released even after the expiry of 14 years because imprisonment for life means imprisonment for life and a specific order under clause (b) is necessary to commute it to imprisonment for 14 years.[115.] That the execution of death sentence will render extinct the immediate progeny or will throw the family of the condemned prisoner orphaned or resourceless are matters extraneous to the judicial computer: these are, however, compassionate matters to be considered by the Executive Government while exercising its powers of clemency.[116.] Government has no power to commute sentence of imprisonment for life to a term less than 14 years. The power has nothing to do with the power of remission envisaged by section 432.[117.] In a multiple murder case, the accused persons were convicted and sentenced to death by a common judgment. Where death penalty was commuted into imprisonment for life in respect of one co-accused, it was held that the other co-accused was also entitled to commutation.[118.] The President has the power in

an appropriate case to commute any sentence. The necessity or the justification for exercising that power has therefore to be judged from case to case.[119.]

The Supreme Court has held that imprisonment for life awarded after 1 January 1956 means RI.[120.] The Supreme Court has also held that the right to exercise power under the section is vested only in the Government and has to be exercised by the Government and not by the Court.[121.]

It has been held by the Supreme Court that a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under the Code.[122.]

The power under this section is to be exercised reasonably and rationally in the interests of the society and overall public interest. The power under this section is absolute and unfettered.[123.]

In *State of Rajasthan v Jamil Khan*,[124.] the Supreme Court was seized of a question that whether there is any restriction on the exercise of power under sections 432 for remission and 433 for commutation in cases of minimum sentence. It was held that neither section 432 nor section 433 contained a *non obstante* provision. Therefore, the minimum sentence provided for any offence cannot be and shall not be remitted or commuted by the Government in exercise of their power under section 432 or 433 CrPC. Wherever the Penal Code or such penal statutes have provided for a minimum sentence for any offence, to that extent, the power of remission or commutation has to be read as restricted; otherwise, the whole purpose of punishment will be deflated and it will be a mockery on sentencing.

The power of the appropriate Government to restrict remission to any class of convicts did not become excluded or denuded by reason of the introduction of section 433A.[125.]

[s 433.1] Supreme Court Recommendation —

Keeping in view the old age of the convict (80 years), the incident also pertained to long back and the peculiar facts and circumstances of the case, the Supreme Court advised the State to consider the case sympathetically as and when an application is made by him for commutation of sentence.[126.]

[s 433.2] Section 433(C) —

Where more than 20 years had passed when the offence was committed, the Court said that it would not be just to send the accused in jail. The appropriate Government is empowered under section 433(c) to commute the sentence of RI into that of fine.[127.]

[s 433.3] Judicial review —

Judicial review of the clemency power of the President or Governor under section 433 or section 433A is amenable to judicial review, only to a limited extent.[128.]

The Supreme Court has held that prolonged delay in execution of death sentence, by itself, gives rise to mental suffering and agony. It cannot be said that the death row convicts are under any obligation to produce evidence of their sufferings and harm

caused on account of prolonged delay. Such a pre-requisite would render the fundamental rights beyond the reach of death-row convicts. It was observed that there is no requirement in Indian law as well as in international judgments for a death-row convict to prove actual harm caused by the delay.[129.]

A three-Judge Bench of the Supreme Court has held that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 and thereby entails as the ground for commutation of sentence. However, the nature of delay, i.e., whether it is undue or unreasonable, must be appreciated based on the facts of individual cases, and no exhaustive guidelines can be framed in this regard.[130.]

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112. *Parkasho v State of UP*, AIR 1962 All 151 .
113. *Madhav Shankar Sonawane v State of Maharashtra*, 1982 Cr LJ 1762 (Bom).
114. *Mohan Singh v State of MP*, 1981 Cr LJ 147 (MP).
115. *Naib Singh v Punjab*, 1983 Cr LJ 1345 : AIR 1983 SC 855 .
116. *Shanker v State of UP*, AIR 1975 SC 757 : 1975 Cr LJ 634 : (1975) 3 SCC 851 ; *Jalandhar Singh v State of Punjab*, 1992 Cr LJ 1772 (P&H).
117. *Pavitar Singh v State of Punjab*, 1988 Cr LJ 1052 (P&H).
118. *Harbans Singh v State of Uttar Pradesh*, AIR 1982 SC 849 : (1982) 2 SCC 101 .
119. *Kuljit Singh alias Ranga v Lt Governor of Delhi*, AIR 1982 SC 774 : (1982) 1 SCC 417 .
120. *Satpal v State of Haryana*, AIR 1993 SC 1218 : 1993 Cr LJ 314 : (1992) 4 SCC 172 .
121. *State of Punjab v Kesar Singh*, AIR 1996 SC 2512 : 1996 Cr LJ 3586 : (1996) 5 SCC 495 .
122. *Duryodhan Rout v State of Orissa*, AIR 2014 SC 3345 : 2014 Cr LJ 4172 (SC) : 2015) 2 SCC 783 ; *Swamy Shraddananda v State of Karnataka*, AIR 2008 SC 3040 : (2008) 13 SCC 767 ; *Mohd Munna v UOI*, AIR 2005 SC 3440 : (2005) 7 SCC 417 —Rel. on.
123. *State of Haryana v Jagdish*, AIR 2010 SC 1690 : (2010) 4 SCC 216 : 2010 Cr LJ 2398 .
124. *State of Rajasthan v Jamil Khan,* (2013) 10 SCC 721 : 2012 Cr LJ 3953 : JT 2012 (6) SC 80 : 2012 (6) Scale 113 .
125. *State of Haryana v Jai Singh,* AIR 2003 SC 1696 : (2003) 9 SCC 114 .
126. *Dila v State of UP*, 2002 Cr LJ 4350 : (2002) 7 SCC 450 .
127. *Ramesh v State of UP*, 2002 Cr LJ 4575 (All).
128. *State of Haryana v Jagdish*, AIR 2010 SC 1690 : (2010) 4 SCC 216 : 2010 Cr LJ 2398 .
129. *V Sriharan v UOI*, AIR 2014 SC 1368 : (2014) 4 SCC 242 : 2014 Cr LJ 1681 (SC).
130. *Shartughan Chauhan v UOI*, (2014) 3 SCC 1 : 2014 Cr LJ 1327 (SC) (Three-Judge Bench).

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CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

E.—Suspension, remission and commutation of sentences.

[131.][[s 433A] Restriction on powers of remission or commutation in certain cases.—

Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.]

COMMENTS

This section was added by the Criminal Law Amendment Act, 1978. The object of the section is to prescribe minimum imprisonment for 14 years for those who are convicted of an offence for which death is one of the punishments provided by law or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life. The *non-obstante* clause makes it clear that such minimum imprisonment is notwithstanding anything contained in section 432 which means that the power to suspend or remit sentence under that section cannot be exercised so as to reduce the imprisonment of a person convicted of such an offence or whose death sentence has been commuted to life imprisonment for less than 14 years.

[s 433A.1] Applicability [*Section 433A*].—

1. The section is not retrospective. GOM no. 557, dated 30 October 1980 issued by Andhra Pradesh Government, is not applicable to those governed by section 433A.[132.]

2. Even where conviction was made after the coming into force of section 433A and it was held that this section applied, the plea that the applicability be decided with reference to the date of the occurrence was not maintainable.[133.] The Government will not, except for weighty reasons, reduce or commute the sentence under section 433A in the case of very serious offences, for example, where the appellant was charged with murder of a young boy.[134.] Where life imprisonment was given on conviction prior to 18 December 1978, section 433A was held to be not applicable.[135.] Where in a case governed by section 433A, the convicts had not completed their detention for full 14 years, they could not claim a direction to the State for their premature release on the basis of pre-conviction detentions and remissions earned by them.[136.]

The Supreme Court has held that for exercising the power of remission to a life convict, the CrPC places not only a procedural check but also a substantive check. This check is through section 433A of the Code which provides that when remission of a sentence is granted to a convict in a capital offence, the convict must serve at least fourteen

years imprisonment. That a prisoner serving a life sentence has an indefeasible right to be released on completion of either 14 years or 20 years imprisonment is a misconception. The prisoner has no such right. A prisoner undergoing life imprisonment is expected to remain in custody till the end of his life.[137.]

Where the State Government refused to release a life convict after undergoing 16 years of imprisonment, under section 2 of the Prisoners Release on Probation Act, 1938, and rejected his form A for premature release on the ground that the District Magistrate, Superintendent of Police and the Probation Board did not recommend his release, the High Court set aside the order, directed him to be released on the basis of the report of the Probation Officer and affidavits of his wife and son and reliability and standing of his proposed guardian.[138.] A life convict applied for his release on licence under MP Prisoners Release on Probation Act, 1954. The application on the recommendation of the Probation Board was rejected by the State Government. The main ground of rejection was that the convict had undergone only eleven years' imprisonment including remissions, so in view of section 433A of CrPC, he was not entitled to be released. The High Court held that a person so released under the MP Prisoners Release Act on licence remained under deemed custody, so section 433A CrPC is not attracted. The Government was directed to decide the petitioner's case for release on licence afresh on merits.[139.] It has been held that it could not be said that parole period was not to be counted for the actual period of 14 years imprisonment as release on parole is only a licensed enlargement on certain condition, violation of which makes him liable to be rearrested.[140.] The Kerala High Court has held that in counting the period of fourteen years, the prisoner is not entitled to have the remitted period included therein.[141.]

Where instructions by the State Government as to premature release were modified to the effect that the cases of convicts falling within the purview of section 433A will be put before the Governor for order under Article 161 of the Constitution, it was held that the law prevailing on the date on which the case was put would be relevant and not the law prevailing in the date of conviction.[142.]

The right of a convict to claim remission of sentence is limited to the consideration of his case as per the relevant Rules and Short Sentencing Schemes existing at the time of his conviction.[143.] No order can be passed on the basis of a subsequent policy decision. In this case, the Court said that it could not direct the Government to release a convict. It could only direct the State Government to consider the cases of convicts for release. The question of release is to be considered as per policy decision as was applicable on the date of conviction, and not on the basis of a subsequent policy decision.[144.]

Where the petitioners were convicted under the NDPS Act, 1985 and various offences and sentenced to suffer RI for more than 10 years and to pay a fine of Rs 1 lakh and the issue before the Supreme Court was that whether denial of remission under the Jail Manual was justified, it was held that the petitioners do not have a right to seek remission under the Code because of section 32A of the NDPS Act, 1985. They can always seek relief either under Article 72 or 161 of the Constitution, as the case may be but a writ under Article 32 cannot be issued to that effect as there is no violation of any fundamental right.[145.]

[s 433A.2] Life convict under Army Act.—

In the absence of a specific provision in the Army Act, 1950, similar or contrary to section 433A, the bar under section 433A is applicable to a convict under section 69 of

the Army Act also.[146.] He has to serve at least 14 years of actual imprisonment excluding the remissions, if any, earned in jail.

This section has been held to be constitutionally valid. The Supreme Court held that (i) the provision was within the legislative competence of the Parliament by virtue of Entry 2 of List III of the Seventh Schedule read with Article 246 of the Constitution; (ii) it was not violative of Article 20(1) of the Constitution; (iii) it was not violative of Article 14 of the Constitution as it was based on reasonable classification.[147.] Guidelines for premature release of prisoners serving life sentences after 18 December 1978 were issued by the Maharashtra Government. The constitutional validity of these guidelines was challenged. The Bombay High Court held them valid as there was no element of arbitrariness in the classification made in the guidelines, which was based on the nature of the crime and its severity and have nexus with the purpose of remission of sentence. It was further observed that remission is not by way of right but a discretionary matter of the State Government, and the guidelines were necessary to check arbitrariness.[148.]

Where the accused, who was convicted and sentenced to life imprisonment under section 302 IPC, applied for his premature release from jail after completion of jail term of more than 14 years and his release was recommended by the Advisory Board as well as the Probation Officer, but the State Government declined to release him, the High Court directed the State Government to release the accused forthwith after necessary formalities in accordance with law unless wanted in other case. It was held that the judgment of the High Court did not in any manner impinge on such power as right of the State.[149.]

Section 433A of the Code does not apply to those convicted under the Borstal Schools Act.[150.]

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131. Ins. by Act No. 45 of 1978, section 32 (w.e.f. 18-12-1978).

132. *State of Andhra Pradesh v GM Moray*, AIR 1982 SC 1195 : (1982) 2 SCC 436 .

133. *Y Dass v State of Karnataka*, 1990 Cr LJ 234 (Kant).

134. *Shidagouda Ningappa Ghandavar v State of Karnataka*, AIR 1981 SC 764 : (1981) 1 SCC 164 : 1981 Cr LJ 324 .

135. *GM Morey v Govt of Andhra Pradesh*, AIR 1982 SC 1163 : (1982) 2 SCC 433 : 1982 Cr LJ 1249 .

136. *Y Dass v State of Karnataka*, 1990 Cr LJ 234 (Kant). *Shri Bhagwan v State of Rajasthan,* (2001) 6 SCC 296 : 2001 SCC (Cri) 1095 : AIR 2001 SC 2342 , sentence of "imprisonment for life" ordinarily means sentence of imprisonment for whole of the remaining period of the convicted period's natural life. Rules framed under Prisons Rules do not substitute a lesser sentence for a sentence for life. For release of a prisoner on expiry of a particular term, an appropriate order of the Government is necessary. *Laxman Nashar v UOI,* AIR 2000 SC 966 : 2000 Cr LJ 1471 : (2000) 3 SCC 501 , premature release on extraneous considerations, *e.g.*, on the ground of police objections, was held to be premature. *Dipak Kumar Bhanuprasad Upadhyay v State of Gujarat,* 1998 Cr LJ 1933 (Guj—FB), remission after completing 10 years of actual imprisonment, the

convict enjoyed periods of furlough and parole, not treated as imprisonment undergone, 10 years not complete, could not enjoy the benefit of remission order.

137. *Sangeet v State of Haryana,* AIR 2013 SC 447 : (2013) 2 SCC 452 .

138. *Mehndi Hasan v State of UP*, 1996 Cr LJ 687 (All).

139. *Ramesh v State of Madhya Pradesh*, 1992 Cr LJ 2504 (MP).

140. *Bachan Singh v State of Haryana*, 1996 Cr LJ 1612 (P&H).

141. *S Sudha v Supdt, Open Prison, Nettukatheri*, 1993 Cr LJ 2630 (Ker).

142. *State of Haryana v Balwan,* AIR 1999 SC 3333 : 1999 Cr LJ 4299 : (1999) 7 SCC 355 .

143. *State of Haryana v Jagdish*, AIR 2010 SC 1690 : (2010) 4 SCC 216 : 2010 Cr LJ 2398 .

144. *State of Haryana v Bhup Singh*, AIR 2009 SC 1252 : (2009) 2 SCC 268 : 2009 Cr LJ 1134 .

145. *Tara Singh v UOI*; WP (Crl) No. 190/2014 as decided on 29th June, 2016 by the Supreme Court.

146. *UOI v Sadha Singh* AIR 1999 SC 3833 : (1999) 8 SCC 375 : 2000 Cr LJ 15 .

147. *Maru Ram v UOI*, 1980 Cr LJ 1440 : AIR 1980 SC 2147 : (1981) 1 SCC 107 .

148. *Shanker Babu Ghavali v State of Maharashtra*, 1993 Cr LJ 1497 (Bom).

149. *State of UP v Barati*, 2002 Cr LJ 927 (SC).

150. *State of AP v Vallabhgaram Ravi*, 1984 Cr LJ 1511 : AIR 1985 SC 870 : (1984) 4 SCC 410 .

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CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

E.—Suspension, remission and commutation of sentences.

[s 434] Concurrent power of Central Government in case of death sentences —

The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.

COMMENT

As a rule of self-imposed discipline, mercy petition would be decided by the President of India within a period of three months from the date of prosecution.[151.]

151. *KP Mohammed v State of Kerala*, 1985 SCC (Cri) 142 : 1984 SCC (Supp) 684 (685).

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CHAPTER XXXII EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

E.—Suspension, remission and commutation of sentences.

[s 435] State Government to act after consultation with Central Government in certain cases —

(1) **The powers conferred by sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence —**

(a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

shall not be exercised by the State Government except after consultation with the Central Government.

(2) **No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.**

COMMENT

This provision was made on the recommendation of the Law Commission and of the Joint Committee of Parliament. Sub-section (1) enumerates the cases in which the State Government, before it remits or commutes the sentence, should consult the Central Government.

[s 435.1] Exercise of concurrent powers of remission [*Sub-section (2)*].—

It provides for a contingency where some of the offences of which a person has been convicted relate to the matters to which the executive power of the Central Government

extends. In such a case, the person cannot be released unless the Central Government also suspends, remits or commutes a part of sentence relating to an offence falling within its field.

In *UOI v Sriharan alias Murugan,*[152.] a Constitution Bench of the Supreme Court was seized of an important question that whether the expression "Consultation" stipulated in section 435(1) of the Code implied "Concurrence"? It was held in the majority opinion of Justices Kalifulla, Dattu and Ghose that in those situations covered by sub-clauses (a) to (c) of section 435(1) falling within the jurisdiction of the Central Government, it will assume primacy and consequently the process of "Consultation" in reality be held as the requirement of "Concurrence". The majority opinion also held that while interpreting section 435(1)(a) which mandates that any State Government while acting as the "Appropriate Government" for exercising its powers under sections 432 and 433 of CrPC and consider for remission or commutation to necessarily consult the Central Government. In this context, the requirement of the implication of section 432(7)(a) has to be kept in mind, more particularly in the light of the prescription contained in Article 73(1)(a) and Article 162 read along with its proviso, which asserts the status of the Central Government Authorities as possessing all pervasive right to hold the Executive Power by virtue of express conferment under the Constitution or under any law made by the Parliament, though the State Legislature may also have the power to make laws on those subjects. In the concurrent opinion by Justice UU Lalit for himself and Justice Sapre, it was also held that the expression "consultation" ought to be read as concurrence and primacy must be accorded to the opinion of the Central Government in matters covered under clauses (a), (b) and (c) of section 435(1) of the CrPC.

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152. *UOI v V Sriharan,* (2016) 7 SCC 1 : 2016 Cr LJ 845 : 2015 (13) Scale 165 [Five-Judge Constitution Bench].

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CHAPTER XXXIII PROVISIONS AS TO BAIL AND BONDS

Provisions as regards bail can be broadly classed into two categories: (1) bailable cases, and (2) non-bailable cases. In the former class, the grant of bail is a matter of course. It may be given either by the police officer in charge of a police station having the accused in his custody or by the Court. The release may be ordered on the accused executing a bond and even without sureties [section 436(1)]. In non-bailable cases, the accused may be released on bail: but no bail can be granted where the accused appears on reasonable grounds to be guilty of an offence punishable either with death or with imprisonment for life. But the rule does not apply to (1) a person under 16 years of age, (2) a woman or (3) a sick or infirm person. As soon as reasonable grounds for the guilt cease to appear, the accused is entitled to be released on bail or on his own recognizance; he can be also released, for similar reasons, between the close of the case and delivery of the judgment. When a person is released on bail, the order with reasons therefor should be in writing. A person released on bail may be taken into custody by order of the Court (section 437). In the same way, the High Court or the Court of Session may admit a person to bail or reduce the amount of the bail [sections 439(1) and 440]. As soon as the bail bond is executed, the accused is entitled to be released from custody (section 442). When the amount of bail taken is found to be insufficient, the Court may demand additional bail (section 443). A surety who is once accepted is at liberty to apply to the Court for his discharge; and the accused is then called upon to find fresh sureties (section 444).

The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[s 436] In what cases bail to be taken —

(1) **When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:**

Provided **that such officer or Court, if he or it thinks fit, may,** [5]**[may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail] from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:**

[6][*Explanation*.—Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.]

Provided further **that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116** [7] **[or section 446A.]**

(2) **Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.**

[s 436.1] State Amendment

Uttar Pradesh.— *The following amendments were made by U.P. Act 1 of 1984. S. 10 (w.e.f. 1-5-1984).*

S. 436.—In section 436 in sub-section (1) in the first proviso for the word "discharge" the word "release" shall be substituted.

COMMENT

[s 436.2] CrPC (Amendment) Act, 2005 [Clause 35].—

In respect of bailable offences, a person has to remain in jail for his inability to furnish bail, till the case is disposed of. Section 436(1) is, therefore, being amended to make a mandatory provision that if the arrested person is accused of a bailable offence and he is an indigent and cannot furnish surety, the Court shall release him on his execution of a bond without sureties. (Notes on Clauses).

COMMENTS

Where a person who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. In such cases, the man is ordinarily to be at liberty, and it is only if he is unable to furnish such moderate security, if any, as is required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention.[8] The section is imperative, and under its provisions, the Magistrate is bound to release the person on bail or recognizance.[9] But bail means release of a person from legal custody; it presupposes that he is in custody. Person who is under no such restraint cannot be granted bail.[10] The fundamental principle of our system of justice is that a person should not be deprived of his liberty except for a distinct breach of law. If there is no substantial risk of the accused fleeing the course of justice, there is no reason why he should be imprisoned during the period of his trial. The basic rule is to release him on bail unless there are circumstances suggesting the possibility of his fleeing from justice or thwarting the course of justice.[11] When bail is refused, it is a

restriction on personal liberty of the individual guaranteed by Article 21 of the Constitution and therefore such refusal must be rare.[12.] Where delays in the disposal of criminal proceedings take place, the accused ought not to be kept in custody for an inordinately long time and must be released on bail except when under extremely rare circumstances it is not possible to do so.[13.] In the case of bailable offences, there is no question of discretion in granting bail.[14.]

The power to grant bail given by sections 436 and 437 of the Code vests in the Court before whom an accused appears and is brought. The expression "Court" means the Court which has power to take cognizance of the case. The power of the Magistrate to grant bail does not depend upon his competence to try the case but on the punishment prescribed for the offence.[15.] A Court which has only the power to remand under section 107 is not a competent Court for granting bail. Similarly, an executive Magistrate has no jurisdiction to grant bail except in respect of offences punishable with fine and or imprisonment up to three months. In relation to a person not accused of such offences, the Magistrate who has jurisdiction to take cognizance has power to grant bail even when the accused is in custody on the basis of an order of remand passed by an executive Magistrate.[16.] A successive bail application is allowed only if new and compelling grounds are invoked in support of it.[17.] Where an approver's evidence had already been recorded, the Court directed that he be released on bail since no purpose was going to be served by his further detention.[18.]

The Supreme Court has held that unnecessarily inhibitive condition ought not to be imposed while granting bail. An order rejecting surety because he or his estate was situated in a different district was held to be discriminatory and violative of Article 14 of the Constitution.[19.] Where the accused was granted bail in a bailable offence by the Magistrate on furnishing of bail bond of Rs 2,000 with one surety for the like amount and to deposit cash security of Rs 2,000 and there was no likelihood of absconding, the Orissa High Court directed him to furnish property security of Rs 5,000 with one surety only holding that the bail order should not be so unreasonable, harsh and oppressive so as to result in denial of bail.[20.]

Bail in its fundamental concept is a security for the prisoner's appearance to answer the charge at a specified time and place. It is natural and relevant for any Court to consider such security in relation to and in the light of the nature of the crime charged and the likelihood or otherwise of the guilt of the accused thereunder. At an early stage when accused asks for bail, the Court has necessarily to act on a reasonable and intelligent anticipation which *ex-hypothesis* must, to a certain extent, be problematical because the trial has not run its course. In matters of bail, the test to be applied is the test of reasonable belief as opposed to decision and conclusion which marks the end of the trial. The available materials for the Court in considering the question of granting bail are the charge made, the attendant facts including the police report, facts stated in the petition for bail and the grounds of opposition to the granting of that petition.[21.]

The Supreme Court has held that though a person accused of a bailable offence is entitled to be released on bail pending his trial, if his conduct subsequent to his release, is found to be prejudicial to a fair trial, he forfeits his right to be released on bail and such forfeiture can be made effective by invoking the inherent power of the High Court under section 482 of the Code.[22.] Therefore, if at any subsequent stage of proceedings, it is found that any person accused of a bailable offence is intimidating, bribing or tampering with the prosecution witnesses or is attempting to abscond, the High Court has inherent power to cause him to be arrested and to commit him to custody for such period as it thinks fit. This power can be invoked in exceptional cases only when the High Court is satisfied that the ends of justice will be defeated unless the accused is committed to custody.[23.] Accused was granted bail who was in jail for six years. No progress was made in trial because of an order of the President, not to remove the

accused from the jail. There was no indication as to when the above order would be withdrawn. There was no apprehension that the accused would tamper with the evidence. The bail was granted.[24.] While granting bail in respect of a bailable offence, insistence on personal bond and surety is a matter of discretion and within the jurisdiction of the Court under section 436.[25.]

[s 436.3] Consequences of failure to comply with conditions of bail [*Sub-section (2)*].—

This sub-section empowers the Court to refuse bail to an accused person even if the offence is bailable, where the person granted bail fails to comply with the conditions of the bail bond. Such refusal will not affect the powers of the Court to forfeit the bond and recover penalty from the surety as laid down by section 446.[26.] There is no express provision in the Code prohibiting the Court from re-arresting the accused who has been released on bail. The High Court in the exercise of its inherent powers can cancel a bail bond.[27.]

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1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .
5. Subs. by Act No. 25 of 2005, section 35(a), for "may, instead of taking bail" (w.e.f. 23-6-2006).
6. Ins. by Act No. 25 of 2005, section 35(b) (w.e.f. 23-6-2006).
7. Ins. by Act No. 63 of 1980, section 4 (w.r.e.f. 23-9-1980).
8. *Emperor v Mir Hashamali*, (1918) 20 Bom LR 121 ; *Kanubhai Chhaganlal Brahmbhatt v The State of Gujarat*, 1973 Cr LJ 533 .
9. *Raghunandan Pershad v The Emperor*, (1904) 32 Cal 80 , 83.
10. *Varkey Paily Madthikudiyil Pulinthanam v State of Kerala*, AIR 1967 Ker 189 : 1967 Cr LJ 1152 ; *State of Madhya Pradesh v Narayen Prasad*, AIR 1963 MP 276 : 1963 Cr LJ 375 ; *Bhramar v State of Orissa*, 1981 Cr LJ 1057 (Ori).
11. *State of Rajasthan v Balchand*, 1978 Cr LJ 195 : AIR 1977 SC 2447 : (1977) 4 SCC 308 ; *Gudikanti Narasimhulu v Public Prosecutor*, AP, 1978 Cr LJ 502 : AIR 1978 SC 429 : (1978) 1 SCC 240 .
12. *Babu Singh v State of Uttar Pradesh*, 1978 Cr LJ 651 : AIR 1978 SC 527 : (1978) 1 SCC 579 ; *Afsar Khan v State of Karnataka*, 1992 Cr LJ 1676 (Kant).
13. *Hussainara Khatoon v State of Bihar*, 1979 Cr LJ 1036 : AIR 1979 SC 1360 : (1980) 1 SCC 81 .
14. *Rasiklal v Kishore Khanchand Wadhwani*, AIR 2009 SC 1341 : (2009) 4 SCC 446 : 2009 Cr LJ 1887 .
15. *Aftab Ahmad v State of Uttar Pradesh*, 1990 Cr LJ 1636 (All).
16. *Singeshwar Singh v State of Bihar*, 1976 Cr LJ 1511 (Pat).
17. *Chittar v State of Rajasthan*, 1980 Cr LJ NOC 94 (Raj).

18. *Prem Chand v State*, 1985 Cr LJ 1534 (Del).
19. *Moti Ram v State of Madhya Pradesh*, 1978 Cr LJ 1703 : AIR 1978 SC 1594 : (1979) 4 SCC 485 .
20. *Anwer Husain v State of Orissa*, 1995 Cr LJ 863 (Ori).
21. *Badri Prasad Missir v State*, (1953) ILR 1 Cal 280 : AIR 1953 Cal 28 .
22. *Talab Haji Hussain v Madhukar Purshottam Mondkar*, (1958) SCR 1226 : 60 Bom LR 937 : AIR 1958 SC 376 : 1958 Cr LJ 701 .
23. *Ratilal v Asst Collector of Customs*, AIR 1967 SC 1639 : 1967 Cr LJ 1576 .
24. *Virsa Singh v State through CBI*, 1992 Cr LJ 164 (Del); *Jagannath Mishra (Dr) v CBI,* (1998) 9 SCC 611 : (1998) 9 JT 149 (1) : 1998 SCC (Cri) 1337 , fodder scam case, charge-sheet was already submitted and no investigation was pending against the accused, bail was granted subject to certain conditions.
25. *Chowriappa Constructions v Embassy Constructions & Developments Pvt Ltd,* 2002 Cr LJ 3863 (Kant).
26. *Mool Chand v State*, 1992 Cr LJ 2330 : AIR 1992 SC 1618 : 1991 Supp (2) SCC 101 .
27. *Rasiklal v Kishore Khan Chand Wadhwani*, AIR 2009 SC 1341 : (2008) 15 SCC 705 : 2009 Cr LJ 335 .

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The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[28.][[s 436A] Maximum period for which an under trial prisoner can be detained —

Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for

that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

***Provided* that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:**

***Provided further* that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.**

Explanation.—**In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.]**

COMMENT

[s 436A.1] CrPC (Amendment) Act, 2005 [*Clause (36)*].—

There had been instances, where under-trial prisoners were detained in jail for periods beyond the maximum period of imprisonment provided for the alleged offence. A new section 436A is being inserted in the Code to provide that where an under-trial prisoner other than the one accused of an offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one-half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties.

It is also proposed to provide that in no case will an under-trial prisoner be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence. (*Notes on Clauses*).

In *Bhim Singh v UOI,*[29] the Supreme Court directed that jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall hold one sitting in a week in each jail/prison for two months commencing from 1 October 2014 for the purposes of effective implementation of section 436A. In its sittings in jail, the above judicial officers shall identify the under-trial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed under section 436A pass an appropriate order in jail itself for release of such under-trial prisoners who fulfil the requirement of section 436A for their release immediately. Such jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall submit the report of each of such sitting to the Registrar General of the High Court and at the end of two months, the Registrar General of each High Court shall submit the report to the Secretary General of this Court without any delay. To facilitate the compliance of the above order, we direct the Jail Superintendent of each jail/prison to provide all necessary facilities for holding the Court sitting by the above judicial officers.

The Supreme Court recently gave following directions[30].—

> "27. To sum up:
>
> (i) The High Courts may issue directions to subordinate courts that –
>
> (a) Bail applications be disposed of normally within one week;

(b) Magisterial trials, where accused are in custody, be normally concluded within six months and sessions trials where accused are in custody be normally concluded within two years;

(c) Efforts be made to dispose of all cases which are five years old by the end of the year;

(d) As a supplement to Section 436A, but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence likely to be awarded if conviction is recorded such undertrial must be released on personal bond. Such an assessment must be made by the concerned trial courts from time to time;

(e) The above timelines may be the touchstone for assessment of judicial performance in annual confidential reports. (emphasis added)

(ii) The High Courts are requested to ensure that bail applications filed before them are decided as far as possible within one month and criminal appeals where accused are in custody for more than five years are concluded at the earliest;

(iii) The High Courts may prepare, issue and monitor appropriate action plans for the subordinate courts;

(iv) The High Courts may monitor steps for speedy investigation and trials on administrative and judicial side from time to time;

(v) The High Courts may take such stringent measures as may be found necessary in the light of judgment of this Court in *Ex. Captain Harish Uppal*.

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1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

28. Ins. by Act No. 25 of 2005, section 36 (w.e.f. 23-6-2006).
29. *Bhim Singh v UOI,* (2015) 13 SCC 605 .
30. *Hussain v UOI* as decided on 9th March, 2017 in Criminal Appeal No. 509/2017 by the Supreme Court.

The Code of Criminal Procedure, 1973

CHAPTER XXXIII PROVISIONS AS TO BAIL AND BONDS

Provisions as regards bail can be broadly classed into two categories: (1) bailable cases, and (2) non-bailable cases. In the former class, the grant of bail is a matter of course. It may be given either by the police officer in charge of a police station having the accused in his custody or by the Court. The release may be ordered on the accused executing a bond and even without sureties [section 436(1)]. In non-bailable cases, the accused may be released on bail: but no bail can be granted where the accused appears on reasonable grounds to be guilty of an offence punishable either with death or with imprisonment for life. But the rule does not apply to (1) a person under 16 years of age, (2) a woman or (3) a sick or infirm person. As soon as reasonable grounds for the guilt cease to appear, the accused is entitled to be released on bail or on his own recognizance; he can be also released, for similar reasons, between the close of the case and delivery of the judgment. When a person is released on bail, the order with reasons therefor should be in writing. A person released on bail may be taken into custody by order of the Court (section 437). In the same way, the High Court or the Court of Session may admit a person to bail or reduce the amount of the bail [sections 439(1) and 440]. As soon as the bail bond is executed, the accused is entitled to be released from custody (section 442). When the amount of bail taken is found to be insufficient, the Court may demand additional bail (section 443). A surety who is once accepted is at liberty to apply to the Court for his discharge; and the accused is then called upon to find fresh sureties (section 444).

The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[s 437] [31.][(1) When bail may be taken in case of non-bailable offence.—

(1) **When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—**

(i)

such person shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of [32] [a cognizable offence punishable with imprisonment for three years or more but not less than seven years]:

Provided **that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:**

Provided further **that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:**

Provided also **that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.]**

[33] **[** *Provided also* **that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.]**

(2) **If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, [34] [the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail], or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.**

(3) **When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860), or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) [35] [the Court shall impose the conditions,—**

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,

and may also impose, in the interests of justice, such other conditions as it considers necessary.]

(4) **An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its [36][reasons or special reasons] for so doing.**

(5) **Any Court which has released a person on bail under sub-section (1) or subsection (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.**

(6) **If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.**

(7) **If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.**

[s 437.1] **State Amendments**

Punjab.— *The following amendments were made by Punjab Act 22 of 1983, section 10 (w.e.f. 27-6-1983), for one year.*

S 437.—In its application to the State of Punjab, in relation to the "specified offences" as defined in section 2(b) Code of Criminal Procedure (Punjab Amendment) Act, 1983 (22 of 1983), after section 437(7) add section 437(8) as under:—

"(8) Before releasing the accused on bail under sub-section (1) or sub-section (2), the Court shall give the prosecution a reasonable opportunity to show cause against such release."

Union Territory of Chandigarh.—(Same as Punjab). After section 437(7) add as under—

"(8) Before releasing the accused on bail under sub-section (1) or sub-section (2), the Court shall give the prosecution a reasonable opportunity to show cause against such release."

COMMENT

[s 437.2]CrPC (Amendment) Act, 2005 [*Clause (37)*].—

This clause seeks to amend section 437 to provide that if a person commits a cognizable and non-bailable offence, and he has previously been convicted on two or

more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years, he shall not be released except in the circumstances specified in the provision.

It is further provided that if an accused appears before the Court while in judicial custody and prays for bail, or a prayer for bail is made on his behalf, the Court shall grant bail only after giving an opportunity of hearing to the prosecution, if the offence alleged to have been committed by the accused is punishable with death, imprisonment for life or imprisonment for not less than seven years.

Under sub-section (3) of section 437 of the Code, the Court has got the discretion to impose certain conditions for the grant of bail. Under section 441(2), where any condition is imposed for the release of a person on bail, the bond shall contain that condition also. In order to make the provision stringent and to see that the person on bail does not interfere or intimidate witness, sub-section (3) is being amended to specify certain conditions, which are mandatory. (*Notes on Clauses*).

COMMENT

This section gives the Court or a police officer power to release an accused on bail in a non-bailable case, unless there appear reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life. But (1) a person under the age of 16 years; (2) a woman; or (3) a sick or infirm person may be released on bail even if the offence charged is punishable with death or imprisonment for life.[37.] Where a person is charged with a non-bailable offence, but it appears in the course of the trial that he is not guilty of such offence, he can be immediately released on bail pending further inquiry. The same may be done after the conclusion of a trial and before judgment is pronounced, if the person is believed not to be guilty of a non-bailable offence. As a safeguard, the section provides for review of the order by the Court which has released the person on bail. The Court should take into consideration various matters such as nature and seriousness of the offence, the character of evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the interest of the public or the State and similar other considerations before granting the bail. Where an accused was charged under section 3 of the Official Secrets Act relating to military affair and the High Court granted bail on the ground of insufficiency of materials to sustain the conviction, the Supreme Court held that the bail ought not to have been granted.[38.] The power of the Court is discretionary. It has to be exercised with great care and caution by balancing the individual right of liberty with the interest of the society in general. The Court has to state reasons for its order.[39.] The Allahabad High Court has held that when an accused surrenders in the Court and applies for bail, the subordinate Courts have jurisdiction to release him on personal bond, pending disposal of his bail, application. This should be particularly so in the cases of women and children. It was further observed that bail applications should be decided as expeditiously as possible and should not be allowed to remain pending for long.[40.] Where the accused was arrested on a charge under section 6 of TADA, which carries a punishment of five years, and he remained in jail for four years and eight months, the Supreme Court granted him bail.[41.]

[s 437.3] Constitutional validity —

The mere fact that the section makes a distinction between persons accused of graver offences and of lesser offences or that exceptions are created in favour of (a) young persons, (b) women, and (c) infirm persons does not make the section constitutionally invalid being hit by Article 14 of the Constitution. The classification is based on

intelligible differentia and has reasonable relation to the object of legislation in the matter of grant of bail.[42.] At the time of granting the bail, there is a statutory obligation cast upon the Court to record the reasons in writing. An order without recording any reasons cannot be sustained.[43.] When the offence is non-bailable and of a serious nature, issuance of a bailable warrant cannot be the sole premise for granting the bail.[44.]

It has been held by the Supreme Court that there is no provision in the Code curtailing the power of either the Sessions Court or the High Court to entertain and decide pleas for bail. But the regimes regulating the power of Magistrate and that of Sessions Court are drastically dissimilar. While section 437 requires that the person seeking bail must be arrested or detained, section 439, on the other hand, requires that the person must be in custody. It has been held that the word 'custody' as such cannot be given a meaning similar to arrest or detention. A person surrendering before the Court is in custody of the Court and can be released on bail or if the Court finds that he is not entitled to bail, the Court may pass necessary orders for judicial or police custody. Therefore, where a person surrendered before High Court, it was held that the High Court was not correct in concluding that it was devoid of jurisdiction. The High Court could have taken the person in custody and then proceeded to deal with the prayer for bail.[45.]

[s 437.4] Mode of exercising discretion —

The Supreme Court has laid down guidelines regarding the mode of exercising discretion in grant or refusal of bail. The Court said[46.]: Grant of bail, though is a discretionary order, it, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reasons cannot be sustained. While placement of the accused in the society, though may be considered, but that by itself cannot be a guiding factor in the matter of grant of bail and the same ought always to be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail—more heinous is the crime, the greater is the chance of rejection of bail, though, however, dependent on the factual matrix of the matter.

> "...Certain other relevant considerations, which are only illustrative and not exhaustive, are as follows:
>
> (a) not only the nature of accusations but the severity of punishment in case of conviction and the nature of the supporting evidence,
>
> (b) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant,
>
> (c) *prima facie* satisfaction of the Court in support of the charge, and
>
> (d) frivolity and genuineness of the prosecution, and it is only the element of genuineness that has to be considered in the matter of grant of bail, and in the event of some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

Where the application for bail was moved by an accused who was charged with criminal misappropriation of public fund, the Court said that the amount involved was a relevant factor but not the only consideration in considering the application.[47.] The role of facts and circumstances is the most important. There is no absolute rule that bail must be granted because a long period of imprisonment has expired. The accused in this case had been a member of Parliament and had been already in jail for more than

six years. It was a triple murder case. The statement of the accused was that he and other accused had been hired by the Member of Parliament (MP) to carry out the killing. Deliberate dilatory tactics were used by the MP to delay the trial. The Court said that it was not a fit case for grant of bail. Investigation had been completed. The trial was also partly over, and allegations against the MP were very serious.[48.]

[s 437.5] "Reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life" —

The main question to consider is— 'are there reasonable grounds for believing that the petitioner is guilty of the offence of which he has been accused'. Other considerations must also arise in deciding the question of releasing the accused on bail, and one of these, which has always guided Courts of justice, both in England and India, is whether there are any grounds for supposing that the accused, if released on bail, would abscond and attempt to escape justice by avoiding or delaying an inquiry or trial.[49.] There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court and mere allegation of the prosecution that an accused is involved in an offence punishable with death or imprisonment for life is not decisive of the matter.[50.]

It has been held by the Supreme Court that conditions of bail should not be so onerous as to make it beyond reach of the accused.[51.] Where an accused was required to furnish security for Rs 1,00,000 with two sureties residing in the State, it was held that the condition amounted to denial of the bail itself.[52.] At the time of granting the bail, the amount of security should not be excessive.[53.]

[s 437.6] Magistrate's power to grant bail in non-bailable offences —

A Magistrate can grant bail only when there is no reasonable ground to believe that the accused is guilty of the offence punishable with sentence of death or life imprisonment, unless he is covered by the provisos to section 437(1). Merely because the accused was initially granted anticipatory bail under section 438 for a lesser offence (under sections 306 and 398A, IPC), would not entitle him to grant of a regular bail under section 437 when subsequently he was found to be involved in a graver offence like murder under section 302. The Court said that the Magistrate erred in granting bail under section 437 when accused was charged with offence under section 302. "Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking, if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Session, the Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to section 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction."[54.]

The Supreme Court has pointed out that the Courts exercising bail jurisdiction should refrain from giving elaborate reasons in their orders for justifying the grant or refusal of bail. But this does not constitute a glaring defect.[55.]

Where there had been enormous delay in the commitment of the case, and there was no possibility of the Sessions trial concluding the trial in the near future, the applicant

was held, entitled to bail.[56.]

[s 437.7] Release of woman, sick, infirm, children below 16 [*Sub-section (1) Proviso I*].—

Where a daughter-in-law was killed by the mother-in-law and other members of the family, it was held that mother-in-law was not entitled to bail simply because of the proviso I, sub-section (1) of section 437(1) CrPC, which is not a mandatory provision.[57.] An application for bail was accompanied with the report of the Civil Surgeon that the applicant was suffering from a serious incurable ailment which required specialised handling. The Court granted bail subject to certain conditions.[58.]

It has been held that the conditions laid down in section 437(1)(i) are *sine qua non* for grant of bail even under section 439.[59.]

[s 437.8] Release of previous convicts on bail [*Sub-section (1), Proviso II*].—

The proviso entitles the accused to be enlarged on bail if he is entitled to be so enlarged, even though he may be required for purposes of identification during the course of investigation. The Supreme Court observed on the facts of a case[60.]:

> The High Court had dealt with the matter in a most cursory manner. Bail had been granted ignoring the provisions of section 437. According to that section a person who has been previously convicted of an offence punishable with life imprisonment shall not be released on bail unless there is no reasonable ground for believing that the person committed the offence or there are some other special reasons to do so. In this case the co-accused was still absconding. Two witnesses had already retracted their statements. There were still eye-witnesses, who had directly connected the 2nd respondent with the murder and assigned a specific role to him. Thus at this stage it could not be said that there was reasonable ground for believing that the 2nd respondent had not committed the offence. No special reasons for granting bail had been indicated by the High Court. The alleged ailment of the 2nd respondent was also not such as required releasing him on bail. The 2nd respondent could always apply to the jail authorities to see that he got the required medical treatment.

[s 437.9] Conditional bail in certain cases [*Sub-section (3)*].—

This sub-section empowers the Court to impose conditions in cases mentioned in sub-clauses (a), (b) and (c). Thus, the Court may, under this sub-section, while granting bail to a person, ask him to surrender his passport.[61.] Where a Magistrate while granting bail, directed the sureties to produce solvency certificates, it was held that insistence upon solvency certificates was not beyond the powers of the Magistrate in view of section 437(3) of CrPC, under which the Court can impose any condition which it considers necessary.[62.] However, insistence upon solvency certificate must be the exception rather than the rule.[63.] The orders pertaining to the grant of bail and incidental terms are essentially interim orders always liable to modification.[64.] The accused appellant was arrested in connection with a murder. The only role attributed to him was that he made an oral exhortation. Even so he had remained under incarceration for long. The Court granted him conditional bail.[65.] While granting bail, imposition of the condition that cash deposit of Rs 10,000 be made, was held to be illegal.[66.]

[s 437.10] No bail on assurance of compromise —

The Supreme Court has been of the opinion that a bail cannot be granted on the basis of assurance of compromise or cancelled for violation of terms of the compromise between parties.[67.]

[s 437.11] Alteration of terms of bail —

The Magistrate has the power to amend or effect necessary alterations, short of cancellation, in the earlier bail order passed by him.[68.]

[s 437.12] Order of re-arrest of person released on bail [*Sub-section (5)*].—

The power to cancel a bail vests in the Court that granted it.[69.] But an order made by one Magistrate releasing an accused person on bail pending trial can for proper reasons be cancelled by another Magistrate to whom the case may be transferred for trial.[70.] Where an accused was released on bail for a non-bailable offence and subsequently the offences were converted into more serious ones, it was held that the Court had power to cancel the bail and take back the accused into custody.[71.]

There are five cases where a person granted bail may have the bail cancelled and be recommitted to jail: (i) where the person on bail, during the period of the bail, commits the very same offence for which he is being tried or has been convicted, and thereby proves his utter unfitness to be on bail; (ii) if he hampers the investigation as will be the case if he, when on bail, forcibly prevents the search of places under his control for the *corpus delicti* or other incriminating things; (iii) if he tampers with the evidence, as by intimidating the prosecution witnesses, interfering with the scene of offence in order to remove traces or proofs of crime, *etc*.; (iv) if he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and (v) if he commits acts of violence, in revenge, against the police and the prosecution witnesses and those who have booked him or are trying to book him.[71]

[s 437.13] Grant of bail after once refusing it —

The Supreme Court has stressed the need for recording reasons and of taking note of subsequent events[72.]:

After the first rejection of bail application, another application is permissible only if it is under changed circumstances.[73.]

> Undoubtedly, considerations applicable to the grant of bail and considerations for cancellation of an order of bail are independent and do not overlap each other, but in the event of non-consideration of considerations relevant for the purpose of grant of bail and in the event of an earlier order of rejection available on records, it is a duty incumbent on the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago.[74.]

[s 437.14] Successive applications —

In the case of a person accused of murder, the earlier application was rejected by the High Court on the ground that the accused was likely to influence witnesses. The rejection of bail was confirmed by the Supreme Court. A fresh application was made within a short span of time. There had been no change of circumstances since then. The Supreme Court held that a fresh application could not be entertained. The order granting bail was set aside.[75.]

[s 437.15] Basic criteria for cancellation —

Cancellation of bail—Basic criteria are interference or even an attempt to interfere with the due course of justice and/or any abuse of the indulgence/privilege granted to the accused.[76.]

[s 437.16] No appeal against grant of bail —

There is a Supreme Court decision to the effect that no appeal lies against an order of grant of bail. The use of the expression "appeal in respect of an order of bail" as used in some judgments is so used in the sense that one can move the higher Court.[77.]

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1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

31. Subs. by Act No. 63 of 1980, section 5(a), for sub-section (1) (w.r.e.f. 23-9-1980).
32. Subs. by Act No. 25 of 2005, section 37(i)(a), for "a non-bailable and cognizable offence" (w.e.f. 23-6-2006).
33. Ins. by Act No. 25 of 2005, section 37(i)(b) (w.e.f. 23-6-2006).
34. Subs. by Act No. 63 of 1980, section 5(b), for "the accused shall, pending such inquiry, be released on bail". (w.r.e.f. 23-9-1980).
35. Subs. by Act No. 25 of 2005, section 37(ii), for "the Court may impose any condition which the Court considers necessary—
36. Subs. by Act No. 63 of 1980, section 5(c), for "reasons" (w.r.e.f. 23-9-1980).
37. *Venkataramanappa v State of Karnataka*, 1992 Cr LJ 2268 (Knt).
38. *State v Jaspal Singh Gill*, AIR 1984 SC 1503 : (1984) 3 SCC 555 : 1984 Cr LJ 1211 .
39. *Mansab Ali v Irsan,* AIR 2003 SC 707 : 2002 Cr LJ 871 .
40. *Issma v State*, 1993 Cr LJ 2432 (All).
41. *Giani Pratap Singh v State of Rajasthan*, 1995 Cr LJ 4187 : (1995) 5 SCC 591 : AIR 1996 SC 74 .

42. *Nirmal Kumar Banerjee v The State*, 1972 Cr LJ 1582 ; *Shehat Ali v State of Rajasthan*, 1992 Cr LJ 1335 (Raj).

43. *Prashant Kumar v Mancharlal*, 1988 Cr LJ 1463 (Bom).

44. *IT Officer v Gopal Dhamani*, 1988 Cr LJ 1079 (Raj).

45. *Sundeep Kumar Bafna v State of Maharashtra*, AIR 2014 SC 1745 : 2014 Cr LJ 2245 (SC) : (2014) 16 SCC 623 .

46. *Ram Govind Upadhyay v Sudarshan Singh,* (2002) 3 SCC 598 : AIR 2002 SC 1475 : 2002 Cr LJ 1849 : JT 2002 (3) SC 185 : 2002 (3) Scale 12 ; *Chandraswami v CBI,* AIR 1997 SC 2575 : 1997 Cr LJ 3124 , charge under sections 120B and 420, no likelihood of tampering with evidence, the case not falling under section 437(1)(i) and (ii), entitled to bail. In *Chandraswami v CBI,* AIR 1998 SC 2679 : (1998) 9 SCC 696 , an application was made for permission to go abroad for medical advice and propogation of Hindu religion. The Supreme Court did not grant the permission. *Satya Brat Gain v State of Bihar,* 2000 Cr LJ 2296 : AIR 2000 SC 1925 : (2000) 9 SCC 398 , the accused had been in custody for five years, the case was proceeding at slow pace, released on condition of submitting a bond.

47. *Fida Hussain Bohra v State of Maharashtra*, AIR 2009 SC 2080 : (2009) 5 SCC 150 : (2009) Cr LJ 1775 .

48. *Rajesh Ranjan Yadav v CBI*, AIR 2007 SC 451 : (2007) 1 SCC 70 : 2007 Cr LJ 304 .

49. *Jamini Mullick v Emperor*, (1908) ILR 36 Cal 174, 177; *Emperor v Keshav Kortikar*, (1933) 35 Bom LR 1072 : AIR 1933 Bom 492 . *Jintabi v State of MP*, 1996 Cr LJ 4305 (MP), seizure of contraband, house from where seizure belonged to the applicant-woman's father-in-law, reasonable ground to believe that she was not guilty of the offence, bail granted. *Vijoyananda Swain v State of Orissa*, 1996 Cr LJ 4231 (Ori), bail granted in a property dispute subject to the condition that the grantee would not enter the land in question whereas the civil Court had ordered *status quo*, condition improper.

50. *State of Kerala v MK Pyloth*, 1973 Cr LJ 869 .

51. *Moti Ram v State of Madhya Pradesh*, 1978 Cr LJ 1703 : AIR 1978 SC 1594 : (1978) 4 SCC 47 .

52. *Keshab Narayan v State of Bihar*, 1985 Cr LJ 1857 : AIR 1985 SC 1666 .

53. *Mohd Tariq v UOI*, 1990 Cr LJ 474 : 1989 All LJ 85.

54. *Prahlad Singh Bhatt v NCT Delhi,* AIR 2001 SC 1444 : 1444 Cr LJ 1730 : (2001) 4 SCC 280 . *Anjani Kumar Singh v State of Orissa,* 2003 Cr LJ 2489 (Ori), elimination of a probable witness to misappropriation, link of the accused with the crime established, bail refused. *Jayendra Saraswathi Swamigal v State of TN*, AIR 2005 SC 716 : (2005) 2 SCC 13 : 2005 Cr LJ 883 , the Supreme Court again listed the factors that should have weight in grant of bail in such cases.

55. *Kashi Nath Roy v State of Bihar*, AIR 1996 SC 3240 : 1996 Cr LJ 2469 : (1996) 4 SCC 539 .

56. *Chintamani Tripathi v State of Uttar Pradesh*, 1991 Cr LJ 1662 (All).

57. *Chandrawati v State of UP*, 1992 Cr LJ 3634 (All).

58. *Sanjay Singh v State of Chhattisgarh,* 2003 Cr LJ 2877 (Chh).

59. *Dinesh MN (SP) v State of Gujarat*, AIR 2008 SC 2318 : (2008) 5 SCC 66 : 2008 Cr LJ 3008 .

60. *Ram Prakash Pandey v State of UP,* (2001) 9 SCC 121 : AIR 2001 SC 3592 : 2001 Cr LJ 4247 : JT 2001 (7) SC 178 : 2001 (6) Scale 20 .

61. *Hazari Lal v Rameshwar Prasad*, AIR 1972 SC 484 : 1972 Cr LJ 298 : (1972) 1 SCC 452 .

62. *Lokesh Naidu v State of Kerala*, 1993 Cr LJ 548 (Ker).

63. *Valson v State of Kerala*, 1984 KLT 443 .

64. *Nazeem v Asstt Collector of Customs, 1992 Cr LJ* 390 (Bom).

65. *Srichand P Hinduja v State*, 2002 Cr LJ 942 (SC).

66. *Kaleem v State,* 2003 Cr LJ 353 (Kant).

67. *Biman Chatterjee v Sanchita Chatterjee*, AIR 2004 SC 1699 : (2004) 3 SCC 388 : 2004 Cr LJ 1451 .

68. *Brijesh Singh v State of Karnataka,* 2002 Cr LJ 1362 (Kant).

69. *Imperatrix v Sadashiv*, (1896) 22 Bom 549.

70. *Emperor v Rautmal Kanumal*, (1939) 41 Bom LR 1232 : (1940) Bom 38 : AIR 1940 Bom 40 .

71. *Kalyan Singh v State of Madhya Pradesh,* 1989 Cr LJ 512 (MP).

72. *Ram Govind Upadhyaya v Sudershan Singh,* (2002) 3 SCC 598 : 2002 Cr LJ 1894 .

73. *State of MP v Kajad,* (2001) 7 SCC 673 : (2001) SCC (Cri) 1520 , the Court said that the acceptance of second application without any change in circumstances was held to be not proper because it amounts to a review of the earlier judgment which is not permissible under criminal law.

74. *Ram Govind Upadhyay v Sudarshan Singh*, 2002 Cr LJ 1849 (SC) : AIR 2002 SC 1475 : JT 2002 (3) SC 185 : 2002 (3) Scale 12 : (2002) 3 SCC 598 .

75. *State of Tamil Nadu v SA Raja,* AIR 2005 SC 4462 : (2005) 8 SCC 380 : 2005 Cr LJ 4640 .

76. *Ram Govind Upadhyay v Sudarshan Singh*, 2002 Cr LJ 1849 (SC) : AIR 2002 SC 1475 : JT 2002 (3) SC 185 : 2002 (3) Scale 12 : (2002) 3 SCC 598 .

77. *Dinesh MW (SP) v State of Gujarat,* AIR 2008 SC 2318 : (2008) 5 SCC 66 : 2008 Cr LJ 3008 .

The Code of Criminal Procedure, 1973

CHAPTER XXXIII PROVISIONS AS TO BAIL AND BONDS

Provisions as regards bail can be broadly classed into two categories: (1) bailable cases, and (2) non-bailable cases. In the former class, the grant of bail is a matter of course. It may be given either by the police officer in charge of a police station having the accused in his custody or by the Court. The release may be ordered on the accused executing a bond and even without sureties [section 436(1)]. In non-bailable cases, the accused may be released on bail: but no bail can be granted where the accused appears on reasonable grounds to be guilty of an offence punishable either with death or with imprisonment for life. But the rule does not apply to (1) a person under 16 years of age, (2) a woman or (3) a sick or infirm person. As soon as reasonable grounds for the guilt cease to appear, the accused is entitled to be released on bail or on his own recognizance; he can be also released, for similar reasons, between the close of the case and delivery of the judgment. When a person is released on bail, the order with reasons therefor should be in writing. A person released on bail may be taken into custody by order of the Court (section 437). In the same way, the High Court or the Court of Session may admit a person to bail or reduce the amount of the bail [sections 439(1) and 440]. As soon as the bail bond is executed, the accused is entitled to be released from custody (section 442). When the amount of bail taken is found to be insufficient, the Court may demand additional bail (section 443). A surety who is once accepted is at liberty to apply to the Court for his discharge; and the accused is then called upon to find fresh sureties (section 444).

The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[78.] [[s 437A] Bail to require accused to appear before next appellate Court.—

(1) **Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed**

against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) **If such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply.]**

COMMENT

Section 437A inserted by the Criminal Procedure (Amendment Act), 2008, makes it obligatory for the trial Court or the Appellate Court, as the case may be, to execute bail bonds with sureties to appear before the higher Court as and when such Court issues notice against the judgment of that Court. Sub-section (2) further provides that if the accused fails to appear on receiving such notice from the higher Court, his bond shall stand forfeited and procedure under section 446 CrPC shall apply.

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

78. Ins. by Act No. 5 of 2009, section 31 (w.e.f. 31-12-2009).

The Code of Criminal Procedure, 1973

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[79.][s 438] Direction for grant of bail to person apprehend-ding arrest.—

[80.][(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:—99

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

***Provided* that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.**

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.]

(2) **When the High Court or the Court of Session makes a direction under subsection (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—**

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) **If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).**

[81][(4) **Nothing in this section shall apply to any case involving the arrest of any**

person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.]

[s 438.1] **State Amendments**

Maharashtra.—*The following amendments were made by Maharashtra Act No. 24 of 1993, section 2* (w.e.f. 28-7-1993).

S 438.—For section 438 of the Code of Criminal Procedure, 1973, in its application to the State of Maharashtra, the following section shall be substituted, namely:—

"438. Direction for grant of bail to person apprehending arrest.—(1) When any person has reasons to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail; and that Court may, after taking into consideration, *inter alia*, the following factors:—

(i) the nature and gravity or seriousness of the accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and

(iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1) the Court shall indicate passing an order thereon, as the Court may deem fit; and if the Court passes any order granting anticipatory bail, such order shall include *inter alia* the following conditions, namely:—

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv)

such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice, being not less than seven days' notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police, or as the case may be, the concerned Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(5) On the date indicated in the Court considers such presence necessary in the interest of justice, Public Prosecutor and the applicant and after due consideration of their contentions, if may either confirm, modify or cancel the interim order made under sub-section (1)."

Orissa.—*Following amendments were made by Orissa Act 11 of 1988, section 2 (w.e.f. 28-6-1988).* **S 438.—** To sub-section (1), the following proviso shall be *added*, namely:—

"*Provided* that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State notice to present its case".

West Bengal.— *The following amendments were made by WB Act 47 of 1981, section 3 (w.e.f. 24-12-1982).*

S 438.—In its application to the State of West Bengal, to section 438(1), add proviso as under:—

"*Provided* that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State not less than seven days'

West Bengal.— *The following amendments were made by West Bengal Act, 1990 No. 25 of 1990, section 3 (w.e.f. 1-10-1992).*

S 438.—For sub-section (1) of Section 438 of the principal Act, the following sub-sections shall be substituted:

"(1) (*a*) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail:

Provided that the mere fact that a person has applied to the High Court or the Court of Session for a direction under this section shall not, in the absence of any order by that Court, be a bar to the apprehension of such person, or the detention of such person in custody, by an officer-in-charge of a police station.

(*b*) The High Court or the Court of Session, as the case may be, shall dispose of an application for a direction under this sub-section within thirty days of the date of such application:

Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State not less than seven days notice to present its case.

(*c*) If any person is arrested and detained in custody by an officer-in-charge of a police station before the disposal of the application of such person for a direction under this sub-section, the release of such person on bail by a Court having jurisdiction, pending such disposal, shall be subject to the provisions of section 437.

(1A) The provisions of sub-section (1) shall have effect notwithstanding anything to the contrary contained elsewhere in this Act or in any judgment, decree or order of any Court, Tribunal or other authority."

[s 438.2] CrPC (Amendment) Act, 2005 [*Clause (38)*].—

Section 438 is being amended to the effect that (*i*) the power to grant anticipatory bail should be exercised by the Court of Session or High Court after taking into consideration certain circumstances; (*ii*) if the Court does not reject the application for the grant of anticipatory bail, and makes an interim order of bail, it should, forthwith give notice to the Public Prosecutor and Superintendent of Police and the question of bail would be re-examined in the light of the respective contentions of the parties; and (*iii*) the presence of the person seeking anticipatory bail in the Court should be made mandatory at the time of hearing of the application for the grant of anticipatory bail subject to certain exceptions. (*Notes on Clauses*).

[s 438.3]Criminal Law (Amendment) Act, 2018.—

In section 438 of the Code of Criminal Procedure, a new sub-section (4) has been inserted. The newly inserted sub-section (4) provides that "nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code". Therefore, an application for anticipatory bail filed by the accused shall not be entertained in any case where the accusation against a person is of having committed an offence under section 376(3) or section 376AB or section 376DA or section 376DB of the Indian Penal Code, 1860.

COMMENT

This provision was made on the recommendation of the Law Commission. Under the old Code, there was no specific provision for grant of "anticipatory bail".

The 41st Report of the Law Commission recommended for the first time, inclusion of a provision for anticipatory bail. Section 438 contemplates an application by a person on an apprehension of arrest in regard to the commission of a non-bailable offence: the object being to relieve a person from unnecessary harassment or disgrace and it is granted when the Court is otherwise convinced that there is no likelihood of misuser of

the liberty granted since he would neither abscond nor taken such step so as to avoid due process of law.[82.]

The power of anticipatory bail has to be exercised sparingly and in exceptional cases.[83.] Although the power appears to be unguided, it is in fact required to be exercised subject to limitations imposed by section 437 on the power of granting bail. In addition to the limitations incorporated in section 437, the petitioner must make out a special case for getting anticipatory bail.[84.]

A condition precedent for grant of such bail is the apprehension of arrest of the accused. The Court cannot restrain arrest while dealing with an application for anticipatory bail. A direction was issued by the Court requiring the accused to execute a bond to appear before the police at a specified time and to surrender before the Court to execute the bond. The Court said that the direction was liable to be modified, namely that it would become effective only after arrest.[85.]

An interim order restraining arrest if passed while dealing with an application under section 438, it would amount to interference in investigation. The use of the expression "reason to believe" shows that the apprehension of arrest must be founded on reasonable grounds. Such grounds must be capable of being examined. A mere fear is not a sufficient ground. A blanket order that the "applicant shall be released on bail whenever arrested for whichever offence whatsoever," cannot be passed. The power is extraordinary. It is to be exercised only in exceptional cases.[86.]

The provision is based upon the principle of criminal jurisprudence that there is presumption of innocence till the accused is found to be guilty.[87.] Each case has to be considered on its merits for grant of such bail or refusal. No straight-jacket formula of universal application can be laid down.[88.] There were allegations of cheating and forgery. The High Court had rejected the third bail application. The appellant submitted that the dispute was purely of civil nature. The Supreme Court said that such submission could not be brushed aside. The defence could not be obliterated at this stage itself. It was not proper to deny bail merely because the allegations pertain to cheating or forgery of a valuable security or solely on the ground that the *challan* had been presented.[89.]

The expression "reason to believe" does not include fear, because a mere fear is not a belief. There should be no blanket direction of this kind that the applicant should be released on bail whenever arrested for whichever offence whatsoever. The existence of a *prima facie* case is only to be examined. Detailed discussion of evidence and elaborate documentation of merits is to be avoided.[90.]

It has been held by the Supreme Court that for the grant of anticipatory bail, section 438 need not be invoked only in exceptional or rare cases. Discretion must be exercised on the basis of available material and facts of a particular case. Where the accused has joined investigation and is fully co-operating with the investigating agency and is not likely to abscond, in that event custodial interrogation should be avoided.[91.]

In *Bhadresh Bipinbhai Sheth v State of Gujarat,*[92.] following principles for grant of anticipatory bail were laid down—

(i) The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If

the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

(ii) The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

(iii) It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

(iv) There is no justification for reading into Section 438 CrPC the limitations mentioned in Section 437 The plentitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 CrPC to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

(v) The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of anticipatory bail at any time if liberty granted by the court is misused. The anticipatory bail granted by the court should ordinarily be continued till the trial of the case.

(vi) It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

(vii) In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

(viii) Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 CrPC should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

(ix) No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

(x) We shall also reproduce para 112 of the judgment wherein the Court delineated the following factors and parameters that need to be taken into consideration while dealing with anticipatory bail:

(a) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(b) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(c) The possibility of the applicant to flee from justice;

(d) The possibility of the accused's likelihood to repeat similar or other offences;

(e) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(f) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(g) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because over implication in the cases is a matter of common knowledge and concern;

(h) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(i) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(j) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused in entitled to an order of bail.

[s 438.4] Duration of bail —

The duration of bail has to be for a limited period. The duration cannot be extended till the applicant availed his remedies up to the higher Courts. Any such approach would render section 439 nugatory. A blanket order is not to be passed. In this case, the applicants were alleged to have misappropriated public money. An application for anticipatory bail was rejected. But the Court directed that they were not to be arrested if

they joined investigation. It was held that the order did not fit in the parameters of section 438 but even so, on the facts, was not liable to be interfered with.[93.]

[s 438.5] Blanket protection for unlimited period —

An order granting blanket protection for an unlimited period was held clearly to be untenable and liable to be set aside.[94.] The observation in *KL Verma v State*,[95.] that extension of time to move to the higher Court may be given to the accused, was held to be *per incuriam*.

[s 438.6] Bail not in *praesenti*.—The order of anticipatory bail does not operate in *praesenti*. The order becomes operative only when the person in question is arrested.[96.]

[s 438.7] Conditional Bail, burdensome conditions —

Harsh, onerous, excessive, irrelevant or freakish conditions cannot be imposed on the accused for granting him bail.[97.]

There was the FIR against the appellants and others for their alleged involvement in the misappropriation of stock. The bail order imposed the condition of making a huge deposit and without reasons. The order was held to be not valid. The Court said that the ambit of section 438 as delineated by the Supreme Court was not kept in view.[98.]

[s 438.8] Territorial jurisdiction —

The accused persons were alleged to have committed nefarious activities in the state of Assam. The Court said that the question of grant of bail must for all practical purposes be considered by the Gauhati High Court, within whose territorial jurisdiction such activities were perpetrated. Applications which were filed in the Bombay High Court were directed to be transferred to the Gauhati High Court.[99.]

The High Court can grant bail to enable the accused to surrender before the Court under whose jurisdiction the offence committed by him falls.[100.]

The High Court has jurisdiction to grant bail to the limited extent even in an outstation case.[101.]

[s 438.9] Opportunity to State —

Where anticipatory bail was granted without affording opportunity of hearing to the State authorities, the order was held liable to be set aside.[102.]

[s 438.10] Scheduled Caste matters —

In the cases relating to atrocities on the members of Scheduled Castes and Scheduled Tribes, section 438 CrPC will not apply as it is specifically excluded by section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989), which is constitutionally valid.[103.]

Anticipatory bail is not available to persons accused of offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989) in view of section 18 of the Act, which is not violative of Articles 14 and 21 of the Constitution and constitutionally valid. Moreover, anticipatory bail could not be claimed as a matter of right.[104.]

However, the Supreme Court has held that a duty is cast on the Court to verify the averments in the complaint and to find out whether an offence under the 1989 Act has been *prima facie* made out. If there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail. It has been further observed by the Supreme Court that while considering the application for bail, scope for appreciation of evidence and other material on record is limited. The Court is not expected to indulge in the critical analysis of the evidence on record.[105.]

The Supreme Court has held that persons who have been declared absconders/ proclaimed offender are not entitled to anticipatory bail.[106.]

In *Teru Majhi v State of West Bengal,*[107.] it was held that petitions under section 438 of the Code are maintainable even in the case of NDPS Act as the above stated Act does not expressly bar to entertain petitions filed under section 438.

The view expressed by the Supreme Court is that an anticipatory bail cannot be granted for a limited period only. The accused released on anticipatory bail cannot be compelled to surrender before the trial Court and again apply for a regular bail. It would be contrary to the spirit of section 438 and also would amount to deprivation of his personal liberty. Ordinarily, therefore, the benefit of grant of anticipatory bail should continue till end of the trial, unless the bail is cancelled because of fresh circumstances.[108.]

[s 438.11] Proper exercise of judicial discretion —

The Supreme Court,[109.] after analysing various previous judgments and guidelines, has enumerated the following factors and parameters that can be taken by Courts into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before the arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude

affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, 1860 the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The Court is to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall be considered in the matter of grant of bail and in the event of there being some doubt as the genuineness of the prosecution in the normal course of events, the accused is entitled to an order of bail.

It has been accordingly clarified by the Supreme Court that arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The Court must carefully examine the entire available record and, particularly the allegations which have been directly attributed to the accused and these are corroborated by other material and circumstances on record. The Court has termed these factors and parameters as not exhaustive but only illustrative in nature since it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail.[110.]

Protection under section 438 is available to accused till court summons the accused based on charge sheet. On such appearance, accused has to seek regular bail under section 439 and that application has to be considered by court on its own merits. Merely because accused was under protection of anticipatory bail granted under section 438 that does not mean that he is automatically entitled to regular bail under section 439. Satisfaction of court for granting protection under section 438 is different from one under section 439 while considering regular bail.[111.]

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1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

79. As per section 18 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989)—"Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

80. Subs. by the CrPC (Amendment) Act, 2005 (25 of 2005), section 38 (date of enforcement yet to be notified). Prior to its substitution read as under:

"(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail."

81. Ins. by Act 22 of 2018, section 22 (w.r.e.f. 21-4-2018).

82. *Narinderjit Singh Sahini v UOI,* (2002) 2 SCC 210 : AIR 2001 SC 3810 : JT 2001 (8) SC 477 : 2001 (7) Scale 189 .

83. *Balchand Jain v State of Madhya Pradesh*, AIR 1977 SC 366 : 1977 Cr LJ 225 : (1976) 4 SCC 572 .

84. *Gurbaksh Singh v State of Punjab*, AIR 1978 P&H 1 : 1978 Cr LJ 20 .

85. *DK Ganesh Babu v PT Manokaran,* AIR 2007 SC 1450 : (2007) 2 SCC 434 : 2007 Cr LJ 1827 .

86. *Adri Dharam Das v State of WB,* AIR 2005 SC 1057 : (2005) 4 SCC 303 : 2005 Cr LJ 1706 .

87. *Sidharam Satlingappa Mhetre v State of Maharashtra,* AIR 2011 SC 312 : 2010 (2011) 1 SCC 694 .

88. *Pravin Bhai Kashirambhai Patel v State of Gujarat,* AIR 2010 SC 3511 : (2010) 7 SCC 598 : 2010 Cr LJ 3867 .

89. *Ravindra Saxena v State of Rajasthan,* AIR 2010 SC 1225 : (2010) 1 SCC 684 .

90. *Vaman Narain Ghiya v State of Rajasthan,* AIR 2009 SC 1362 : (2009) 2 SCC 281 : 2009 Cr LJ 1311 .

91. *Siddharam Satlingappa Mhetre v State of Maharashtra,* AIR 2011 SC 312 : (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514 .

92. *Bhadresh Bipinbhai Sheth v State of Gujarat,* (2016) 1 SCC 152 : AIR 2015 SC 3090 : 2015 (9) Scale 403 : (2016) 1 SCC 152 .

93. *Parvinderjit Singh v State (UI Chandigarh)*, AIR 2009 SC 502 : (2008) 13 SCC 431 .

94. *Sunita Devi v State of Bihar*, AIR 2005 SC 498 : (2005) 1 SCC 608 .

95. *KL Verma v State,* (1996) 7 Scale (SP) 20 : (1999) 5 SLT 474 .

96. *Savitri Agarwal v State of Maharashtra*, AIR 2009 SC 3173 : (2009) 8 SCC 325 : 2009 Cr LJ 4290 .

97. *Munish Bhasin v State (Govt of NCT of Delhi)*, AIR 2009 SC 2072 : (2009) 4 SCC 45 .

98. *Sohan Lal Suneja v State of Punjab*, AIR 2007 SC 136 : (2006) 12 SCC 433 : 2007 Cr LJ 303 , that case is reported in *Adri Dharan Das v State of West Bengal,* AIR 2005 SC 1057 : (2005) 4 SCC 303 : 2005 Cr LJ 1706 .

99. *State of Assam v RK Krishna Kumar,* AIR 1998 SC 144 : (1997) 8 JT 650 .

100. *Sanjeev Chandel v State of HP,* 2003 Cr LJ 935 (HP).

101. *Mahesh Kumar Sarda alias Maheshwari v UOI,* 2000 Cr LJ 2951 (Cal—FB).

102. *State of Assam v RK Krishna Kumar,* AIR 1998 SC 144 : (1997) 8 JT 650 .

103. *Jai Singh v UOI*, 1993 Cr LJ 2705 (Raj—FB) : AIR 1993 Raj 177 .

104. *State of MP v RK Balothia*, AIR 1995 SC 1198 : 1995 Cr LJ 2076 : (1982) 2 SCC 440 . *Mavuram Papi Reddy v State of AP,* 2003 Cr LJ NOC 163 (AP) : (2003) 1 Andh LT (Cri) 121 , specific allegations made in the complaint that the petitioners abused and beat complainants publicly. Bar of section 18 applied. Application for anticipatory bail not maintainable. *Rakesh Kumar Mishra v State Chhattisgarh,* 2002 Cr LJ 4394 (Chh), another similar ruling.

105. *Vilas Pandurang Pawar v State of Maharashtra,* AIR 2012 SC 3316 : (2012) 8 SCC 795 : (2012) 3 SCC 1062 .

106. *State of Madhya Pradesh v Pradeep Sharma*, AIR 2014 SC 626 : (2014) 2 SCC 171 .
107. *Teru Majhi v State of West Bengal,* 2015 Cr LJ 1017 .
108. *Siddharam Sadlingappa Mhetre v State of Maharashtra,* AIR 2011 SC 312 : (2011) 1 SCC 694 .
109. *Siddharam Satlingappa Mhetre v State of Maharashtra*, (2011) 1 SCC 694 : AIR 2011 SC 312 .
110. *Ibid*.
111. *Satpal Singh v State of Punjab*, AIR 2018 SC 2011 : 2018 Cr LJ 2843 : LNIND 2018 SC 159 .

The Code of Criminal Procedure, 1973

CHAPTER XXXIII PROVISIONS AS TO BAIL AND BONDS

Provisions as regards bail can be broadly classed into two categories: (1) bailable cases, and (2) non-bailable cases. In the former class, the grant of bail is a matter of course. It may be given either by the police officer in charge of a police station having the accused in his custody or by the Court. The release may be ordered on the accused executing a bond and even without sureties [section 436(1)]. In non-bailable cases, the accused may be released on bail: but no bail can be granted where the accused appears on reasonable grounds to be guilty of an offence punishable either with death or with imprisonment for life. But the rule does not apply to (1) a person under 16 years of age, (2) a woman or (3) a sick or infirm person. As soon as reasonable grounds for the guilt cease to appear, the accused is entitled to be released on bail or on his own recognizance; he can be also released, for similar reasons, between the close of the case and delivery of the judgment. When a person is released on bail, the order with reasons therefor should be in writing. A person released on bail may be taken into custody by order of the Court (section 437). In the same way, the High Court or the Court of Session may admit a person to bail or reduce the amount of the bail [sections 439(1) and 440]. As soon as the bail bond is executed, the accused is entitled to be released from custody (section 442). When the amount of bail taken is found to be insufficient, the Court may demand additional bail (section 443). A surety who is once accepted is at liberty to apply to the Court for his discharge; and the accused is then called upon to find fresh sureties (section 444).

The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[s 439] Special powers of High Court or Court of Session regarding bail —

(1) **A High Court or Court of Session may direct—**

(a) that any person accused of an offence and in custody, be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437,

may impose any condition which it considers necessary for the purposes mentioned in that subsection;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided **that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.**

[112] **[Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.]**

[113] **[(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.]**

(2) **A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.**

[s 439.1] **State Amendments**

Punjab.—*The following amendments were made by Punjab Act 22 of 1983, section 11 (w.e.f. 27-6-1983)*. **S 439A.—**In its application to the State of Punjab, after section 439, insert section 439A as under:— "**439A.** Notwithstanding anything contained in this Code, no person—

(a) who, being accused or suspected of committing an offence under any of the following sections, namely—Sections 120B, 121, 121A, 122, 123, 124A, 153A, 302, 304, 307, 326, 333, 363, 364, 365, 367, 368, 392, 394, 395, 396, 399, 412, 431, 436, 449 and 450 of the Indian Penal Code, 1860, Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908, and Sections 25, 26, 27, 28, 29, 30 and 31 of the Arms Act, 1959, is arrested or appears or is brought before a Court; or

(b) who, having any reason to believe that he may be arrested on accusation of committing an offence as specified in clause (a), has applied to the High Court or the Court of Session for a direction for his release on bail in the event of his arrest,

shall be released on bail or, as the case may be, directed to be released on bail, except on one or more of the following grounds, namely:—

(i) that the Court including the High Court or the Court of Session for reasons to be recorded in writing is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in clause (a);

(ii) that such person is under the age of sixteen years or a woman or a sick or an infirm person;

(iii) that the Court including the High Court or the Court of Session for reasons to be recorded in writing is satisfied that there are exceptional and sufficient grounds to release or direct the release of the accused on bail."

Tripura.— *The following amendments were made by Tripura Act 11 of 1983, section 3 (w.r.e.f. 26-5-1983 to 25-5-1986).*

S 439A.— In its application to the State of Tripura, after section 439, insert section 439A as under:— "**439A. Power to grant bail.—**Notwithstanding anything contained in this Code, no person—

(a) who, being accused of or suspected of committing an offence under sections 120B, 121, 121A, 122, 123, 153A, 302, 303, 304, 326, 333, 363, 364, 365, 367, 368, 376, 386, 395, 396, 397, 436, 449 or 450 of the Indian Penal Code (No. 45 of 1860) or section 26 or 27 of the Arms Act, 1959 (54 of 1959) or section 3, 4, or 5 of the Explosive Substances Act, 1908 (Act No. VI of 1908), is arrested or appears or is brought before a Court; or

(b) who, having any reason to believe that he may be arrested on an accusation of committing an offence as specified in clause (a) has applied to the High Court or Court of Session for a direction for his release on bail in the event of his arrest,

shall be released on bail, or as the case may be, directed to be released on bail, except on one or more of the following grounds, namely:—

(i) that the Court including the High Court or the Court of Session, for reasons to be recorded in writing, is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in clause (a);

(ii) that such person is under the age of sixteen years or any woman or any sick or infirm person;

(iii) that the Court including the High Court or the Court of Session, for reasons to be recorded in writing, is satisfied that there are exceptional and sufficient grounds to release or direct the release of the accused on bail."

Tripura.—*The following amendments were made by Tripura Act 6 of 1992, section 3 (w.e.f. 29-7-1992).* **Insertion of a new section 439A.—**After section 439, the following section shall be inserted, namely:— "**439A. Power to grant bail.—**Notwithstanding anything contained in this Code, no person—

(a) who, being accused of or suspected of committing an offence under sections 120B, 121, 121A, 122, 123, 124A, 153A, 302, 303, 304, 307, 326, 333, 364, 365, 366, 366-A, 366-B, 367, 368, 376, 386, 387, 392, 394, 395, 396, 397, 399, 412, 436, 449 and 450 of the Indian Penal Code (No. 45 of 1860) or Sections 25, 26, 27 and 28 of the Arms Act, 1959 (54 of 1959) or Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908 (Act No. VI of 1908), is arrested or appears or is brought before a Court; or

(b) who, having any reason to believe that he may be arrested on an accusation of committing an offence as specified in clause (a) has applied to the High Court or Court of Session for a direction for his release on bail in the event of his arrest,

shall be released on bail, or as the case may be, directed to be released on bail, except on one or more of the following grounds, namely:—

(i) that the Court including the High Court or the Court of Session, for reasons to be recorded in writing, is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in clause (a);

(ii) that such person is under the age of sixteen years or any woman or any sick or infirm person;

(iii) that the Court including the High Court or the Court of Session, for reasons to be recorded in writing, is satisfied that there are exceptional and sufficient grounds to release or direct the release of the accused on bail."

Union Territory of Chandigarh.—(Same as Punjab).

S. 439A.—After section 439, insert as under—

"**439A.** Notwithstanding anything contained in this Code, no person—

(a) who, being accused or suspected of committing an offence under any of the following sections, namely—Sections 120B, 121, 121A, 122, 123, 124A, 153A, 302, 304, 307, 326, 333, 363, 364, 365, 367, 368, 392, 394, 395, 396, 399, 412, 431, 436, 449 and 450 of the Indian Penal Code, 1860, Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908, and Sections 25, 26, 27, 28, 29, 30 and 31 of the Arms Act, 1959, is arrested or appears or is brought before a Court; or

(b) who, having any reason to believe that he may be arrested on accusation of committing an offence as specified in clause (a), has applied to the High Court or the Court of Session for a direction for his release on bail in the event of his arrest,

shall be released on bail or, as the case may be, directed to be released on bail, except on one or more of the following grounds, namely:—

(i) that the Court including the High Court or the Court of Session for reasons to be recorded in writing is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in clause (a);

(ii) that such person is under the age of sixteen years or a woman or a sick or an infirm person;

(iii) that the Court including the High Court or the Court of Session for reasons to be recorded in writing is satisfied that there are exceptional and sufficient grounds to release or direct the release of the accused on bail."

[s 439.2]Legislative Changes.—

Section 439 of the Code has been recently amended *vide* the Criminal Law (Amendment) Act, 2018. The 2018 Amendment has modified section 439 of the Code of Criminal Procedure, 1973 to insert a proviso therein to provide for serving of notice of application of bail relating to offences under sub-section(3) of section 376, section 376A, 376DA or section 376DB to the Public Prosecutor within a period of fifteen days. It has also inserted sub-section (1A) to make it obligatory for the informant or his authorised person to be present at the time of hearing of an application for bail for offences under sub-section (3) of section 376, section 376A, 376DA or 376DB of the Indian Penal Code.

COMMENT

This section gives an unfettered discretion to the High Court or Court of Session to admit an accused person to bail, but that discretion must be exercised judicially. The power of the High Court and of a Court of Session to grant bail is not fettered by the restrictions contained in section 437.[114.] In every case, it is the cumulative effect of all the combined circumstances that must weigh with the Court and those considerations are far too numerous to be classified or catalogued exhaustively.[115.] In exercising its discretion under this section, the High Court need not confine its attention to the question whether the prisoner is or is not likely to abscond, as other circumstances may also affect the question of granting bail to persons accused of having committed crimes of a grave and serious nature.[116.] Though the bail is a rule and jail is an exception, but where the accused is involved in offences which are grave, serious and heinous, it is the exception and not the rule which is attracted. Considering the possibility of tampering with the evidence and influencing the witnesses who are yet to be examined by the prosecution in case of the accused's enlargement on bail and also the fact that the offence was punishable with death and as such there was also a chance that he may jump bail and become unavailable, the accused's plea for his enlargement on bail during trial was held to be unacceptable.[117.]

It has been held by the Supreme Court that the object of bail is to secure the appearance of the accused at his trial. The object of bail is neither punitive nor preventive. Hence, grant of bail is the rule and committal to jail, an exception. Refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution.[118.]

Bail is not to be withheld merely as a punishment, and the requirements as to bail are merely to secure the attendance of the accused at the trial. The test is to be applied by reference to the following considerations amongst others: (1) the nature of the accusation; (2) the nature of the evidence in support of the accusation; (3) the severity of the punishment which conviction will entail; (4) the character of the sureties, that is to say, whether they are independent or indemnified by the accused; (5) the character and the behaviour of the accused. Any allegation that the accused is tampering or attempting to tamper with witnesses and thereby obstructing the course of justice would be a very cogent ground for refusing bail.[119.]

[s 439.3] Grant or cancellation of bail—considerations for —

The Supreme Court has held that it cannot be contended that the consideration for cancellation of bail is different from the consideration for grant of bail. It is not an absolute rule. For cancellation of bail, the Court has to consider the gravity and nature of the offence, *prima facie* case against the accused, the position and standing of the

accused, *etc*. If there are very serious allegations, the bail may be cancelled even if he has not misused the bail granted to the accused. There is no absolute rule that once bail is granted, then it can only be cancelled if there is livelihood of misuse of bail. There are several other factors also which may be seen while deciding to cancel the bail.[120.]

[s 439.4] Interim Bail —

The Courts possess jurisdiction to release an accused on interim bail pending final disposal of the bail application. No hard and fast rules can be laid down in this regard. However, few illustrations can be given where it would be proper to grant such release: —

(i) offences of trivial nature in which bail is generally granted;

(ii) women, children, minors and aged persons of 70 years or more should invariably be released on interim bail;

(iii) students whose examinations are to commence should also be given interim relief;

(iv) cases in which accusations appear to be frivolous or *mala fide*.

But release on interim bail is no ground for grant of bail, which has to be made only on merits. However, it may not be desirable to grant interim bail in cases punishable with death except to women, children, minors and aged persons, offences under TADA [now repealed], cases of Narcotic Drugs, offences committed by organised gangs or habitual criminals.[121.]

[s 439.5] High Court cannot bar Sessions Judge from exercising bail power —

The High Court, while disposing of the matter in a *habeas corpus* petition, ordered that no application for bail was to be entertained by the Sessions Judge or any other Court except the High Court or the Apex Court. The Supreme Court said that the jurisdiction of a Session Judge under CrPC to entertain a bail application and dispose of it in accordance with law, could not be taken away by the High Court. Irrespective of the facts, the right of an accused to move an application for bail could not be curtailed in the manner as done in this case.[122.]

[s 439.6] Application for cancellation of bail [*Sub-section (2)*].—

Where prosecution was unable to establish that the accused were tampering with the investigation, and the facts also showed that the prosecution no more required the presence of the accused for further investigation, the application was dismissed.[123.] The High Court refused to cancel bail where there was no specific proof of any threat to or instance of tampering of evidence.[124.] One more ground has been added by the Supreme Court, it is when the order granting bail is suffering from some perversity. The Court said[125.]:

Generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade

the due course of justice or abuse of the concession granted to the accused in any manner. One of the ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial Court has to be corrected. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling a bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation.

A bail was not allowed to be cancelled on the basis of certain factors of which the Court granting the bail was fully aware.[126.]

[s 439.7] Re-appreciation of evidence —

The Supreme Court has pointed out that in the matter of cancellation of bail the type of re-appreciation of evidence as has been done in this case is to be avoided. But the Court can consider whether irrelevant material happened to be taken into consideration. Where it is so, the Court would have to see whether the irrelevant material was of substantial nature because such material of trivial nature should not matter. The facts of the case were that the accused, a high ranking police officer, was involved in a fake encounter.

The bail granted by ignoring relevant factors and by acting upon the irrelevant factors was held as liable to be cancelled.[127.] The Court also pointed out that parameters for grant of bail and cancellation of bail are different.[128.]

[s 439.8] Cancellation and rejection of bail —

Bail once granted should not be cancelled unless a cogent case, based on a supervening event has been made out.[129.] An order of cancellation of bail must be a reasoned order. The rejection and cancellation of bail stand on different footings. Cancellation of bail is a harsh order because it takes away liberty of the person concerned.[130.]

[s 439.9] Cancellation of bail by another Bench or Judge of the same High Court —

Where a bail was granted by a single judge, the cancellation of it by another single judge on a subsequent application of the state was held to be not appropriate. The Supreme Court said:

> It was not open to the other Judge of the High Court to sit in appeal against the order passed by another coordinate Bench of the same Court. If the accused had obtained a bail order by misrepresentation or by suppression of facts, it was open for the State Government either to approach the appropriate higher forum or to place the matter before the same Judge. The longstanding convention and judicial discipline require that subsequent application for grant or rejection of bail should be placed before the same Judge who had passed earlier orders. Placing of such matter before the same Judge has its roots in principle as it prevents abuse of process of Court inasmuch as an impression is not created that a litigant is shunning or selecting a Court depending on whether the Court is to his

> liking or not. This practice also prevents the filing of subsequent applications without any new factor cropping up. Disposal of successive bail applications on the same subject by different Judges, if permitted, would lead to conflicting orders.[131.]

[s 439.10] Who can apply for cancellation of bail —

The power of the Court under the section to cancel bail can be invoked either by the state itself or by any aggrieved party or even *suo motu*. In this case, the invocation was by the father of the deceased. The Court said:

> The framework of section 439(2) indicates that it is a power conferred on the Courts mentioned therein. There is nothing to indicate that the power can be exercised only if the State or investigating agency or a Public Prosecutor moves a petition. The power so vested in the High Court can be invoked either by the State or by any aggrieved party. The power could also be exercised *suo motu* by the High Court. Therefore, any member of the public, whether he belongs to any particular profession or otherwise can move the High Court to remind it of the need to exercise its power *suo motu*. There is no barrier either in section 439, CrPC, or in any other law which inhibits a person from moving the High Court to have such powers exercised *suo motu*. If the High Court considers that there is no need to cancel the bail then it can dismiss the petition. It is always open to the High Court to cancel the bail if it feels that there are sufficient reasons for doing so.[132.]

Any member of the public can maintain a petition before the High Court reminding it of the need to exercise its *suo motu* power in a particular case. Where a single judge of the High Court having granted bail to certain persons, a group of practising advocates presented petitions before the Chief Justice of the High Court seeking initiation of *suo motu* proceedings for cancellation of the bail by posting the petitions before a Division Bench of the High Court and accordingly the matter was placed before a Division Bench, it was held the Division Bench erred in refusing to exercise its *suo motu* power on the ground that the petition submitted by the advocates was not maintainable.[133.]

[s 439.11] High Court as superior Court for cancellation bail —

In the hierarchy of Courts, the High Court is the superior Court. A restrictive interpretation which would have the effect of nullifying section 439(2) cannot be given. When section 439(2) grants to the High Court the power to cancel bail, it necessarily follows that such powers can be exercised also in respect of orders passed by the Court of Session and not merely the orders passed by a Magistrate. The Court rejected the arguments that the Court of Sessions and the High Courts are co-ordinate Courts for this purpose.[134.]

[s 439.12] Cancellation of bail in non-bailable case —

The Supreme Court observed as follows:[135.]

> Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet, another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial, to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These

> principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted.

On the order of the High Court of Andhra Pradesh in a writ petition, the CBI, Hyderabad registered a case under sections 409, 420, 477A read with section 120B of the IPC and section 13(2) read with section 13(1)(c) and (d) of the Prevention of Corruption Act, 1988, against YS Jaganmohan Reddy, Member of Parliament and 73 others. The Special Judge, CBI cases granted bail to the respondent before the Supreme Court and when the CBI moved the High Court for cancellation of bail, the High Court rejected the application of CBI and affirmed the order of bail passed by the Special Judge. In appeal, the Supreme Court held that the Special Judge took irrelevant materials into consideration and the High Court after arriving at definite conclusion that several findings of Special Judge were unacceptable or irrelevant ultimately affirmed the order of the Special Judge and as such both the orders were not sustainable.[136.]

Speaking for the Bench, P Sathsivam J (as he then was), observed as follows:

> It is settled by a series of decisions that if irrelevant materials have been taken into account or relevant materials have been kept out of consideration, the order granting bail to the accused cannot be sustained. In the same way, if there is specific allegation by the prosecution that the accused in question was a party to criminal conspiracy, neither the Special Court nor the High Court is justified in Granting bail to the said person.[137.]

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1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

112. Ins. by Act No. 22 of 2018, section 23(a) (w.r.e.f. 21-4-2018).

113. Ins. by Act No. 22 of 2018, section 23(b) (w.r.e.f. 21-4-2018).

114. *Kirpa Shankar v Emperor*, (1947) All 733 ; *Shanti Lal*, (1955) Raj 566 .

115. *Sagri*, (1950) 30 Pat 115.

116. *Narendra Lal Khan v Emperor*, (1909) ILR 36 Cal 166, 170; *Jamini Mullick v Emperor*, (1909) ILR 36 Cal 174, 177.

117. *Sidharath Vashisht v State*, 2002 Cr LJ 341 (Del).

118. *Sanjay Chandra v CBI*, AIR 2012 SC 830 : (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 .

119. *Krishna Chandra Jagati v Emperor*, (1927) ILR 6 Pat 802, 803 : AIR 1927 Pat 302 ; *N Chikkanna v State of Karnataka*, 1992 Cr LJ 2254 (Knt).

120. *Prakash Kadam v Ramprasad Vishwanath Gupta*, AIR 2011 SC 1945 : (2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848 .

121. *Haji Peer Bux v State of UP*, 1993 Cr LJ 3574 (All).

122. *Shankar Lal v State of Rajasthan,* (2002) 7 SCC 735 : 2002 SCC (Cri) 1859 . *Manjoor Khan v State of Bihar,* (1998) 8 SCC 368 : 1999 Cr LJ 5006 , the High Court may not entertain a bail petition, but it cannot prevent an accused person from seeking bail.

123. *State of Maharashtra v Kirti V Ambani*, 1992 Cr LJ 1647 (Bom).

124. *Karan Singh v State of Rajasthan*, 1993 Cr LJ 251 (Raj).

125. *Puran v Rambilas,* AIR 2001 SC 2023 : 2001 Cr LJ 2566 : (2001) 6 SCC 338 ; *Rajendra Prasad Arya v State of Bihar,* 2000 Cr LJ 4046 : (2000) 9 SCC 514 , the accused was released pursuant to a wrong order of bail. The order was recalled and the trial Court was directed to bring back the accused into custody. The accused was to be given the opportunity to be heard.

126. *Kashmira Singh v Duman Singh*, AIR 1996 SC 2176 : 1996 Cr LJ 3235 : (1996) 4 SCC 693 ; *Rashbehari Karmakar v Indrajit Mukharjee,* 2002 Cr LJ 4250 (Cal), no proper circumstances for cancellation of bail made out.

127. *Dinesh MN (SP) v State of Gujarat*, AIR 2008 SC 2318 : (2008) 5 SCC 66 : 2008 Cr LJ 3008 .

128. *Ibid*.

129. *X v State of Telangana,* AIR 2018 SC 2466 : 2018 (7) Scale 494 : LNIND 2018 SC 284 .

130. *Manjit Prakash v Shobha Devi*, AIR 2008 SC 3032 : (2009) 13 SCC 785 .

131. *Harjeet Singh v State of Punjab,* AIR 2002 SC 281 : 2002 Cr LJ 571 : (2002) 1 CHN (Supp) 127 : (2002) 1 SCC 649 .

132. *Puran v Rambilas,* (2001) 6 SCC 338 : AIR 2001 SC 2023 : 2001 Cr LJ 2566 .

133. *R Rathinam v State,* AIR 2000 SC 1851 : (2000) 2 SCC 391 .

134. *Puran v Rambilas,* AIR 2001 SC 2023 : 2001 Cr LJ 2566 : (2001) 6 SCC 338 .

135. *Dolat Ram v State of Haryana,* (1995) 1 SCC 349 at pp 350–351 : (1994) 4 Scale 1119 . The order of bail was restored. This decision was followed in *Subhendu Mishra v Subral Kumar Mishra,* AIR 1999 SC 3026 : 1999 Cr LJ 4063 , where also the bail was cancelled in a mechanical manner and that was held to be unsustainable. *Mansab Ali v Irsan,* AIR 2003 SC 707 : 2003 Cr LJ 871 : JT 2002 (10) SC 264 : 2002 (9) Scale 309 : (2003) 1 SCC 632 , the accused was on bail pending appeal against conviction for murder. The High Court granted bail only to the accused and not to the co-accused without indicating any reasons. The Supreme Court held the order to be not proper. The Sessions Judge was directed to consider the application for cancellation of bail on the basis of evidence on record.

136. *CBI v V Vijay Sai Reddy*, 2013 (7) Scale 15 : AIR 2013 SC 2216 : 2013 Cr LJ 3016 : JT 2013 (8) SC 25 : (2013) 7 SCC 452 .

137. *Ibid*, para 9 at p 16. *State of UP through CBI v Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 (7) Scale 489 ; *Dinesh MN (SP) v State of Gujarat*, (2008) 5 SCC 66 : 2008 (6) Scale 407 ; *Narendra K Amin (Dr) v State of Gujarat*, (2008) 13 SCC 584 : 2008 (6) Scale 415 ; *State of Maharashtra v Dhanendra Shriram Bhurle*, (2009) 11 SCC 541 : 2009 (2) Scale 448 ; *CBI, Hyderabad v Subramani Gopalakrishnan*, (2011) 5 SCC 296 : 2011 (5) Scale 12 —Ref.

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The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[s 440] Amount of bond and reduction thereof —

(1) **The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.**

(2) **The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.**

COMMENT

See comment on the previous section, as regards considerations which should prevail while granting or refusing bail.

[s 440.1] Onerous conditions for bail —

The Supreme Court said in a case of this kind:[138.]

> We are unable to appreciate even the first order passed by the Metropolitan Magistrate imposing the onerous condition that an accused at the FIR stage should pay a huge sum of Rs. 2 lakhs to be set at liberty. But the fact that he was not able to pay that amount and in default thereof he is to languish in jail for more than 10 months now, is sufficient indication that he was unable to make up the amount. Can he be detained in custody endlessly for his inability to pay the amount in the range of Rs. 2 lakhs? If the cheques issued by his surety were dishonoured, the Court could perhaps have taken it as a ground to suggest to the payee of the cheques to resort to the legal remedies provided by law. Similarly if the Court was dissatisfied with the conduct of the surety as for his failure to raise funds for honouring the cheques issued by him, the Court could have directed the appellant to substitute him with another surety. But to keep him in prison for such a long period, that too in a case where bail would normally be granted for the offences alleged, is not only hard but improper. It must be remembered that the Court has not even come to the conclusion that the allegations made in the FIR are true. We, therefore, allow this appeal and set aside the impugned judgment. We order the appellant to be released on bail on his executing a bond in a sum of Rs. 25,000, with two solvent sureties, to the satisfaction of the Metropolitan Magistrate.

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

138. *Sandeep Jain v NCT of Delhi,* AIR 2000 SC 714 : 2000 Cr LJ 807 : (2000) 2 SCC 66 .

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The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[s 441] Bond of accused and sureties —

(1) **Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the**

time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) **Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.**

(3) **If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.**

(4) **For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness.**

COMMENTS

This section contemplates furnishing of a personal bond by the accused person and a bond by one or more sufficient sureties. It does not authorise a demand of cash security by a Magistrate. Section 445 provides for a concession to an accused person who is unable to produce sureties.[139.] An accused person is entitled as of right to bail, provided the necessary conditions prescribed by law are fulfilled, and his sureties cannot be rejected unless the police officer or Court is not satisfied about their identity, solvency or reliability.[140.]

[s 441.1] Modification of conditions of bail, effect upon sureties —

Alteration of conditions of bail does not absolve the surety from this liability in terms of the bond. If the surety is not agreeable to the modified conditions, he should apply to the Court under section 444(1) to seek his discharge. This will be different where the alteration is for the purpose of ensuring the attendance of the accused in the Court whenever required.[141.]

[s 441.2] Extent of liability of surety on forfeiture of bond —

Each surety is liable for the amount which he has undertaken to pay. In this case, the accused had furnished a personal bond of Rs 25,000 and two sureties for the same amount. On the forfeiture of the bond, each surety became liable to pay Rs 25,000 individually and could not ask for proportionate reduction of the amount.[142.]

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).

2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .
139. *RR Chari v Emperor*, AIR (1948) All 238 .
140. *Emperor v Banarashidas*, (1937) ILR Nag 168.
141. *Mohd Kunju v State of Karnataka,* (1999) 8 SCC 660 : AIR 2000 SC 6 : 2000 Cr LJ 165 .
142. *Ibid*.

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[143.][[s 441A] Declaration by sureties—

Every person standing surety to an accused person for his release on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars.]

COMMENT

[s 441A.1] CrPC (Amendment) Act, 2005 [*Clause (39)*].—

This clause seeks to insert a new section 441A which provides that a person standing surety for an accused person shall disclose as to in how many cases he has already stood surety for accused persons. (*Notes on Clauses*).

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1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

143. Ins. by Act No. 25 of 2005, section 39 (w.e.f. 23-6-2006).

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[s 442] Discharge from custody —

(1) **As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer-in-charge of the jail, and such officer on receipt of the orders shall release him.**

(2) **Nothing in this section, section 436 or section 437 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.**

COMMENT

When a Court orders the release of an accused person under this section, it has no right or power to put any restrictions on the accused's movements, and when an accused person is released on the suretyship of another, the intention is that the surety should have control over his movements. Otherwise, there is no sense in making the surety responsible for the attendance of the accused in Court. But conditions may be imposed under sub-section (3) of section 437 in certain cases. Where a person stood surety for a woman who was being prosecuted under section 380 of the Penal Code but in spite of the fact that the Magistrate took bail from the accused he ordered her to be sent to a woman's relief association, and she failed to appear on date fixed for hearing and thereupon the Magistrate ordered a portion of the amount of the bond to be forfeited, it was held that so long as the accused lived in the association under the order of the Court, she was virtually in the custody of the Court, that is to say, she was not released within the meaning of this section and the surety was not bound by the term of his bond and the order of forfeiture was wrong.[144.]

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

144. *Raghubai Dayal v Emperor*, (1937) 13 Luck 720 .

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[s 443] Power to order sufficient bail when that first taken is insufficient —

If, through mistake, fraud, or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

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[s 444] Discharge of sureties —

(1) **All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.**

(2) **On such application being made, the Magistrate shall issue his warrant of**

arrest directing that the person so released be brought before him.

(3) **On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to jail.**

[s 444.1] **State Amendment**

West Bengal.—The following amendments were made in its application to the State of West Bengal by WB Act 24 of 2003, section 3.

S 444.—In section 444 of the principal Act,—

(1) in sub-section (1), after the words "at any time", the words ", on showing sufficient cause," shall be inserted;

(2) after sub-section (1), the following sub-section shall be inserted :—

"(1A) On such application being made the Magistrate may either hold an inquiry himself, or cause and inquiry to be made by a Magistrate subordinate to him, on the correctness of the reason shown in the application to discharge the bond as stated in sub-section (1).";

(3) for sub-section (2), the following sub-section shall be substituted:—

"(2) If the Magistrate is satisfied, on enquiry made under sub-section (1A), that all or any of the sureties applying for discharge may be discharged, he shall issue warrant of arrest directing that the person so released be brought before him."

COMMENT

When a surety applies for the cancellation of his bond, there is no such thing as hearing the application on the merits. The presentation of the application itself imposes upon the Magistrate the duty of issuing a warrant for the arrest of the accused. Even if the surety fails to appear at a subsequent hearing, the Magistrate has to act under the section.[145.]

The provisions of this section are meant for the continuity of the surety bond and for enabling the accused to offer other surety bonds; they are not conditions precedent for the acceptance of a fresh surety in place of an earlier one.[146.]

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.

4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

145. *Anant Shivaji*, (1907) 9 Bom LR 1285 ; *Abdul Rehman*, (1956) Raj 829 .

146. *Bekaru Singh v State of UP*, (1963) 1 SCR 55 : AIR 1963 SC 430 : (1963) 1 Cr LJ 335 .

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[s 445] Deposit instead of recognizance —

When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing such bond.

State Amendment

West Bengal.—The following amendments were made in its application to the State of West Bengal by WB Act 24 of 2003, section 4.—

S 445.—In section 445 of the principal Act,—

(a) the words "with or without sureties" shall be omitted; and

(b) for the word "permit", the word "direct" shall be substituted.

COMMENTS

This section permits payment of cash or Government promissory notes in substitution of passing a bond, except where the bond is one for good behaviour. This provision is salutary and is meant to help an accused who is a stranger to the place. The concession under this section is available to the accused person only and does not extend to sureties.[147.]

[s 445.2] "In lieu of" —

This means that the deposit of cash or security is in substitution of,[148.] and not in addition to,[149.] the passing of a bond.

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

147. *Edmund Schuster v Asstt Collector of Customs*, AIR 1967 P&H 189 : 1967 Cr LJ 586 .

148. *Laxmanlal v Mulshankar*, (1908) 32 Bom 449, 452 : 10 Bom LR 553, 557.

149. *Fata*, (1893) Unrep CRC 671.

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[s 446] Procedure when bond has been forfeited —

(1) **Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited,**

or where, in respect of any other bond, under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited,

the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

Explanation.—**A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.**

(2) **If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code:**

[150].[*Provided* that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]

(3) **The Court may,** [151].**[after recording its reasons for doing so], remit any portion of the penalty mentioned and enforce payment in part only.**

(4) **Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.**

(5) **Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.**

[s 446.1] CrPC (Amendment) Act, 2005—*Clause 40*.—

Under sub-section (1) of section 446, where a bond for appearance before a Court is forfeited, the Court records the grounds of such proof and calls upon persons bound by such bond to pay a penalty thereof or to show cause why it should not be paid. The Court, however, has a discretion to remit any portion of the penalty and enforce payment in part only. In order to see that such a penalty is rest reduced liberally, sub-section (3) of section 446 is being amended to provide that the Court shall record reasons before reducing the penalty. (*Notes on Clauses*).

COMMENT

This section refers to two classes of bonds: (1) a bond under the Code for appearance or for production of property and (2) any other bond under the Code. Both stand on the same footing so far as forfeiture is concerned. The section lays down the procedure on

forfeiture of such bonds. The Court before which an appearance is to be made or property is to be produced or the Court to which the case is subsequently transferred or, in respect of the second class of bonds, the Court by which the bond was taken or any Court to which the case is subsequently transferred, or the Court of any Magistrate of the first class, may satisfy itself as to forfeiture and call upon the person bound by it either to pay penalty or to show cause. If sufficient cause is not shown and penalty not paid, the Court will recover the same as if it were a fine imposed by a Court under this Code as laid down in section 421. The Court has a discretion to remit a portion of the penalty. If a surety dies before the bond is forfeited, his estate is discharged. Where a person is convicted of a breach of the bond taken under sections 106, 117, 360 or 448, a certified copy of the judgment will be used as evidence in proceedings against the surety and shall be presumptive proof of his liability unless he proves the contrary.

When the bond executed by a surety is an undertaking to produce an accused in a certain Court on being called upon to do so, in the absence of any notice calling upon the surety to produce the accused, it cannot be said that the surety has failed to perform the conditions of the bond or that the bond has been forfeited.[152.] The surety bond was executed at the stage of investigation. A term in the bond said that the surety would produce the accused on every hearing before any Court trying the case. The bond could not be said to be vague for non-mention of the Court or the date of appearance. Held, in *OP Anand v State* when the surety bond was executed at the investigation stage, no case was pending in any Court, so the question of giving any indication in the surety bond regarding the name of the Court or the date of appearance could not have arisen.[153.] Similarly, when a bond is taken by the Bombay Police under the City Police Act, proceedings for its breach cannot be had before the Metropolitan Magistrate.[154.]

A general undertaking given by the surety to produce a truck "whenever ordered" cannot be said to be an undertaking to produce it in respect of a particular Court only.[155.]

[s 446.2] "To show cause" —

Before a surety becomes liable to pay the amount of the bond forfeited, it is necessary to give notice, and if the surety fails to show sufficient cause only then can the Court proceed to recover the money. Where no opportunity has been given to show cause why he should not be made to pay, the proceedings cannot be said to be in accordance with law and should be quashed.[156.]

[s 446.3] Bond money recoverable as fine [*Sub-section (2)*].—

Where the bond is forfeited and the penalty is not paid, the Court may proceed to recover the amount by issuing a warrant for attachment under section 421. Section 446(2) creates a fiction in relation to the amount of penalty imposed under the section to the effect that the penalty may be recovered as if it were a fine. Therefore, section 421 is attracted to the recovery of penalty under section 446.[157.] If security of immoveable property is given, then the bond has to be registered under section 17 of the Indian Registration Act. An unregistered bond cannot affect any immoveable property and is therefore invalid.[158.]

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

150. Ins. by Act No. 63 of 1980, section 6 (w.r.e.f. 23-9-1980).
151. Subs. by Act No. 25 of 2005, section 40, for "at its discretion" (w.e.f. 23-6-2006).
152. *Manindra Kumar Majumdar v Emperor*, (1942) 2 Cal 482 : AIR 1943 Cal 236 .
153. *OP Anand v State*, 1989 Cr LJ 2468 (Del).
154. *Crawford*, (1981) 42 Bom 400 : 20 Bom LR 379.
155. *Ramesh Chandran v State of UP*, AIR 1972 SC 16 : 1972 Cr LJ 5 : (1971) 3 SCC 689 .
156. *Ghulam Mehdi v State of Rajasthan*, AIR 1960 SC 1185 : 1960 Cr LJ 1527 ; *Sujan Kumar Seal*, (1949) 2 Cal 164 ; *Mahmood Hasan v State of Uttar Pradesh*, 1979 Cr LJ 1439 (All); *P Papamma v State of Orissa,* 2003 Cr LJ 2148 , forfeiture without notice, bad in law.
157. *Kopparakandathil Narayanan v District Collector, Kannur*, 1993 Cr LJ 3718 (Ker).
158. *Nisar Ahmad v Emperor*, (1945) All 639 : AIR 1945 All 389 .

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[159.][[s 446A] Cancellation of bond and bailbond.—

Without prejudice to the provisions of section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition—

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition:

Provided **that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient.]**

COMMENT

Cancellation of bail bond of the accused falls under section 446A and not under 446, as section 449 of CrPC does not provide for appeal against the said order, and writ petition lies against the said order.[160.]

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

159. Ins. by Act No. 63 of 1980, section 7 (w.r.e.f. 23-9-1980).

160. *Sandeep Kumar Tekriwal v State of Bihar*, 2009 Cr LJ 523 (527) : 2009 (2) Pat LJR 260 (Pat).

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The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The High Court of Allahabad directed that when a particular person surrenders and makes an application for bail, it should be considered the same day. However, if it has to be adjourned, the applicant should be directed to appear on the date fixed with a further direction to the police not to arrest him till disposal of his bail application.[1.] But it does not mean that the bail application should be allowed invariably. It may also be dismissed. Short-term release or keeping good conduct during that period shall not be the sole ground for enlarging a person on bail finally. It should be decided on merits alone.[2.] The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.[3.] Bail was refused by the Supreme Court to an unauthorised dealer illegally dealing in foreign exchange, commonly known as *Hawala* transaction and who had been instrumental in transferring huge sums to militants of Jammu & Kashmir for use in disruptive and terrorist activities, although there was every likelihood that completion of investigation may take a long time. Bail was refused having regard to seriousness of allegations against the accused.[4.]

[s 447] Procedure in case of insolvency or death of surety or when a bond is forfeited —

When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 446, the Court by whose order such bond was taken, or a Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or

Magistrate may proceed as if there had been a default in complying with such original order.

COMMENT

[s 447.1]Release after forfeiture of bond is discretionary.—

On forfeiture of the bond, the accused has no right to be released on bail on his furnishing fresh securities. But it would be within the discretion of the Court to release him or not to release him upon the execution of fresh personal or surety bond.[161.]

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

161. *Johny Wilson v State of Rajasthan*, 1986 Cr LJ 1235 (Raj-DB).

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[s 448] Bond required from minor —

When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

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[s 449] Appeal from orders under section 446 —

All orders passed under section 446 shall be appealable,—

- **(i) in the case of an order made by a Magistrate, to the Sessions Judge;**
- **(ii) in the case of an order made by a Court of Session, to the Court to which an appeal lies from an order made by such Court.**

COMMENT

An appeal ordinarily would lie to the Court of Session from an order passed by an Assistant Sessions Judge; but where the sentence imposed exceeds imprisonment for seven years, the appeal will lie before the High Court. Appeal against any sentence of fine would hence lie to the Court of Session only.[162.]

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).
2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

162. *Jubairiya v State of Kerala*, 2008 Cr LJ 4753 (4754) : 2008 (3) Ker LT 975 (Ker).

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[s 450] Power to direct levy of amount due on certain recognizances —

The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond for appearance or attendance at such High Court or Court of Session.

1. *Rajendra Prasad v State of UP*, (1989) 26 ACC 57 (All).

2. *Hidayat Husain Khan (Dr) v State of UP*, 1992 Cr LJ 3534 (All).
3. *Re Nagendra Nath Chakravarti*, (1924) ILR 51 Cal 402, 416; *Re Robinson*, (1854) 23 LJQB 286 , 287; *R v Rose* (1898) 18 Cox 717, 719.
4. *Mool Chand v State*, AIR 1992 SC 1618 : 1992 Cr LJ 2330 : (1991) 2 Supp SCC 101 .

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CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 451] Order for custody and disposal of property pending trial in certain cases —

When any property is produced before any Criminal Court during any inquiry or trial the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.—**For the purposes of this section, "property" includes—**

- **(a) property of any kind or document which is produced before the Court or which is in its custody.**
- **(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.**

COMMENTS

This section enables the Courts to pass orders for the custody or disposal of property during an inquiry or trial.[1.] The Explanation gives the word "property" a wider meaning than it ordinarily has.

Person in whose name a motor vehicle stands with the registering authority is entitled to custody of it unless any other person establishes his superior title.[2.]

A registered owner is entitled to the interim custody of the vehicle. The pawnee had no right to claim interim custody, as the dispute was with regard to the transfer of the vehicle and not with respect to the custody. Hence, the pawnee had no right to claim the custody so long as the charge of theft filed against him was not cleared.[3.]

The petitioner, a registered owner of the vehicle, is the proper person to whom custody of the vehicle is to be entrusted and not the complainant who claims to have purchased the vehicle.[4.]

A registered owner of a vehicle is the proper person to have interim custody of the lorry seized by police in a theft case as against the person with whom he had executed a hire-purchase agreement.[5.]

The Supreme Court has held that subject to certain conditions, the custody of a vehicle could be entrusted temporarily to the registered owner during the pendency of the trial.[6.] It is not advisable to keep a vehicle in Court compound indefinitely. A more advisable course would be to release it to the owner subject only to certain conditions during the trial.[7.] In reference to a car seized by the police, it was held that it could be returned to the owner with the order of a competent Court only.[8.]

Ordinarily, the registered owner is the right and correct person to whom the custody of the vehicle has to be entrusted. However, the Court should also take into consideration, while making an interim order for custody of a motor vehicle as to who would be the best person to make use of the vehicle pending conclusion of the inquiry or trial.[9.]

Where there is no power of confiscation of case property even after the conviction of the accused, the Courts have no jurisdiction to impose any condition for the release of the case property pending trial. In the case of a car, retention of registration book along with an undertaking by the person seeking its release, that he will not alienate, transfer or encumber the vehicle and produce it as and when directed by the Magistrate, was sufficient. The concerned transport authority may be informed.[10.]

Where a third party appears before the Magistrate and alleges that the things seized by the police under a search warrant are his property and not the subject of the alleged offence, the Magistrate is bound to hear that party and, if necessary, to restore the things to their owner.[11.]

Where the property seized belonged not to the absconding father but to his son, the appellant, who was not absconding but only admitted to a hospital, it was held that his application for release of property should have been considered on merits.[12.]

The summary powers to order custody and possession given to Magistrate under this section should not be used when the Civil Court is seized of the matter to decide the question of ownership and right to possession and has passed an order regarding such custody or possession.[13.] An order for the custody of a property made *ex parte* can be reviewed by the Court which made it after hearing the party or parties adversely affected by it.[14.] The Court does not decide the question of rights of the parties over a property. It decides merely about the custody of such property.[15.]

It has been held that when property produced before a Court during the pendency of a case is stolen, lost or destroyed and there is no *prima facie* defence made out that the State or its officers had taken due care and caution to protect the property, the Court has power to order payment of the value of the property.

Production before the Court does not mean physical custody or possession by the Court but includes even control exercised by the Court. Hence, the property which after the production was directed to be kept in police custody is the property produced before the Court and becomes *custodia legis*.[16.] Where the timber of the forest Department was seized, though not produced before the Magistrate, it was held that he could entertain an application for interim release of the seized forest product.[17.]

The Magistrate shall make such an order, as he thinks fit, for disposal of the property which was seized by the police as being suspected to be stolen.[18.] When a Magistrate forwards a complaint to the police for investigation, there is neither "enquiry" nor "trial" pending before him and the property seized by the Custom Officers under Customs Act could not be said to have been produced during "inquiry or trial", so an order by a Magistrate directing delivery of such property is plainly illegal.[19.]

In cases of prosecution for offence under sections 420, 467 and 478 of the Penal Code, the question of Benami Transaction was raised when the subject matter of the offence was the interim custody of a motor vehicle. It was held that provisions of section 4 of Benami Transactions (Prohibition) Act of 1988 could not be availed in determining interim custody under section 451.[20.]

Where an additional Chief Judicial Magistrate ordered return of the contraband goods seized by the Customs and Central Excise officials, the Madras High Court held that

disposal of the property so seized is permissible only under the machinery provided under the Customs Act, 1962, and a Criminal Court has no jurisdiction or power either to order for interim custody of such seized goods or for return of the same.[21.]

[s 451.1] Disposal of perishable property —

Paddy and rice were seized and were lying in the Court's custody. The seizure was effected during pendency of the suit and criminal complaint. The material being of perishable nature, the Court directed its sale by public auction pending disposal of the proceedings. The Court also directed the proceedings to be disposed of expeditiously.[22.]

[s 451.2] Procedure for disposal —

The power under the section should be exercised expeditiously and judiciously. The Court should pass appropriate orders immediately.

The articles are not to be kept for a long time at the police station, in any case, not for more than 15–30 days. The Court suggested the following procedure for disposal.[23.]

The powers under section 451 should be exercised expeditiously and judiciously. It would serve various purposes, namely:—

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation;
2. Court or the police would not be required to keep the article in safe custody;
3. If the proper *panchanama* before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and
4. The jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

The Court suggested the procedure for disposal of seized articles and currency notes, vehicles, seized liquor and narcotics drugs suggested. It also directed the Magistrate to pass appropriate orders immediately so that the articles are not kept for a long time. This object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly.

[s 451.3] Release of property —

A vehicle was seized because it was carrying prohibited spirit. The vehicle was purchased under hire-purchase agreement. The agreement described the financier as the registered owner and the user as hirer. The vehicle was released in favour of the hirer on certain conditions. But the hirer failed to fulfil those conditions. The vehicle remained with the authorities for eight years. It was directed to be delivered to the owner on his fulfilling the conditions.[24.]

[s 451.4] Directions under writ of mandamus —

The property in question was stolen from the strong room of the Court. The High Court said that the state is under a duty to assist the Courts in discharge of its legal and Constitutional obligations. The writ of *mandamus* could be issued directing the State Government to make available necessary funds for returning the case property to the parties.[25.]

[s 451.5] Revision —

An order for release of the seized vehicle being an arrangement for custody of the vehicle till conclusion of the trial is an interlocutory order against which no revision application is maintainable.[26.]

[s 451.6] Security for delivery of possession —

The order to release the vehicle on condition to furnish bank guarantee was held to be not sustainable. The Court, therefore, modified the order to the effect that on the applicant's furnishing a solvent security of Rs 50,000, the vehicle would be released forthwith on *supurdnama* of the applicants.[27.]

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1. *BH Shyamu v Bhoopalam,* 1968 Cr LJ 1243 .
2. *Nandiram v State of Gujarat*, AIR 1967 Guj 80 : 1967 Cr LJ 483 ; *Mahamaya Dasi v Sanat Kumar*, AIR 1968 Cal 564 ; *Sardar Singh v SF Corp*, (1964) 2 Cr LJ 492 .
3. *Gadadhar v Srinivas Mishra*, 1990 Cr LJ 1190 (Ori).
4. *Abdul Jabbar v Khaleed Ahmed*, 1988 Cr LJ 810 (Kant).
5. *S Hafeezulla v State of Karnataka*, 1987 Cr LJ 868 (Kant).
6. *Rajendra Prasad v State of Bihar,* (2001) 10 SCC 88 : 2001 Cr LJ 4946 : JT 2000 (5) SC 502 .
7. *Ashok Kumar v State of Bihar,* (2001) 9 SCC 718 : JT 2000 (8) SC 54 .
8. *George v State of Kerala,* AIR 1998 SC 1376 : 1998 Cr LJ 2034 : (1998) 4 SCC 605 ; *Jagbandhu Mahanta v Bijay Kumar Kar,* 2003 Cr LJ 2679 (Ori), application before forest officer for release of vehicle which was seized while transporting illegal timber cargo, the vehicle was transferred by the Magistrate to the forest officer for further action. It could not be said that the Magistrate had assumed jurisdiction. *Priyabrata Sukla v State of Orissa,* 2003 Cr LJ 2787 (Ori), vehicle seized in offences under sections 399–402 IPC and was kept in the open space in the police station, subjected to vagaries of nature and damaged day by day. The owner was favoured with an interim release. *Suresh R Dave v State of MP,* 2003 Cr LJ 3141 (MP), a vehicle was seized under the MP Excise Act. The Court ordered release of the vehicle on interim basis because no proceedings for its confiscation had been initiated.
9. *Swapan Dam v Golap Chand*, 1989 Cr LJ NOC 117 (Gau).
10. *Baligera Bheemudu v State of AP*, 1993 Cr LJ 3462 (AP).

11. *Lakshman Govind Nirgude*, (1902) 26 Bom 552, 557 : 4 Bom LR 276.
12. *Dhananjay Kumar Pandey v State of Bihar,* (2000) 9 SCC 209 : 2000 SCC (Cr) 1207.
13. *Haobam Nongyat Singh v Thonnavjain*, (1961) 2 Cr LJ 256 .
14. *Basappa Durgappa Kurubar v State of Karnataka*, 1977 Cr LJ 1541 (Knt); *Shamrao Sampatrao v State of Maharashtra*, 1979 Cr LJ 1457 (Bom—DB).
15. *Charlingappa Sharnappa v State of Karnataka*, 1978 Cr LJ NOC 274 (Kant).
16. *Basava Kour Dyamogouda Patil v State of Mysore*, AIR 1977 SC 1749 : 1977 Cr LJ 1141 : (1977) 4 SCC 358 ; *Gijji v AK Gopinathan Nair*, 1996 Cr LJ 140 (Ker), recovered bus ordered to be delivered to the complainant—buyer under "interim custody" instead of to the seller who was accused of having stolen it.
17. *Karnam Laxmipati Padmini v State of Orissa*, 1993 Cr LJ 219 (Ori).
18. *Kasturilal Ralia Ram Jain v State of Uttar Pradesh*, AIR 1965 SC 1039 : (1965) 2 Cr LJ 144 .
19. *Vinayak Gururao Inamdar v Bhaskar Vasudeo Shirsat*, 1993 Cr LJ 3594 (Bom).
20. *P Mehta v State of Madhya Pradesh*, 1989 Cr LJ NOC 159 (MP).
21. *Supdt of Customs & Central Excise, Nagarcoil v R Sunder*, 1993 Cr LJ 956 (Mad). *UOI v Chungnunga*, 2003 Cr LJ 2579 (Gau), smuggled goods seized and handed over to the Criminal Court for trial under the Arms Act. Refusal to release them on compliance with requirements was held to be not proper.
22. *Satnam Agro Industries v State of Punjab*, AIR 2009 SC 249 : (2008) 15 SCC 784 : 2009 Cr LJ 387 .
23. *Sunderbhai Ambalal Desai v State of Gujarat*, AIR 2003 SC 638 at pp 640, 642 : (2002) 10 SCC 283 .
24. *Bharath Metha v State*, AIR 2008 SC 1970 : (2008) 5 SCC 752 : 2008 Cr LJ 2245 .
25. *M Satyamma v Govt of AP*, 2003 Cr LJ 3350 (AP).
26. *Ravindra Nath Singh v State of Bihar*, 2002 Cr LJ 3395 (Pat).
27. *Bhagwati Shanker Sahu v State of Chhattisgarh*, 2002 Cr LJ 4391 (Chh). *Madan Lal v State (NCT of Delhi,* 2002 Cr LJ 2605 (Delhi), a tempo on which contraband was found was released in favour of the owner on bond of Rs 1,75,000.

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CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 452] Order for disposal of property at conclusion of trial —

(1) **When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.**

(2) **An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.**

(3) **A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.**

(4) **Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.**

(5) **In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.**

COMMENT

This section can only apply when any property or document was produced before the Court or was in its custody after it was produced or regarding which any offence appeared to have been committed or which had been used for the commission of an offence.[28.] A Judicial Magistrate has no statutory power to deal with the money seized by the police under warrant and orders of Income-tax Department and has no authority to inquire into the validity of the warrant of authorisation for delivery of the money to the Income-tax Department. Orders passed under this section for restoration of money was illegal and void.[29.] The provisions of this section come into operation only on

conclusion of an inquiry or a trial in a Criminal Court. They refer to four classes of property or document: (1) produced before the Court; or (2) in its custody; or

(3) regarding which any offence is committed; or (4) which is used in committing any offence. Such property can be disposed of in any of the four following ways: (1) destruction; (2) confiscation; (3) delivery to person entitled to its possession; or (4) otherwise. The power of the Court extends to the confiscation of the property in the custody of the Court but it is not in every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case.[30.] The term "property" means not only the property in its original form but also that into which it is converted or for which it is exchanged. An order under this section passed at the conclusion of a trial only concludes immediate right to possession but does not conclude the right or title of any person to the ownership of the property.[31.]

An order under section 452 for return of the articles by the trial Court should record the specific findings with reasons. When conflicting claims to articles are raised in a Sessions case, the Sessions Judge can direct delivery of the property to the Magistrate under section 452(3) for disposal.[32.]

Offence was committed under section 411 of IPC. Some of the items of property were recovered from the houses of the accused persons. The accused persons were convicted based on the identification of the two items. The trial Court directed the return of those two items to the complainant and relegated the parties to the Civil Court in respect of the other items. In appeal, the High Court set aside the convictions and directed the return of all the items of property to the accused persons. Complainant was directed to file a suit. Held that in the interest of justice, the matter relating to the disposal of the two items could be relegated to the Chief Judicial Magistrate before whom the matter relating to the disposal of other items was pending.[33.]

The Court has power to pass an order regarding the property produced before or in custody of the Court even though no offence has been committed in respect of it.[34.] Hence, where a person charged with theft is discharged, the Court can award possession of the subject-matter of the alleged theft to some person other than the party in whose possession the property was found.[35.] Where the title to seized property is doubtful, it should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable;[36.] or the property itself may be kept in Court[37.]; or the property may be sold and its proceeds kept in deposit by the Court, until the question of title is settled.[38.] Where an elephant was seized from the possession of the appellant by the forest Range Officer because he had no licence, the Supreme Court released the animal as the appellant was issued a valid certificate of ownership and his application for licence was pending at the time of seizure. The Court quashed the criminal proceedings as no case was made out.[39.]

When after an inquiry or trial the accused is discharged or acquitted, the Court should normally restore the property which is produced before it or which is in its custody to the person from whose custody it was taken.[40.] When money was found in the possession of the accused as belonging to him and not to the complainant, on acquittal of the accused from the charge of stealing that money, the money must be returned to the accused and not to the complainant.[41.] Where the accused was acquitted due to bar under section 468 but it was found that the *Katha* had been extracted out of illicitly felled trees, the confiscation of the *Katha* under section 452 in favour of the State was held to be valid.[42.] For the purpose of the disposal of the property, there is no need to examine the witnesses and hold an elaborate inquiry. For arriving at a decision, the Court looks at and examines the facts and the evidence

already before it in the main case. No accused can claim as of right that the property seized from him should be returned to him.[43.]

This section provides for disposal of property at the conclusion of inquiry or trial, contemplates only one order by Criminal Court, and after it has passed that order and effect has been given to it by disposing of the property, the Court has no authority in law to pass another order in respect of that property, which is no longer before it or in its custody. Where, therefore, the property alleged to have been stolen was delivered to the complainant by the order of the trial Court as well as the appellate Court and the accused, thereafter, applied for taking back the property from the complainant and its delivery to him (accused), it was held that the property having already passed out of the custody of the Court, it had no jurisdiction to call back the property from the complainant and give it to the accused.[44.] The provision in sub-section (2), for imposition of condition or taking of bond, is made to provide for the order being set aside in appeal or revision.

[s 452.1] "Person claiming to be entitled to possession" —

When an accused is given the benefit of doubt and acquitted of theft, it cannot be said that he was necessarily in lawful possession of the property which was the subject-matter of the theft and he is not, therefore, entitled to recover the property under this section.[45.] In a theft case, the accused persons did not claim the property recovered in the beginning, and denied the seizure of property from their possession but laid their claim when the complainant applied for the return of property after the case ended in acquittal. The MP High Court held that the accused could not claim back the property.[46.]

Where the Magistrate refused to return the seized stolen property to the son of the deceased complainant after the case had ended, as no succession certificate was produced, the High Court directed return of the property to the son as other legal heirs had no objection and succession certificate was required only in respect of any debt.[47.]

In case a Motor vehicle is seized, it is the duty of the Magistrate to order the delivery of the vehicle to the person entitled to its lawful possession. It was held that though the petitioner was not the registered owner, he was entitled to the delivery of the vehicle, irrespective of the fact that he neither had the title nor the ownership over it. This possession is of a person who has a right to hold. The person entitled to the possession would be one from whose possession the property had been seized and who is found not to have committed any offence so as to render his possession unlawful.[48.]

An application for disposal of property was made after eight months from the conclusion of the trial. It was pleaded that the order passed by the Additional District Judge was made only by relying on the police report. The police report had not disclosed the fact from whose possession the property had been seized, since the question from whose possession the property has been seized or to whom *prima facie* it belonged was not decided by the Additional District Judge before making the order, the order was held to be not maintainable.[49.]

28. *Sita Ram*, (1952) 31 Pat 779.
29. *UOI v In charge, Police Station, Janakganj*, 1992 Cr LJ 1320 (MP).
30. *Suleman Issa v The State of Bombay*, (1954) SCR 976 : AIR 1954 SC 312 : 1954 Cr LJ 881 .
31. *Jagannath v State of Bombay*, (1961) 64 Bom LR 150 : AIR 1963 Bom 83 : 1963 Cr LJ 745 ; *BS Tokappa v State by Ripponpet Police*, 1972 Cr LJ 1850 (Kant); *Malabar Cashewnuts v State of Kerala*, 1982 Cr LJ NOC 162 (Ker).
32. *Anduri Podhan v State of Orissa*, 1987 Cr LJ 1478 (Ori).
33. *Sulekh Chand v Suresh Chand*, 1991 Cr LJ 469 : AIR 1991 SC 380 .
34. *Russul Bibee v Ahmed Mossajee*, (1906) 34 Cal 347 , 350; *Pydi Ramanna*, (1918) 42 Mad 9.
35. *Kanga Sabai*, (1910) 34 Mad 94.
36. *Srinivasamoorthi v Narasimhulu Naidu*, (1927) 50 Mad 916; *Inter Continental Agencies Pvt Ltd v Amin Chand Khanna*, 1980 Cr LJ 689 : AIR 1980 SC 951 : (1980) 3 SCC 201 .
37. *Ram Khalawan Ahir v Tulsi Telini*, (1924) 28 Cal WN 1094 : AIR 1924 Cal 1040 .
38. *Re Visa Samta*, (1914) 16 Bom LR 951 : AIR 1914 Bom 225 (1).
39. *Gunnaseelam v State of Tamil Nadu*, AIR 1994 SC 1816 : 1994 Cr LJ 3835 .
40. *N Madhavan v State of Kerala*, AIR 1979 SC 1829 : 1979 Cr LJ 1197 : (1979) 4 SCC 1 .
41. *Pushkar Singh v State of Madhya Pradesh*, AIR 1953 SC 508 : 1954 Cr LJ 153 .
42. *Amar Nath v State of Himachal Pradesh*, 1990 Cr LJ 506 (HP).
43. *Meena Ram v State of Uttar Pradesh*, 1990 Cr LJ 1347 (All).
44. *Ghoor Mal*, (1952) Raj 559 .
45. *Joharilal v Emperor*, (1948) Nag 948 : AIR 1949 Nag 17 .
46. *Kamar Lal v State of Madhya Pradesh*, 1992 Cr LJ 3407 (MP).
47. *Ram Chandra kesharwani v State of MP*, 1995 Cr LJ 3296 (MP).
48. *Mohammed Zariff v SK Zinaullah*, 1988 Cr LJ 55 (Ori).
49. *Raja Ram v Awadh Ram*, 1990 Cr LJ 1663 (All).

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CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 453] Payment to innocent purchaser of money found on accused —

When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person bought the stolen property from him without knowing or having reason to believe that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

COMMENT

This section deals only with the money found on the person of the accused at the time of his arrest. It may be utilised in compensating an innocent purchaser of property who loses possession on conviction of the accused. This section may be compared with section 357(d).

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CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 454] Appeal against orders under section 452 or section 453 —

(1) **Any person aggrieved by an order made by a Court under section 452 or section 453, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.**

(2) **On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, or may modify, alter or annul the order and make any further orders that may be just.**

(3) **The powers referred to in sub-section (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in sub-section (1) was made.**

COMMENTS

The wordings of the present section have been so framed as to indicate that a party aggrieved—the words used are "any person aggrieved"—possesses a substantive right of appeal against the order made by a Court under the two preceding sections. The section also provides for stay of the operation of the order pending the disposal of the appeal. The Law Commission was not satisfied with the wordings of section 520 of the 1898 Code. It observed:

> Thus, if in a prosecution under section 411 of the Indian Penal Code, the case ends in acquittal and the trial Court directs the alleged stolen property to be returned to the accused, the State may not care to prefer an appeal against the order of acquittal. But the informant may desire to challenge the order for disposal of property on the ground that it was his property and wrongfully taken away from his possession. Unless an independent right of appeal under section 517 (old Code) is conferred on him, he will be without any direct remedy. Then again, there may be instances where, apart from the informant or complainant and the accused, there may be a third party who may be entitled to possession of the property or to compensation as provided in section 519 (old Code). He may be aggrieved by the order passed by the trial Court under any of the three preceding sections, (now sections 452 and 453), and he will be without any remedy unless an express right of appeal is conferred.

When an appeal against the main judgment is pending before an appellate Court and the aggrieved party also files an appeal under this section, it should be heard and disposed of by the same Court to avoid conflict of findings. Where theft of the crop could not be proved, the informant did not claim property and the appellant claiming property could not show his possession over the property nor could they show how he was an aggrieved person, the Orissa High Court dismissed the revision.[50.]

[s 454.1] "And make any further orders that may be just" —

This provision is meant to enable a superior Court to give effect to an order setting aside the order of the Court of first instance, if that order has been carried out, by directing the restitution of property.[51.]

Though sections 452 and 454 of the Code confer a discretion upon superior Courts as regards disposal of the property, the discretion should be exercised according to proper legal principle.[52.] A hired truck was confiscated for carrying contraband material, the drivers in possession of the trucks were acquitted, the hirer of the truck was not proceeded against, and the owners had no knowledge, the High Court set aside the confiscation order and released the truck.[53.]

[s 454.2] Notice —

Notice to the affected party should be given before passing an order for return of seized property under this section so as to give him an opportunity of being heard.[54.]

[s 454.3] "Court of appeal, confirmation, or revision" —

There was a difference of opinion as regards the meaning of the words "Court of appeal" under the old Code. A Full Bench of the Bombay High Court had held that any Court which has powers of appeal, confirmation or revision in respect of the trial Court, that being the Court subordinate thereto, can make any substantive order it thinks fit in respect of property dealt with by the trial Court under section 452 or section 453.[55.] The former Chief Court of Sind had adopted this view.[56.]

The Calcutta High Court had differed from the above view and held that an Additional Sessions Judge is a Court of appeal but not a Court of revision within the meaning of this section. The Court of appeal mentioned in this section must be a Court of appeal as contemplated by Chapter XXIX of the Code. There is nothing in the terms of this section justifying the view that the words "Court of appeal" in the section mean only Court to which either of the parties to the criminal case has appealed or could appeal. The wording of the section rather indicates that the Court of appeal is any Court, which has powers of appeal, ie, any Court to which appeals would ordinarily lie from the decision of the Magistrate by whom the case was tried. The Court of revision within the meaning of this section must be a Court of revision as contemplated by Chapter XXX of the Code. The Sessions Judge or the Additional Sessions Judge is not a Court of revision within the meaning of this section.[57.]

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50. *Narayan Chandra Nayak v Surjya Gourango*, 1996 Cr LJ 1580 (Ori).
51. *Shwe Wa v CJ Mehta*, (1927) 5 Ran 553.
52. *State Bank of India v Rajendra Kumar*, AIR 1969 SC 401 : (1969) 2 SCR 216 : 1969 Cr LJ 659 .
53. *Punjab Kashmir Finance Pvt Ltd v State of Rajasthan*, 1993 Cr LJ 498 (Raj).
54. *State Bank of India v Rajendra Kumar, supra*.
55. *Walchand v Hari*, (1932) 56 Bom 369 : 34 Bom LR 1203 (FB) : AIR 1932 Bom 534 , **overruling** *Khima Rukhad*, (1918) 42 Bom 664 : 20 Bom LR 395 : AIR 1918 Bom 186 ; *Thiraj*, (1928) 10 Lah 187; *Srinivasamoorthi v Narasinhulu Naidu*, (1927) 50 Mad 916; *The Empress v Joggessur Mochi*, (1878) 3 Cal 379 , 381; *Ram Abhilakh v The State*, AIR 1961 All 544 : 1961 Cr LJ 597 .

56. *Fatima v Sain Bakhsh*, (1941) Kar 442 : AIR 1942 Sindh 1 .
57. *Shabhapati Dobey v Ramkishan Kumar*, (1935) 62 Cal 861 .

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CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 456] Power to restore possession of immovable property —

(1) **When a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the Court that, by such force or show of force or intimidation, any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order that possession of the same be restored to that person after evicting by force, if necessary, any other person who may be in possession of the property:**

Provided **that no such order shall be made by the Court more than one month after the date of the conviction.**

(2) **Where the Court trying the offence has not made an order under sub-section (1), the Court of appeal, confirmation or revision may, if it thinks fit, make such order while disposing of the appeal, reference or revision, as the case may be.**

(3) **Where an order has been made under sub-section (1), the provisions of section 454 shall apply in relation thereto as they apply in relation to an order under section 453.**

(4) **No order made under this section shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.**

COMMENTS

Sections 452 and 455 dealt with movable property only: this section refers to immovable property. Where a person is deprived of his possession of immovable property by (1) criminal force, (2) show of force, or (3) criminal intimidation, he may be reinstated in possession by the Court, when convicting the dispossessor of the offence. There are two conditions precedent to the making of the order: (a) the dispossessor must be convicted; and (b) the dispossession should be under circumstances detailed in the section.[58.] The order may be passed either at the time of the conviction or within one month of its date. It may be passed by the trial Court or by any Court of appeal, confirmation, or revision, while disposing of appeal, reference or revision. The aggrieved party may resort to a Civil Court to have the order set aside. Section 145 may be contrasted with this section.

It will be noted that the section says that the offence must be attended by criminal force, *etc*, not that criminal force, *etc*, must necessarily form an ingredient of the offence.[59.] It is only when the actual use of criminal force leads to the dispossession that an order can be made.[60.] The force as contemplated by the provisions of section 456 is the force applied to human body as envisaged by the provisions of sections 349 and 350 of the IPC. But there is another rule of law which is now settled that if the accused takes possession of an immovable property in the absence of the person who

was in possession of it and on the return of that person, uses criminal force when a protest is made against the taking of possession by him, the provisions of section 456 are attracted.[61.] The power to restore possession could only rest with the competent Court. It was held that the police could not on their own deliver possession of the premises to the complainant when the same were found to be in the possession of the accused.[62.] It has been held that where the accused had been wrongfully dispossessed, an order of restoration survives even after his death and abatement of appeal, and whosoever be in possession of that property including his legal representatives are bound to restore it. It was further held that an appeal in this regard could be disposed of even without impleading legal representatives of the accused.[63.]

The Magistrate can pass an interim order for the disposal of the seized property according to law.[64.]

Restoration of possession is to be ordered to serve the ends of justice that no one should thrive on his criminal and wrongful acts.[65.]

[s 456.1] "When a person is convicted" —

The phrase does not mean that the order about the dispossession of land must be made simultaneously with the conviction of the offender. This order is an independent order and all that the section contemplates is that the order can only be made on conviction of the offender.[66.]

[s 456.2] "More than one month" —

Any order made after one month is without jurisdiction.[67.]

[s 456.3] Powers of higher Courts [*Sub-section* (2)].—

The sub-section does not impose any time-limit as in sub-section (1) within which a Court of appeal, confirmation or revision must act.[68.] It sets at rest the prior controversy as to whether the period of one month applies also in cases of Courts of appeal, confirmation or revision by providing that such Courts may, while disposing of the appeal, reference or revision, pass such order as in sub-section (1).[69.]

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58. *Ram Chandra Boral v Jityandria*, (1897) 25 Cal 434 ; *Ishan Chandra v Dina Nath*, (1899) 27 Cal 174 ; *Churaman v Ram Lal*, (1903) 25 All 341 ; *Tulshi Ram v Abrar Ahmad*, (1915) 37 All 654 : AIR 1915 All 377 ; *K Rangarajan v RP Gramani*, 1971 Cr LJ 1349 ; *Chellappan v Sivanandan*, 1972 Cr LJ 443 ; *Abul Hossain v Masadul Haq*, 1972 Cr LJ 1499 ; *Subhan*, 1974 Cr LJ 731 .

59. *Mohini Mohan Chowdhry v Harendra Chandra Chowdhry*, (1904) ILR 31 Cal 691, 696 (FB).

60. *Narayan v Visaji*, (1898) 23 Bom 494; *Re Batakala Pottiavadu*, (1902) 26 Mad 49; *Ishan Chandra v Dina Nath*, (1899) 27 Cal 174 ; *Dhani Dibya v Kasinath Nanda*, 1979 Cr LJ 1297 (Ori).

61. *Ram Nath v State*, 1982 Cr LJ NOC 106 (Del) : AIR 1982 Raj 256 .
62. *State of HP v Paras Ram*, 1990 Cr LJ 1358 (HP).
63. *Ganga v State of Rajasthan*, 1993 Cr LJ 216 (Raj).
64. *State of UP v Sai Ram Baboo Kesani*, 1990 Cr LJ 87 (All).
65. *Prem Chand Sharma v State*, 1985 Cr LJ 374 (Del).
66. *Narayan v Visaji*, (1898) 23 Bom 494, 499.
67. *Ashwinikumar Das v Shashankamohan Basu*, (1932) 59 Cal 1153 .
68. *Fida Hussain v Sarfaraz, Hussain*, (1933) 12 Pat 787 : AIR 1933 Pat 617 ; *Namdeo*, (1938) Nag 454.
69. *HP Gupta v Manoharlal*, 1979 Cr LJ 199 : AIR 1979 SC 443 : (1979) 2 SCC 486 .

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CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 457] Procedure by police upon seizure of property —

(1) **Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.**

(2) **If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.**

COMMENTS

Under this section what the Magistrate has to consider is, who is entitled to the possession of property which has been seized by the police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, the Magistrate can only hold that person is entitled to possession of the property.[70.] Once property is seized under circumstances mentioned in the section then, irrespective of the fact whether the investigation by the police discloses an offence or not, the Court has to dispose of the property and while doing so, it has got an absolute discretion to pass an order as it thinks fit.[71.]

Ancestral transport business was carried on and disputes arose on the same in the family. Due to the nature of the business, the exact persons entitled to the property were not ascertainable. Under such circumstances, it was held that the custody and use of each bus was to be auctioned annually confined to the brothers and to use it as a prudent owner and to produce it as and when required by the Court. Here, the release of the buses in favour of the registered owner was not proper.[72.]

Truck was seized for defaults committed by the owner hirer in paying the instalments. Custody of it has to be given to financer and not to the owner hirer. The Magistrate released the truck in favour of the hirer owner without applying his mind. The order will be interfered with in revision.[73.]

The order for the disposal of an article seized by the police can be passed only by the judicial Magistrate. The police order disposing of the seized property in the absence of any order of a Magistrate under section 457 was held illegal.[74.]

Where the registered owner of a motor cycle reported the matter of forcible taking away of the motor cycle by three named persons while he was on way to his village and after inquiry the police reported the seizure of the motor cycle to the Magistrate, but the Magistrate passed the order for the delivery of the motor cycle to the registered owner as the alleged sale from him to the person (from whom it has been seized) was not proved, the order was held to be legal.[75.]

A tractor was seized from the possession of one M. The legal heir of the registered owner claimed possession of the tractor. It was held that the proceedings under section 457 are summary in nature and are not meant for determining title to the property. It is always open to the party concerned to get his title or right established by a proper Court. The tractor was handed over to the person from whose possession it was seized.[76.]

The opportunity of hearing the rival claimant is necessary. Though in legal sense custody is of the Court, it does not mean that the seized property can be arbitrarily directed to be delivered to any party without affording an opportunity of being heard to the person likely to adversely effected.[77.]

Where by the death of the accused the inquiry, which was pending has abated and as such neither any inquiry nor trial can be said to be pending, then the order for disposal can only be made under this section and not under section 451 or section 452.[78.]

This section deals generally with all cases where seizure of property is reported by the police officer to the Magistrate. The Magistrate can act under this section only when the seizure of the property is reported to him. He is entitled to do one of three things: (a) he may pass an order regarding the disposal of the property; or (b) deliver it to the person entitled to its possession subject to conditions, if any, imposed; or (c) in his absence pass an order for its custody and production. In the last-mentioned case, the Magistrate may issue a proclamation requiring its owner to appear and establish his claim within six months. If no claimant so appears, the property may be placed at the disposal of the Government and can be sold by the Government (section 458). Where the property is subject to speedy and natural decay, and the owner is absent or unknown, or if its sale is more beneficial to its owner, or if its value is less than 10 rupees, it may be sold immediately (section 459).

The discretion given by the section must be judicially exercised. Where a Judicial Magistrate ordered release of property recovered from the accused in a robbery case, in favour of a person, without notice to the accused, it was held not to be a correct approach.[79.] In the absence of anything to show the title to the property, it should be ordered to be delivered to the person in whose possession it had been at the time of attachment.[80.] The Magistrate does not decide the question of title, but merely decides the question of possession.[81.] The real owner can assert his right in the Civil Court.[82.]

A Magistrate having no power to hold inquiry or trial but only empowered to commit the case to Sessions has no jurisdiction to pass orders regarding the disposal of property.[83.] After the criminal proceedings are dropped, the property should be returned to the person from whose possession it had been taken. The finding whether the person had got possession of that property dishonestly need not be given when prosecution was considered not worth pursuing.[84.] Two conditions must be fulfilled for the return of the property (i) it must have been seized by the police and (ii) it is not required to be produced before Court. If these conditions are fulfilled, it must be returned under section 457.[85.] If the property is likely to be required for production, it may be withheld.[86.] The words "is not produced" in sub-section (1) refer merely to a stage of investigation and not the stage of inquiry or trial. The reference is to a point of time when the Magistrate is called to make an order of disposal of such property. If it is

produced, he will have no jurisdiction to deal with it. If it is not produced before a Criminal Court during an inquiry or trial, he will make an order for its disposal in the prescribed manner.[87.]

Where the Special Judge did not follow the prescribed procedure and there was controversy between the parties about the value of the *dhotis* and the cloth and where unless the value of the property could be estimated no proper order regarding security could be passed, the impugned order could not be sustained and had to be set aside.[88.]

Where the property in question was seized under suspicion by the police under section 102 of CrPC, it was held that the property had to be returned to the person from whose possession it was seized, particularly after expiry of six months of detention of the person under section 109 of CrPC without issuing proclamation under section 457(2) of CrPC.[89.]

A lorry was confiscated in an *abkari* offence but was released under the orders of the High Court when the owner furnished bank guarantee of two lakh rupees in appeal. However, after the termination of all proceedings against the owner, the Assistant Commissioner, Excise first encashed the bank guarantee and also demanded the lorry from the owner, the High Court directed the Excise Department to return two lakh rupees of bank guarantee with interest due thereon to the owner and the owner was directed to hand over the lorry to the Excise Department in running condition.[90.]

[s 457.1] Magistrate not to decide ownership in manner of Civil Court —

There were rival claims to a seized vehicle. The property could be released only to the person who had the rightful or lawful title to hold property. The Magistrate has to come to a *prima facie* conclusion and has not to decide the question of title in the manner of a Civil Court. The petitioner, who was seeking custody of the vehicle, had delivered the vehicle to the respondent asking him to sell it. The petitioner subsequently took away the possession saying that the balance price had not been paid to him. The vehicle was seized from him. The release of the vehicle in favour of the respondent on a finding that he had paid the full price, was held to be not illegal.[91.]

[s 457.2] Where the "person so entitled, is known", or "unknown" [*Sub-sectionc (2)*].—

The sub-section provides for an inquiry only in the case where the person entitled to possession of property is unknown.[92.]

[s 457.3] Compensation to owner —

Where the police officers had misappropriated the seized articles, and thus the same had not been released in favour of the petitioner who was entitled to get them back, the petitioner would be entitled to compensation for the value of the articles.[93.]

[s 457.4] Conditional delivery —

Once interim custody was given of the property, (in this case a car) having no evidentiary value and required only for the purpose of passing final orders under

section 452, it was held to be not proper to impose a condition that the original of the property must be kept intact without alienation.[94.]

If the material *prima facie* discloses that any vehicle seized had been used in commission of offence under the Wild Life Protection Act, the same should not normally be returned till culmination of the Criminal proceedings, if material. But if for any exceptional reason the Court feels that the vehicle is not *prima facie* involved in the commission of such offence, it should impose stringent conditions while ordering its release.[95.]

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70. *Lakshmichand v Gopikisan*, (1935) 38 Bom LR 117 : 60 Bom 183 : AIR 1936 Bom 171 .
71. *ASS Ahmed v Commissioner of Police, Madras*, AIR 1970 Mad 220 : 1970 Cr LJ 1016 .
72. *Pramod Kumar v Gouramaya*, 1989 Cr LJ NOC 170 (Ori).
73. *Arunachalam v State of Orissa*, 1989 Cr LJ 739 (Ori).
74. *Ganesh v State of Rajasthan*, 1988 Cr LJ 475 (Raj).
75. *Devendra Kumar v State of Uttar Pradesh*, 1988 Cr LJ NOC 14 (All).
76. *Senserpal Singh v Mahmood*, 1992 Cr LJ 3157 (All). *State of AP v A Surajmal Sethia*, 1996 Cr LJ 4338 (AP), forest produce and vehicle seized, the authorised officer under the AP Forest Act could confiscate or release, order of release passed by the Magistrate was held to be improper.
77. *Shyam M Sanchdev v State*, 1991 Cr LJ 300 (Del).
78. *State v Sova Rani*, 1973 Cr LJ 784 .
79. *Baba Abdul Khan v AD Savant*, 1994 Cr LJ 2836 (Bom).
80. *Bahinu*, (1902) 5 Bom LR 25 ; *Kareppa*, (1914) 17 Bom LR 79 : AIR 1915 Bom 295 ; *Babu Ram*, (1941) 17 Luck 430 ; *ASS Ahmed v Commissioner of Police, Madras*, AIR 1970 Mad 220 : 1970 Cr LJ 1016 ; *Rishinath Singh v State of MP*, 1992 Cr LJ 1764 (MP); *Sharangdhar Sharma v State of Bihar*, 1992 Cr LJ 2063 (Pat).
81. *Hussensha v Mashaksha*, (1910) 12 Bom LR 232 .
82. *Tribhovan Manekchand*, (1884) 9 Bom 131, 134.
83. *Balaji v State of AP*, 1976 Cr LJ 1461 (AP).
84. *Brijendra Singh v Brij Kumar Gupta*, 1976 Cr LJ 467 (All).
85. *PV Joseph v State of Kerala*, 1978 Cr LJ 1206 (Ker).
86. *Ram Prakash Sharma v State of Haryana*, 1978 Cr LJ 1120 : AIR 1979 SC 1282 .
87. *Ajai Singh v Nathi Lal*, 1978 Cr LJ 629 (All).
88. *Roop Kishore v State of Uttar Pradesh*, 1989 Cr LJ 2326 (All).
89. *Keshu Lal v State of Rajasthan*, 1996 Cr LJ 740 (Raj).
90. *PV Asoorty v Assistant Commissioner, Excise*, 1996 Cr LJ 2139 (Ker). *Ganesh Chandra Nayak v State of Orissa*, 2003 Cr LJ 3142 (Ori), vehicle seized under Narcotic Drugs and Psychotropic Substances Act, 1985, if allowed to remain at police station without care and subjected to rain and sun, its condition was to deteriorate. The High Court directed the trial Court to release the vehicle for interim period subject to the final decision in the case after ascertaining genuineness of ownership. The person in question should be directed not to transfer it or misuse it and produce it as and when required.

91. *Sharif Mohd. v State of HP*, 2003 Cr LJ 2911 (HP).
92. *Sulleman*, (1942) Kar 72 .
93. *Umeshwar Sahu v State of Jharkhand*, 2002 Cr LJ 3799 (Jhar).
94. *KW Ganapathy v State of Karnataka*, 2002 Cr LJ 3867 (Kant).
95. *State of Maharashtra v Gajanan D Jambhulkar*, 2002 Cr LJ 349 (Bom).

The Code of Criminal Procedure, 1973

CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 458] Procedure when no claimant appears within six months —

(1) **If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, the Magistrate may by order direct that such property shall be at the disposal of the State Government and may be sold by that Government and the proceeds of such sale shall be dealt with in such manner as may be prescribed.**

(2) **An appeal shall lie against any such order to the Court to which appeals ordinarily lie from convictions by the Magistrate.**

The Code of Criminal Procedure, 1973

CHAPTER XXXIV DISPOSAL OF PROPERTY

[s 459] Power to sell perishable property —

If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is [96.][less than five hundred rupees], the Magistrate may at any time direct it to be sold; and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

[s 459.1]CrPC (Amendment) Act, 2005—*Clause 41*.—

This clause seeks to make a consequential amendment in section 459 of the Code. A new proviso which is being added in sub-section (3) of section 102 of the Code seeks to empower the police to sell perishable property upto a value of Rs 500. As per the existing provisions of section 459, the Magistrate is empowered to sell perishable property of the value of less than Rs 10 only. As a result, police has been given concurrent jurisdiction in the matter with the Magistrate. (*Notes on Clauses*).

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96. Subs. for "less than ten rupees" by the CrPC. (Amendment) Act, 2005, section 41 (w.e.f. 23-6- 2006 *vide* Notification. No. SO 923(E), dated 21-6-2006).

The Code of Criminal Procedure, 1973

CHAPTER XXXV IRREGULAR PROCEEDINGS

[s 460] Irregularities which do not vitiate proceedings —

If any Magistrate not empowered by law to do any of the following things, namely:—

(a) to issue a search-warrant under section 94;

(b) to order, under section 155, the police to investigate an offence;

(c) to hold an inquest under section 176;

(d) to issue process under section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190;

(f) to make over a case under sub-section (2) of section 192;

(g) to tender a pardon under section 306;

(h) to recall a case and try it himself under section 410; or

(i) to sell property under section 458 or section 459,

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

COMMENTS

This section cures nine kinds of irregularities, provided they are caused erroneously and in good faith. A further qualification is implied, though it is not expressly stated in the section, *viz*, they should not occasion a failure of justice.[1.] The section deals with acts done by a Magistrate in no way empowered by law to do those acts; it has no reference to a Magistrate empowered otherwise under the Act to do an act but not possessing jurisdiction over the offence.[2.]

Where a Magistrate holds the trial of a warrant case in a manner prescribed for that of a summons case, the trial is bad.[3.] See also section 259.

[s 460.1] *De novo* trial when to be ordered.—

The set of provisions from sections 460–466 recognises the possibility of irregularity in proceedings and that proceedings are to be quashed only on demonstration of failure of justice. Normally, a *de novo* trial should not be ordered.[4.] While ordering *de novo* trial, the appellate Court should have regard to its impact upon the pending cases as well as hardship caused to persons who had to depose their versions before the Court. The Supreme Court explained the circumstances in which such trial can be ordered:

> A *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial. This is because the appellate Court has plenary powers for re-evaluating and reappraising the evidence and even to take additional evidence by the appellate Court itself or to direct such additional evidence to be collected by the trail court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the Court once again for repeating the whole deposition would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior Court which orders a *de novo* trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how must that order would inflict hardship on many innocent persons who once took all the trouble to reach the Court and deposed their versions in the very same case. To them and the public the reenactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.

Section 465 of the Code falls within Chapter XXXV under the caption "Irregular Proceedings". The entire purport of the provisions subsumed in Chapter XXXV is to save the proceedings linked with erroneous steps, unless the error is of such a nature that it had occasioned a failure of justice. Section 465(1) makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any inquiry was 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.

[s 460.2] Clause (e) —

If any Magistrate not empowered by law to take cognizance of an offence under section 190(1)(a) or (b) erroneously but in good faith does take cognizance, the proceedings will not be set aside merely on the ground of his not being so empowered.[5.]

[s 460.3] Clause (f) —

Transfer of a case.[6.]

[s 460.4] Clause (g) —

Tender of pardon.[7.]

Where an investigation was in breach of the provision in section 167(5), it was held that subsequent proceedings would be bad if the Magistrate has not taken the step he was bound to take under that section. Section 460 or section 465 cannot cure such defect.[8.] Investigation made without an order under section 155(2) is not curable under section 460.[9.] Where a

Magistrate took cognizance of a private complaint for defamation on police report, the whole proceedings were not vitiated due to erroneous cognizance. The defect could be cured by section 460.[10.] Where a case was committed to Session in the absence of an

accused charged of an offence under section 307 of the Indian Penal Code (IPC), it was held that even though the Court of Session tried the case without referring the matter to the High Court, it was not vitiated.[11.]

In a case of tender of pardon to an accomplice under the Prevention of Corruption Act, 1988, where during investigation of the case, the Magistrate granted pardon under section 306 of CrPC even after the appointment of Special Judge under the Act, it was held by the Supreme Court that it was a curable irregularity which does not vitiate the proceedings. It has to be borne in mind that both the Special Judge and the Magistrate have concurrent jurisdiction to grant pardon during investigation.[12.]

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1. *Lalit Chandra Chanda Chowdhury v Emperor*, (1912) ILR 39 Cal 119, 127.
2. *Queen-Empress v Chidda*, (1897) 20 All 40 , 41.
3. *Manak Lal*, (1954) Raj 109 .
4. *State of MP v Bhoomraji*, (2001) 7 SCC 679 : AIR 2001 SC 3372 : 2001 Cr LJ 4228 : JT 2001 (7) SC 55 : 2001 (5) Scale 423 .
5. *Maqbuluddin v Rex*, (1950) All 1113 : AIR 1950 All 5 .
6. *Kishori Lal Roy v Srinath, Kishori Lal Roy v Srinath Roy*, (1909) ILR 36 Cal 370; *Dasarath Rai v Emperor*, (1909) ILR 36 Cal 869; *Emperor v Babu Hasanali*, (1928) 30 Bom LR 653 .
7. *Chidda, supra*. *A Devendran v State of TN*, (1997) 11 SCC 720 : AIR 1998 SC 2821 : 1998 Cr LJ 814 , pardon granted to approver by the CJM after committing him to the Court of session was held to be without jurisdiction. The irregularity was not curable.
8. *Raj Singh v State*, 1985 Cr LJ NOC 41 (Del).
9. *Avinash Madhukar Mukhedkar v State of Maharashtra*, 1983 Cr LJ 1833 (Bom).
10. *Abdul Ameez Khan v State of Karnataka*, 1979 Cr LJ NOC 182 (Knt).
11. *Kamlesh Kumar Dixit v State of UP*, 1981 Cr LJ NOC 92 (All).
12. *PC Mishra v State (CBI),* AIR 2014 SC 1921 : (2014) 14 SCC 629 .

The Code of Criminal Procedure, 1973

CHAPTER XXXV IRREGULAR PROCEEDINGS

[s 461] Irregularities which vitiate proceedings —

If any Magistrate not being empowered by law in this behalf, does any of the following things, namely:—

(a) attaches and sells property under section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under section 133 as to a local nuisance;

(i) prohibits, under section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub-section (1) of section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under section 397, for proceedings; or

(q) revises an order passed under section 446,

his proceedings shall be void.

COMMENTS

This section enumerates 17 kinds of irregularities which render proceedings void. No question of error or good faith arises here. In other words, they are illegalities which vitiate the proceedings. Such proceedings have no existence in point of law: they need not be set aside by a superior Court.[13.] This means, the Magistrate has no initial jurisdiction to try the matter.

[s 461.1] Clause (j) —

This clause refers to a case where a Magistrate is not competent, by virtue of the position he holds or powers vested in him, to try a case of the character referred to in section 144 or section 145.[14.] The cardinal principle of law in criminal trial is that it is the right of an accused that he should be tried by a judge who is competent. If an incompetent Magistrate records the evidence, the successor Court cannot proceed from that stage onwards but must try the case *de novo*.[15.] Where a Magistrate took cognizance under section 190(1)(c) on the basis of a complaint lodged by himself under section 195(b)(i), it was held that the entire proceedings resulting in an order of conviction and sentence was liable to be quashed because the complainant could not be a judge in his own cause.[16.]

Where successor Magistrate under section 326(3) of the Code appreciated the evidence in case by his predecessor in a summary trial and recorded a finding, it was held by the Supreme Court that it is not a case of irregularity but want of competency and as such the defect cannot be cured under section 465 of the Code.[17.]

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13. *Queen-Empress v Husein Gaibu*, (1884) 8 Bom 307; *Abdul Ghani v Emperor*, (1902) ILR 29 Cal 412.
14. *Raj Mohan Roy Chowdhury v Prosunno Chandra Chatterji*, (1901) 5 Cal WN 686.
15. *Ramdas Kelu Naik v VM Muddayya*, 1978 Cr LJ 1043 (Knt).
16. *Harekrishna Sahu v State of Orissa*, 1986 Cr LJ 691 (Ori).
17. *Nitinbhai Saevatilal Shah v Manubhai Manjlbhai Panchal*, AIR 2011 SC 3076 : (2011) 9 SCC 638 : (2011) 3 SCC (Cri) 788 .

The Code of Criminal Procedure, 1973

CHAPTER XXXV IRREGULAR PROCEEDINGS

[s 462] Proceedings in wrong place —

No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area unless it appears that such error has in fact occasioned a failure of justice.

COMMENTS

The object of sections 462 to 466 is to uphold, in most cases, the orders passed by Criminal Courts which lacked local jurisdiction or which had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned thereby.[18.] Where a personnel of Bihar Military Police was tried at Patna for the offence of deserting in Kashmir, the Supreme Court held that the trial at Patna was not vitiated as there was no failure of justice on account of the trial having been conducted in Patna, particularly where there was no allegation of failure of justice.[19.] It will be observed that the key-note of this and the following sections is "failure of justice".[20.]

An order which is void for want of jurisdiction must nevertheless be regarded as valid unless it is set aside by a Court of competent jurisdiction. A conviction for an offence tried summarily though not triable by a summary procedure stands until it is set aside in revision.[21.]

This section applies solely to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in the wrong local area. Sections 177, 179, 180, 181, 182 and 183 should be read with this section. The manifest intention of this section is to provide against the contingency of a finding, sentence or order, regularly passed by a Court in the case of an offence committed outside its local area, being set aside when no failure of justice has taken place.[22.]

[s 462.1] "Sessions division, district, sub-division or other local area"—

Means those to which the CrPC applies. They have no reference to local area, *etc*., in a foreign country to which the Code has no application.[23.]

18. *Acharaja Singh v Emperor*, (1936) 15 Pat 418 : AIR 1936 Pat 410 ; *Queen-Empress v Fazl Azim*, (1894) 17 All 36 , 38 (FB); *Re Husen Abdul Rahiman*, (1914) 16 Bom LR 84 : AIR 1914 Bom 3 .

19. *Nasiruddin Khan v State of Bihar*, AIR 1973 SC 186 : 1973 Cr LJ 241 : (1973) 3 SCC 79 .
20. *Re Ganapathy Chetty*, (1919) 42 Mad 791, 793; *Lalit Chandra Chanda Chowdhury v Emperor*, (1912) ILR 39 Cal 119, 127; *Birju Marwari v Emperor*, (1921) 44 All 157 , 159 : AIR 1922 All 387 ; *Mohd Maroof v State through Collector*, 1969 Cr LJ 533 .
21. *Haji Mohammad Hanif v The State*, (1951) ILR Nag 328.
22. *Doraiswamy Mudali*, (1906) 30 Mad 94, 95.
23. *Bichitranund Das v Bhugbut Perai*, (1889) 16 Cal 667 , 676.

The Code of Criminal Procedure, 1973

CHAPTER XXXV IRREGULAR PROCEEDINGS

[s 463] Non-compliance with provisions of section 164 or section 281 —

(1) **If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.**

(2) **The provisions of this section apply to Courts of appeal, reference and revision.**

COMMENTS

Owing to the extremely delicate nature of statements and confessions, the law has deliberately hedged salutary safeguards (sections 164 and 281) round them. Non-observance of those requirements may result in having the statements or confessions ruled out of evidence. This section has, however, been enacted in order that technicalities may not succeed in defeating the ends of justice. It has been held that the object of the provision is to enable the Court to take evidence in regard to any non-compliance and to act on such evidence if the Court is satisfied that such non-compliance has not injured the accused in his defence on the merits. Since caution to the confessor, before recording his confession, that he was not bound to make such a confession had been administered by the police officer concerned, resort to said section not felt necessary in *Nazir Ahmad Bhatt v State of Delhi*.[24.]

This section permits oral evidence to be given to prove that the procedure laid down in section 164 had in fact been followed when the Court finds that the record produced before it does not show that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted.[25.] The Law Commission has said that the Magistrate should comply with the substantial provisions of section 164 and there can be no saving on that account. If such compliance is not apparent from the record, it can be proved otherwise, that is by the application of the provisions of this section.

This section cures the irregularity where a confession is made in one language and is recorded in another.[26.] According to section 29 of the Evidence Act, 1872, a confession otherwise admissible does not become inadmissible because the accused person was not warned that he was not bound to make it and that it would be used as evidence against him. By application of section 463 of the Code, the above irregularity can be cured.[27.] While recording the confession statement under section 164, some questions put to the accused were not recorded by the Magistrate. It was held that it was the duty

of the Sessions Judge to look into it and find out whether such omission had prejudiced the accused.[28.]

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24. *Nazir Ahmad Bhatt v State of Delhi*, (2002) 1 SCC 674 : 2002 SCC (Cr) 234 : AIR 2002 SC 30 : 2002 Cr LJ 213 .
25. *State of Uttar Pradesh v Singhara Singh*, AIR 1964 SC 358 , 362 : (1964) 1 Cr LJ 263 (2).
26. *Emperor v Deo Dat*, (1923) ILR 45 All 166; *Vishram Babaji*, (1896) 21 Bom 495; *Raghu*, (1898) 23 Bom 221; *Lalchand v Queen-Empress*, (1891) 18 Cal 549 ; *Sagal Samba Sajalo*, (1893) 21 Cal 642 . **See**, contra *Nilmadhub Mitter*, (1888) 15 Cal 595 (FB); *Queen-Empress v Viran,* (1886) 9 Mad 224; *Ambaji Majhi v The State*, 1966 Cr LJ 851 .
27. *Jotish Roy v State of Orissa*, 1982 Cr LJ 269 (Ori).
28. *Philips v State of Karnataka*, 1980 Cr LJ 171 (Knt).

The Code of Criminal Procedure, 1973

CHAPTER XXXV IRREGULAR PROCEEDINGS

[s 464] Effect of omission to frame, or absence of, or error in, charge —

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

(2) **If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned it may—**

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

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

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

COMMENTS

Omission to frame a charge [section 246(1)] or any error, omission or irregularity in the charge including any misjoinder of charges will be a ground for a retrial, if it has occasioned a failure of justice.[29.] The phrase "merely on the ground that no charge was framed" means a case where the offence being a petty one and the evidence being fairly taken, the Court framed no charge at all.[30.] The first sub-section applies to cases where there is no charge at all, or the offence is not of a serious nature, or in which the offence charged is of such a nature that there is no difference between the ingredients of that offence and the ingredients of the offence of which the accused has been convicted, or the offence charged comprises all the ingredients of the offence of which the accused has been found guilty and some more.[31.] The real test always is to find out whether the accused has been prejudiced.[32.]

[s 464.1] "Any error, omission or irregularity in the charge including any misjoinder of charges" —

Any mere error, omission or irregularity in the charge will not invalidate the finding as a matter of law in the absence of prejudice to the convicted person.[33.] Where the charge by referring to various sections of the IPC made clear the objects of conspiracy, the charge was fully understood by the applicants and they never complained at the appropriate stage that they were confused or bewildered, it was held that the charge

was proper.[34.] Even vagueness of the charge will not make the trial illegal when no prejudice is caused to the accused.[35.] In a case under section 161 of IPC, where the accused, a public servant, was prosecuted for taking bribe and in the charge there was omission to indicate the other public servant with whom service or disservice would be rendered, it was held that it would mean there is a defect in the charge which would be curable under this section.[36.]

If a charge of conspiracy to commit criminal breach of trust is followed by a substantive charge of criminal breach of trust in pursuance of such conspiracy, there is nothing to prevent the Court convicting the accused under the second charge even if the prosecution fails to establish conspiracy. Furthermore, there could not be said to be any prejudice as the accused was aware of the substantive charge under section 409.[37.] Misjoinder of charges is saved under this clause. It is merely an irregularity and not an illegality unless, of course, it has occasioned a failure of justice.[38.] Section 464(1) or section 465 of the Code does not supersede the mandate of section 218(1) but only cures the illegality where the trial has been concluded without any failure of justice on account of such misjoinder. Where consolidation of trials for different offences was done and there was no application by the accused for such consolidation, subsequent letter by him giving his consent to such joint trial was held to be enough to cure the defect.[39.] Where an accused with one other was charged for offences under section 302 read with section 34 and the co-accused was acquitted, irregularity in framing the charge, held, was curable.[40.] Defect in a notice or order under section 111, it was held, does not vitiate the proceedings under section 107 of the Code, if no prejudice is caused to the accused.[41.] A misjoinder of several charges of dacoity was a curable irregularity and it was held that a conviction could not be set aside unless the misjoinder has occasioned a failure of justice.[42.] Where a minor defect was pointed out in the charge in a murder and riot case, it was held that if no prejudice was caused thereby to the accused and no failure of justice was occasioned, no finding, sentence or order should become invalid for such a defect.[43.]

Where an accused was charged of various offences including one under section 302 of IPC read with section 149 but no specific and separate charge under section 302 of IPC was made but he was convicted under that section, it was held that the accused had been prejudiced in his defence and therefore conviction as well as sentence was set aside.[44.]

Where an accused was convicted of murder, without being charged under section 302 read with section 34 of IPC, it was argued before the Supreme Court that the injury caused by the said accused was sufficient to cause death, he cannot be convicted under section 302 of IPC simplicitor. It was observed by the Supreme Court that the appellant has been unable to show what prejudice has been caused to him, when he was fully aware of the facts of the case and what he was being tried for. It was observed that the expression "failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case.[45.]

[s 464.2] Rectification of failure of justice [*Sub-section (2)*].—

The sub-section comes into effect when, in the opinion of the Court of appeal, confirmation or revision, there is a failure of justice due to (a) omission to frame a charge, or (b) error, omission or irregularity in framing it. In the former case, the Court may order a charge to be framed and trial recommenced from that stage.[46.] In the second case, a new trial may be ordered. The provision is not mandatory.

[s 464.3] Court of competent Jurisdiction —

It was held that where on dismissing the complaint and discharging the accused for non-appearance of the complainant, the Magistrate had no jurisdiction to restore the complaint to his file by revoking his earlier order just because the complainant had appeared within a few minutes of the passing of the order.[47.]

The proviso makes it obligatory upon the Court to quash a conviction if it comes to the conclusion on the facts of a particular case that no valid charge could be preferred against the accused.

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29. *Gurdu*, (1880) 3 All 129 ; *Madhab Chandra Saha v Emperor*, (1926) ILR 53 Cal 738 : AIR 1926 Cal 1202 . **See** *Chittaranjan Das v The State of West Bengal*, AIR 1963 SC 1696 : (1963) 2 Cr LJ 534 . *Lallan Rai v State of Bihar*, (2003) 1 SCC 268 : 1999 Cr LJ 1134 , the non-framing of a charge under a particular section would not vitiate a conviction under that section if no prejudice was caused to the accused. The Court said: On interpretation of section 464 CrPC, it was observed in *Kammari v Public Prosecutor, High Court of AP case*, (1999) 2 SCC 522 : AIR 1999 SC 775 : 1999 Cr LJ 1134 : JT 1999 (1) SC 259 that non-framing of a charge would not vitiate the conviction if no prejudice is caused thereby to the accused. Procedural law is the handmaid of justice and the CrPC is no exception thereto. Its incorporation in the statute-book has been to sub serve the ends of justice and non-observance of the technicalities does not and cannot frustrate the concept of justice since technicality alone would not outweigh the course of justice. In the event, however, there being prejudice leading to a failure of justice, it cannot but be treated to be in illegality, which is otherwise incurable in nature. *Kammari Brahmaiah v PP HC of AP*, AIR 1999 SC 775 : (1999) 2 SCC 552 : 1999 Cr LJ 1134 : JT 1999 (1) SC 259 , omission to frame charge under a particular section, though conviction based on it, no prejudice was shown to have been caused to accused persons, it did not effect their conviction.

30. *Sita Ahir v Emperor*, (1913) 40 Cal 168 , 171.

31. *Ramchandra Bhairu v The State of Maharashtra*, (1971) 73 Bom LR 811 : 1972 Cr LJ 938 .

32. *Kantilal v The State of Maharashtra*, AIR 1970 SC 359 : 1970 Cr LJ 510 : (1969) 3 SCC 166 .

33. *Mepa Dana v The State of Bombay*, AIR 1960 SC 289 : 1960 Cr LJ 424 ; *Teeka v State of Uttar Pradesh*, AIR 1961 SC 803 : (1961) 1 Cr LJ 859 ; *Ramesh Chandra v The State*, AIR 1960 SC 154 : 1960 Cr LJ 177 ; *State of Bombay v Umarsaheb*, AIR 1962 SC 1153 : (1962) 2 Cr LJ 259 ; *Kamil v State of Uttar Pradesh*, AIR 2019 SC 45 .

34. *Tulsi Ram v The State of UP*, AIR 1963 SC 666 : (1963) 1 Cr LJ 623 .

35. *RK Dalmia v Delhi Administration*, AIR 1962 SC 1821 : (1962) 2 Cr LJ 805 .

36. *State of Maharashtra v Jagat Singh*, AIR 1964 SC 492 : (1964) 1 Cr LJ 432 .

37. *Madan Lal*, AIR 1967 SC 1401 : (1967) 2 SCr 751 .

38. *Brichh Bhufar v State of Bihar*, AIR 1963 SC 1120 : (1963) 2 Cr LJ 190 .

39. *Manoharlal Lohe v State of MP*, 1981 Cr LJ 1563 (MP).

40. *Mynathil Mathai v State of Kerala*, 1983 Cr LJ NOC 25 (Ker); *See also Kuldip Sham v State of Punjab* 1980 Cr LJ 71 (P&H).

41. *Purnananda Behera v Sunakar Singh*, 1982 Cr LJ NOC 154 (Ori).

42. *Rahmat v State of UP*, 1980 Cr LJ 581 (All); *See also Kailash Gir v VK Khare*, *Food Inspector*, 1981 Cr LJ 1555 (MP—DB).

43. *Mirza v State of UP*, 1996 Cr LJ 472 (All).

44. *Dal Chand v State*, 1982 Cr LJ 1477 (Del); *Taga v State of Rajasthan*, 1977 Cr LJ NOC 240 (Raj).

45. *Darbara Singh v State of Punjab*, AIR 2013 SC 840 *Sanichar Sahni v State of Bihar*, AIR 2010 SC 3786 : (2009) 7 SCC 198 —Rel. on.

46. *Kantilal v The State of Maharashtra*, AIR 1970 SC 359 : 1970 Cr LJ 510 : (1969) 3 SCC 166 .

47. *Chunilal Bhuiya v Bikash Bhuiya*, 1988 Cr LJ 791 (Gau).

The Code of Criminal Procedure, 1973

CHAPTER XXXV IRREGULAR PROCEEDINGS

[s 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 or 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.**

COMMENTS

This section applies to a case where something irregular takes place at a regular trial. It does not apply where the trial is illegal from start to finish.[48.] There are always chances for honest errors or harmless omissions or innocent irregularities to creep in at any trial or proceeding. These are quite innocuous, if they do not occasion "a failure of justice" as a matter of fact. They are here classified into two categories: (1) error, omission or irregularity in any step of a trial, inquiry or proceeding; (2) any error, or irregularity in any sanction for the prosecution of any person. They do not enable a Court of confirmation or appeal or revision to interfere with any finding, sentence or order. To put it shortly, a mere irregularity in procedure is not ordinarily sufficient to avoid a trial. It should, however, only be "one of form and not of substance".[49.] Mere non-examination or defective examination under section 313 is not a ground for interference unless prejudice is established. Non-examination of the complainant also cannot be made a ground to set aside the order issuing process as no prejudice is caused to the accused.[50.]

The disobedience, however, to an express provision as to a mode of trial cannot be classed as a mere irregularity.[51.] "There is a distinction between a case in which the trial itself is contrary to law, in which event it is not a trial at all under the Code, and a case in which the trial is one within the jurisdiction of the Magistrate and irregularities occur in the method of conducting it. In the latter case the provisions of section 465 are applicable and the finding can only be reversed if the irregularity has in fact occasioned a failure of justice".[52.] It is not a universal rule that omission to comply with an express[53.] or mandatory[54.] provision of the Code must always vitiate the trial irrespective of any question of prejudice to the accused or other party. The impugned procedure must be one that is not only prohibited by the Code but also works an actual

injustice to the accused.[55.] Where a search is made in contravention of sub-sections (1) and (2) of section 15 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 [Now Immoral Traffic (Prevention) Act, 1956], the trial cannot be said to be illegal in the absence of any prejudice caused by such non-compliance.[56.] Similarly, where investigation is conducted and a trap is laid by the Inspector of Police, ie, an officer below the rank of a Deputy Superintendent of Police as required by law, the same will not vitiate the trial unless it is shown that there has, in fact, been a miscarriage of justice.[57.]

The Code does not provide that irregularity in investigation would vitiate inquiry or trial. Investigation is certainly not inquiry or trial before the Court.[58.] But where as in section 155(2) the order of the Magistrate is a condition precedent for investigation in the case of non-cognizable offences, and the police *suo motu* investigate the same, it is an irregularity which cannot be cured under this section.[59.]

When a trial is conducted in a manner different from that prescribed by the Code, the trial is bad, and no question of curing an irregularity arises,[60.] but if the trial is conducted substantially in the manner provided by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under this section and nonetheless so because the irregularity involves a breach of one or more of the provisions of the Code.[61.]

Mere affixing of initials where a signature is required by statute in a warrant would, at best, amount to an irregularity curable under this section.[62.]

[s 465.1] "A Court of competent jurisdiction" —

A further explanation of the expression "Court of competent jurisdiction" occurs in a judgment of the Supreme Court as follows:

There is no substance in the contention that section 465 is restricted to any findings, sentence or order passed by "a Court of competent jurisdiction" and that a Special Court under the SC/ST Act which is essentially a Session Court would have remained incompetent until the case is committed to it. The expression "a Court of competent jurisdiction" envisaged in section 465 is to denote a validly constituted Court conferred with jurisdiction to try the offence or offences. Such a Court will not get denuded of its competence on account of any procedural lapse. Its competence would remain unaffected by the fact of non-compliance with the procedural requirement. The inability to take cognizance of an offence without a committal order does not mean that a duly constituted Court became an incompetent Court for all purposes. If an objection was raised in that Court at the earliest occasion on the ground that the case should have been committed by a Magistrate, the same specified Court has to exercise a jurisdiction either for sending the records to a Magistrate for adopting committal proceedings or return the police report to the Public Prosecutor or the Police for presentation before the Magistrate. Even this Court be done only because the Court has competence to deal with the case.

...The bar against taking cognizance of certain offences or by certain Courts cannot govern the question whether the Court concerned is "a Court of competent jurisdiction", e.g., Courts are debarred from taking cognizance of certain offences without sanction of certain authorities. If a Court took cognizance of such offences, which were later found to be without valid sanction, it would not become the test or standard for deciding whether that Court was "a Court of competent jurisdiction". It is now well settled that if the question of sanction was not raised at the earliest opportunity, the proceedings would remain unaffected on account of want of sanction. This is another example to show that the condition precedent for taking cognizance is not the

standard to determine whether the Court concerned is "a Court of competent jurisdiction".[63.]

[s 465.2] "Unless...a failure of justice has in fact been occasioned thereby" —

The Privy Council has expressly laid down in *Abdul Rahman's* case[64.] that the bare fact of an omission or irregularity unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to quash a conviction, which may be supported by curative provisions of section 464 and this section. Failure of justice does not merely mean any erroneous decision. When the procedure which would give a person affected a better opportunity to clear the position has not been followed, it would be a case of failure of justice.[65.]

[s 465.3] Failure of justice [*sub-section (2)*].—

An order issuing the process before the filing of a list of witnesses cannot be set aside unless the Court finds that it has resulted in failure of justice.[66.] Non-compliance with sections 232 and 233 would not vitiate a trial unless prejudice was caused to the accused.[67.] In an appeal before the Supreme Court, where it was contended that failure of the High Court to summon the record of the Sessions Court was vital and hence decision of the High Court should be set aside, the Court held that neither the complainant nor the Advocate-General had raised any objection and assuming that there were some irregularities in the procedure, the decision of the High Court could not be set aside unless it was shown by the appellant that there had been failure of justice as envisaged by section 465.[68.] Where the order of withdrawal of a case was held to be non-sustainable, yet the High Court refused to reverse the order as no injustice was occasioned by the order as the offences were punishable in maximum up to three years' imprisonment and the trial of the accused had remained pending for more than that period.[69.]

[s 465.4] Special Court —

A Session Court was specified as a special Court under the SC & ST (Prevention of Atrocities) Act, 1989. It was held that a Session Court continues to be a Session Court even after being specified as a special Court. A conviction was set aside because of the technical ground after the trial was over (rape case). This was held to be not proper. It defeated the object of section 465.[70.]

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48. *Lilabati Kanjilal v The State*, 1966 Cr LJ 838 .

49. *Queen-Empress v Appa Subhana Mendre*, (1884) 8 Bom 200, 211; *Bibhuti v The State of West Bengal*, AIR 1969 SC 381 : 1969 Cr LJ 654 ; *Makan v The State of Gujarat*, AIR 1971 SC 1797 : 1971 Cr LJ 1310 : (1971) 3 SCC 297 .

50. *Durvasa v Chandrakala*, 1994 Cr LJ 3765 (Knt).
51. *Per LORD HALSBURY LC in Subramania Iyer*, (1901) 3 Bom LR 540 , 541 : 28 IA 257, 263 : 25 Mad 61.
52. *Emperor v Tribhovandas*, (1902) 26 Bom 533, 537 : 4 Bom LR 271; *Chittaranjan v State of West Bengal*, AIR 1963 SC 1696 : (1963) 2 Cr LJ 534 .
53. *Sukhdeo Prasad Tiwari v Emperor*, (1936) 16 Pat 97 : AIR 1938 Pat 55 .
54. *Alimahomed v Kasturchand*, (1938) 41 Bom LR 90 : AIR 1939 Bom 89 .
55. *Re Ramaraja Tevan*, (1930) 53 Mad 937 : AIR 1930 Mad 857 ; *Maganlal v King-Emperor*, (1946) Nag 126.
56. *Bai Radha v The State of Gujarat*, AIR 1970 SC 1396 : 1970 Cr LJ 1279 : (1969) 1 SCC 43 .
57. *Dr MC Sulkunte v State of Mysore*, AIR 1971 SC 508 , 511 : 1971 Cr LJ 519 : (1970) 3 SCC 513 ; *State of Andhra Pradesh v PV Narayana*, AIR 1971 SC 811 : (1971) 1 SCC 483 : 1971 Cr LJ 676 ; *AC Sharma v Delhi Administration*, AIR 1973 SC 913 : (1973) 1 SCC 726 ; *Durga Dass v State of Himachal Pradesh*, AIR 1973 SC 1379 : 1973 Cr LJ 1138 : (1973) 2 SCC 213 .
58. *Niranjan Singh v The State of Uttar Pradesh*, (1956) 2 All 745 : AIR 1957SC 142 : 1957 Cr LJ 294 .
59. *Podan v The State of Kerala*, (1962) 1 Cr LJ 339 ; *Lal Chand Fateh Chand*, (1964) 2 Cr LJ 115 ; *Subodh Singh v The State*, 1974 Cr LJ 185 .
60. *Ismail Rasul Shaikh v The State of Gujarat*, (1964) 5 Guj LR 526.
61. *Pulukuri Kottaya v King-Emperor*, (1946) 49 Bom LR 508 : 74 IA 65.
62. *Daitari v The State*, (1956) Cut 50.
63. *State of MP v Bhooraji*, (2001) 7 SCC 679 : 2001 SCC (Cr) 1373.
64. (1926) 54 IA 96 : 29 Bom LR 813; *Kisan Singh v The State of Bombay*, AIR 1961 Bom 124 : 1961 Cr LJ 628 .
65. *Re K Nagayya*, (1962) 2 Cr LJ 719 .
66. *Kanhu Ram v Durga Ram*, 1980 Cr LJ 518 (HP).
67. *Hanif Banomiya Shikalkar v State of Maharashtra*, 1981 Cr LJ 1622 (Bom).
68. *Hanumant Dass v Vinay Kumar* and *HP v Vinay Kumar*, 1982 Cr LJ 977 : AIR 1982 SC 1052 .
69. *T Anand Rao v State of Karnataka*, 1993 Cr LJ 1012 (Knt).
70. *State of HP v Gita Ram*, AIR 2000 SC 2940 : 2000 Cr LJ 515 : (2000) 7 SCC 452 .

The Code of Criminal Procedure, 1973

CHAPTER XXXVI LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

The general rule prescribed in the maxim *nullum tempus occurrit regi*—lapse of time does not bar the right of the Crown—shows that, in general, the rule of equity, *vigilantibus et non dormientibus jura subveniunt* (the law assists those that are vigilant with their rights and not those that sleep thereupon), does not apply to the Crown. The prosecution in criminal matter is generally launched by the State, as a criminal offence is considered an injury caused not only to the person but also to the society. In *Asst Customs Collector, Bombay v LR Melwani*,[1.] the Supreme Court said: "The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint". However, long delay on the specious plea of *nullum tempus occurrit regi* (no time runs against the king) may lead to serious negligence on the part of the inquiring and prosecuting agencies, forgetfulness on the part of prosecution and defence witnesses and unnecessary mental anguish to the person accused. What is more, infliction of punishment long after the commission of offence impairs its utility as social retribution to the offender.

This Chapter comprising of sections 467 to 473 has been newly added to obviate this lacuna. It prescribes different periods of limitation for taking cognizance depending upon the gravity of the offence (section 468). The Joint Committee of Parliament said: "At present, there is no period of limitation for criminal prosecution and a Court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been provided for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission". Section 469 lays down as to when the period of limitation should begin to run in relation to an offence. Section 470 prescribes certain rules regarding exclusion of time while computing the period of limitation. Section 471 provides for the exclusion of the day when the Court is closed. Section 472 lays down the period of limitation in cases of continuing offences. The last section in the Chapter, *viz.* section 473, lays down as to when the period of limitation may be extended on a proper explanation of the delay or in the interests of justice.

[s 467] Definitions —

For the purposes of this Chapter, unless the context otherwise requires, "period of limitation" means the period specified in section 468 for taking cognizance of an offence.

COMMENTS

The Court cannot take cognizance of an offence before condoning the delay and an order condoning the delay can be passed *ex parte*.[2.]

A two-Judge Bench in *Sarah Mathew v Institute of Cardio Vascular Diseases*[3.] noted the difference of opinion between a two-Judge Bench decision of the Supreme Court in

Bharat Damodar Kale v State of Andhra Pradesh[4] which is followed in another two-Judge Bench decision in *Japani Sahoo v Chandra Sekhar Mohanty*[5] and a three-Judge Bench decision in *Krishna Pillai v TA Rajendran.*[6] In *Bharat Kale,*[7] it was held that for the purpose of computing the period of limitation, the relevant date is the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of a process by Court. In *Krishna Pillai,*[8] this Court was concerned with section 9 of the Child Marriage Restraint Act, 1929, which stated that no Court shall take cognizance of any offence under the Child Marriage Restraint Act, 1929, after the expiry of one year from the date on which the offence is alleged to have been committed. The three-Judge Bench had held that since Magisterial action in the case before it was beyond the period of one year from the date of commission of the offence, the Magistrate was not competent to take cognizance when he did in view of bar under section 9 of the Child Marriage Restraint Act, 1929. Thus, there was apparent conflict on the question whether for the purpose of computing the period of limitation under section 468 of the Code of Criminal Procedure, 1973 (for short "the CrPC") in respect of a criminal complaint, the relevant date is the date of filing of the complaint or the date of institution of prosecution or whether the relevant date is the date on which a Magistrate takes cognizance. The matter was referred to a three-Judge Bench who in turn referred it to a five-Judge Bench.[9]

The Constitution Bench[10] was thus seized of the following two questions—

> A. Whether for the purposes of computing the period of limitation under Section 468 of the CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution or whether the relevant date is the date on which a Magistrate takes cognizance of the offence?
>
> B Which of the two cases i.e. Krishna Pillai[11] or Bharat Kale[12] (which is followed in Japani Sahoo[13]) lays down the correct law.

It was held that for the purpose of computing the period of limitation under section 468 of the CrPC, the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that *Bharat Kale* which is followed in *Japani Sahoo* lays down the correct law. *Krishna Pillai* will have to be restricted to its own facts and it is not the authority for deciding the question as to what the relevant date for the purpose of is computing the period of limitation under section 468 of the CrPC.

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1. *Asst Customs Collector, Bombay v LR Melwani*, AIR 1970 SC 962 , 965 : 1970 Cr LJ 885 .
2. *Ladder Siddabasappa v State of Karnataka*, 1988 Cr LJ 213 (Kant).
3. *Sarah Mathew v Institute of Cardio Vascular Diseases,* (2014) 2 SCC 102 .
4. *Bharat Damodar Kale v State of Andhra Pradesh,* (2003) 8 SCC 559 : AIR 2003 SC 4560 : 2003 Cr LJ 4543 : JT 2003 (Suppl 2) SC 569 : 2003 (8) Scale 392 .
5. *Japani Sahoo v Chandra Sekhar Mohanty,* (2007) 7 SCC 394 : AIR 2007 SC 2762 : 2007 Cr LJ 4068 : JT 2007 (9) SC 471 : 2007 (9) Scale 400 .
6. *Krishna Pillai v TA Rajendran,* (1990) Supp. SCC 121 .
7. *Supra*.
8. *Supra*.
9. *Sarah Mathew v Institute of Cardio Vascular Diseases,* (2014) 2 SCC 104 .

10. *Sarah Mathew v Institute of Cardio Vascular Diseases*, (2014) 2 SCC 62 : AIR 2014 SC 448 : 2014 Cr LJ 586 : JT 2013 (15) SC 97 : 2013 (14) Scale 404 .
11. *Supra*.
12. *Supra*.
13. *Supra*.

The Code of Criminal Procedure, 1973

CHAPTER XXXVI LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

The general rule prescribed in the maxim *nullum tempus occurrit regi*—lapse of time does not bar the right of the Crown—shows that, in general, the rule of equity, *vigilantibus et non dormientibus jura subveniunt* (the law assists those that are vigilant with their rights and not those that sleep thereupon), does not apply to the Crown. The prosecution in criminal matter is generally launched by the State, as a criminal offence is considered an injury caused not only to the person but also to the society. In *Asst Customs Collector, Bombay v LR Melwani*,[1.] the Supreme Court said: "The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint". However, long delay on the specious plea of *nullum tempus occurrit regi* (no time runs against the king) may lead to serious negligence on the part of the inquiring and prosecuting agencies, forgetfulness on the part of prosecution and defence witnesses and unnecessary mental anguish to the person accused. What is more, infliction of punishment long after the commission of offence impairs its utility as social retribution to the offender.

This Chapter comprising of sections 467 to 473 has been newly added to obviate this lacuna. It prescribes different periods of limitation for taking cognizance depending upon the gravity of the offence (section 468). The Joint Committee of Parliament said: "At present, there is no period of limitation for criminal prosecution and a Court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been provided for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission". Section 469 lays down as to when the period of limitation should begin to run in relation to an offence. Section 470 prescribes certain rules regarding exclusion of time while computing the period of limitation. Section 471 provides for the exclusion of the day when the Court is closed. Section 472 lays down the period of limitation in cases of continuing offences. The last section in the Chapter, *viz.* section 473, lays down as to when the period of limitation may be extended on a proper explanation of the delay or in the interests of justice.

[s 468] Bar to taking cognizance after lapse of the period of limitation —

(1) **Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.**

(2) **The period of limitation shall be—**

- **(a) six months, if the offence is punishable with fine only;**
- **(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;**
- **(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.**

[14][(3) **For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]**

ALLIED ACTS (1)

THE ECONOMIC OFFENCES (INAPPLICABILITY OF LIMITATION) ACT, 1974 (ACT NO. 12 OF 1974)

[*27th March, 1974*]

An Act to provide for the inapplicability of the provisions of Chapter XXXVI of the Code of Criminal Procedure, 1973 to certain economic offences

Be it enacted by Parliament in the Twenty-fifth year of the Republic of India as follows:—

1. **Short title, extent and commencement.—**(1) This Act may be called the Economic Offences (Inapplicability of Limitation) Act, 1974.

(2) It extends to the territories to which the Code of Criminal Procedure, 1973 (2 of 1974) applies.

(3) It shall come into force on the 1st day of April, 1974.

2. **Chapter XXXVI of the Code of Criminal Procedure, 1973 not to apply to certain economic offences.—**Nothing in Chapter XXXVI of the Code of Criminal Procedure, 1973 shall apply to—

(i) any offence punishable under any of the enactments specified in the Schedule; or

(ii) any other offence which under the provisions of that Code, may be tried along with such offence,

and every offence referred to in clause (i) or in clause (ii) may be taken cognizance of by the Court having jurisdiction as if the provisions of that Chapter were not enacted.

THE SCHEDULE

(*See* Section 2)

1. The Indian Income-Tax Act, 1922 (11 of 1922).
2. The Income-Tax Act, 1961 (43 of 1961).

2A. The Interest-tax Act, 1974 (45 of 1974).

2B. The Hotel Receipts Tax Act, 1980 (Act 54 of 1980).

3. The Companies (Profits) Surtax Act, 1964 (7 of 1964).
4. The Wealth-tax Act, 1957 (27 of 1957).
5. The Gift-tax Act, 1958 (18 of 1958).
6. The Central Sales Tax Act, 1956 (74 of 1956).
7. The Central Excises and Salt Act, 1944 (1 of 1944).

8. The Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).

9. The Customs Act, 1962 (52 of 1962).

10. The Gold (Control) Act, 1968 (45 of 1968).

11. The Imports and Exports (Control) Act, 1947 (18 of 1947).

12. The Foreign Exchange Regulation Act, 1947 (7 of 1947).

13. The Foreign Exchange Regulation Act, 1973 (46 of 1973).

14. The Capital Issues (Control) Act, 1947 (29 of 1947).

15. The Indian Stamp Act, 1899 (2 of 1899).

16. The Emergency Risks (Goods) Insurance Act, 1962 (62 of 1962).

17. The Emergency Risks (Factories) Insurance Act, 1962 (63 of 1962).

18. The Emergency Risks (Goods) Insurance Act, 1971 (50 of 1971).

19. The Emergency Risks (Undertakings) Insurance Act, 1971 (51 of 1971).

20. The General Insurance Business (Nationalisation) Act, 1972 (57 of 1972).

21. The Industries (Development and Regulation) Act, 1981 (46 of 1981).

[s 468.1] **State Amendment**

Maharashtra.—The following amendments were made by Mah. Act No. 24 of 1976, section 2 (w.e.f 15-9-1976).

(1) Nothing in Chapter XXXVI of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply to—

(i) any offences punishable under any of the enactments specified in the Schedule: or

(ii) any other offence, which under the provisions of that Code, may be tried along with such offence, and every offence referred to in clause (i) or clause (ii) may be taken cognizance of the Court having jurisdiction as if the provisions of that Chapter were not enacted.

THE SCHEDULE

(*See* Section 2)

1. The Bombay Sales of Motor Spirit Taxation Act, 1958 (Bom LXVI of 1958).

2. The Bombay Sales Tax Act, 1959 (Bom LI of 1959).

3. The Maharashtra Purchase Tax on Sugarcane Act, 1962 (Mah IX of 1962).

4. The Maharashtra Agricultural Income Tax Act. 1962 (Mah XLI of 1962).

5. The Maharashtra State Tax on Professions. Trades, Callings and Employments Act, 1975 (Mah XVI of 1975).

ALLIED ACTS (2)

THE MAHARASHTRA TAXATION LAWS OFFENCES (EXTENSION OF PERIOD OF LIMITATION) ACT, 1977

[Act 44 of 1977]

1. Short title and commencement.—(1) This Act may be called the Maharashtra Taxation Laws Offences (Extension of Period of Limitation) Act, 1977.

(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint.

2. Extended period of limitation for offences under certain taxation laws of Maharashtra.—(1) Notwithstanding anything contained in sub-section (2) of s. 468 of the Code of Criminal Procedure. 1973 (2 of 1974), or in any other law for the time being in force, the period of limitation for taking cognizance of any offence punishable under any of the enactments specified in the Schedule, or of any other offence, which under the provisions of that Code, may be tried along with such offence, shall be one year.

(2) Save as otherwise provided by sub-section (1), the provisions of Chapter XXXVI of the said Code shall apply for taking cognizance of the offences mentioned in subsection (1), as they apply to other offences mentioned in Section 468 of the said Code.

THE SCHEDULE

(*See* Section 2)

1. Bombay Motor Vehicles Tax Act, 1958 (Bom. LXV of 1958).
2. The Bombay Motor Vehicles (Taxation of Passengers) Act, 1958 (Bom. LXVII of 1958).
3. The Maharashtra Tax on Goods (Carried by Road) Act, 1962 (Mah. XXXIII of 1962).

ALLIED ACTS (3)

THE MAHARASHTRA TAXATION LAWS OFFENCES (EXTENSION OF PERIOD OF LIMITATION) ACT, 1981 [MAHARASHTRA ACT No. XXII OF 1982]

(First published after having received the assent of the President in the "Maharashtra Government Gazette" on the 10 June 1982.)

An Act to provide for extension of the period of limitation for taking cognizance of offences under certain taxation laws of the State of Maharashtra.

Whereas the period of limitation for taking cognizance of certain offences by the Court is specified in s. 468 of the Code of Criminal Procedure, 1973 (II of 1974);

And whereas, it is expedient to provide for extension of the period of limitation applicable to offences under certain taxation laws of the State of Maharashtra and to provide for matters incidental thereto. It is hereby enacted in the Thirty-second Year of the Republic of India as follows:—

1. **Short title and commencement.—**(1) This Act may be called the Maharashtra Taxation Laws Offences (Extension of Period of Limitation) Act, 1981.

(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint.

2. **Extended period of limitation for offences under certain taxation laws of Maharashtra.—**(1) Notwithstanding anything contained in sub-section (2) of s. 468 of the Code of Criminal Procedure, 1973 (II of 1974); or in any other law for the time being in force, the period of limitation for taking cognizance by the Court of an offence punishable under any of the enactments specified in the Schedule, shall be—

(a) three years where the total amount of tax or duty paid or payable in the case of the said offence is twenty-five thousand rupees or more; and

(b) one year, in other cases.

(2) Save as otherwise provided by sub-section (1), the provisions of Chapter XXXVI of the Code [including sub-section (3) of s. 468 thereof] shall apply for taking cognizance of the offences mentioned in sub-section (1), as they apply to other offences mentioned in s. 468 of the said Code.

SCHEDULE

(*See* Section 2)

1. The Bombay Entertainments Duty Act, 1923 (Bom. I of 1923).
2. The Bombay Stamp Act, 1958 (Bom. LX of 1958).
3. The Maharashtra Advertisements Tax Act, 1967 (Mah. XVIII of 1967).

COMMENTS

The object of this section in putting a bar of limitation on prosecution was clearly to prevent the parties from filing cases after a long time as a result of which material evidence may vanish and also to prevent the filing of vexatious and belated prosecutions.[15.] The appeal was dismissed by the Court as it was barred by limitation as stated in section 468. The object which the section seeks to sub serve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution.[16.] The Magistrate had not heard the accused on the question of condoning the delay before taking cognizance of the offence. Therefore, it was held that the whole proceedings in the Court were vitiated as the Court could not have taken cognizance before condoning the delay and as the order condoning the delay was passed *ex parte* without hearing the accused.[17.] The government has no power to grant permission to institute a prosecution after the expiry of the statutory period of

limitation.[18.] Section 468 was held to be free from any constitutional infirmity and did not conflict with the Limitation Act.[19.] The object of the legislature in prescribing periods of limitation was to put pressure on the organs of criminal prosecution so that they should detect and punish the crime expeditiously.[20.] A period of limitation has been prescribed under section 468 and the Court is enjoined not to take cognizance of an offence specified in sub-section (2) after the expiry of the period of limitation. Notwithstanding such prohibition, in view of the words "Except as otherwise provided" in section 468 which covers the provisions under section 473 and the *non obstante* clause in section 473, the Court is invested with the discretionary power to take cognizance of an offence despite the expiry of the period of limitation.[21.] This power can be exercised if the Court is satisfied that (1) the delay has been properly explained; or (2) it is necessary to take cognizance in the interests of justice. It is necessary to give an opportunity to the accused at the time of considering whether the delay has been explained or whether it is in the interests of justice that the cognizance be taken.[22.] Power to condone the delay can be exercised even after taking cognizance of the offence. Condonation of delay is not a pre-condition to taking cognizance.[23.]

In the matter of delay, the Supreme Court observed that a mere delay in approaching the Court of law is not a ground for dismissing the case though it may be a relevant factor in the final verdict.[24.]

[s 468.2] Period of limitation in cases of joinder of charges [*Sub-section (3)*].—

Where an accused was charged under sections 279 and 304A of IPC and at a subsequent stage, charge under sections 201 and 202 of IPC were added, which were punishable with imprisonment for six months, it was argued that it would be beyond the period of limitation of one year hence could not be added. It was held that sections 201 and 202 of IPC can be tied with section 304A of IPC which is punishable with imprisonment for two years and the limitation will be three years. Therefore, adding of sections 201 and 202 of IPC was well within time.[25.]

Where the accused was charged with some major offences but he was convicted of only the minor offences, it was held that the period of limitation had to be determined with reference to the offences the accused was charged with and not with reference to the charges for which he was convicted.[26.] The Court explained the facts and applicable principles as follows[27.]:

The language of sub-section (3) of section 468 makes it imperative that the limitation provided for taking cognizance in section 468 is in respect of the *offence charged* and not in respect of *offence finally proved*. This being the position, in the case in hand, when the respondents were charged under section 468 read with section 120-B, for which the imposable punishment is seven years and section 5(2) of the Prevention of Corruption Act, 1947, which is punishable with imprisonment for a term which may extend to seven years and for such offences no period of limitation having been provided for in section 468, the cognizance taken by the learned Special Judge cannot be said to be barred by limitation. The High Court in recording its conclusion relied upon the decision of this Court in the case of *State of Punjab v Sarwan Singh*.[28.] In the said, case, the respondent was charged under section. 406 for misappropriation. The *challan* was presented on 13-10-1976 and therein it was clearly mentioned that the offence was committed on 22-8-1972. The learned trial Judge acquitted the accused of the charges under section 468 but convicted him of the charge under section 406 of the Code of Criminal Procedure. This Court came to the conclusion that since the charge-sheet itself mentions that the offence was committed on 22-8-1972, the cognizance was barred under section 468(2)(c) of the Code. At the outset it may be stated that in the aforesaid case the Court had not considered the provisions of sub-section (3) of section 468 which was in fact not there on the statute-book when the

alleged offence was held to have been committed. But in view of the provisions of sub-section (3) of section 468 which we have already considered this decision will be of no application and the High Court committed error in relying upon the aforesaid decision to come to the conclusion that in the case in hand the cognizance itself was barred by limitation."

In *Krishna Bhattacharjee v Sarathi Choudhary,*[29.] the view taken in *Inderjit Singh Grewal v State of Punjab*[30.] that section 468 applied to the Domestic Violence Act, 2005, was approved. It was further held that the concept of continuing offence got attracted from the date of deprivation of *stridhan*, for neither the husband nor any other family members can have any right over the *stridhan,* and they remain the custodians.

[s 468.3] Special Rules —

Where special departmental rules of limitation were adopted for proceedings against retired Government personnel, it was held that such Rule was to operate only in the context of the right of the Government to withhold or withdraw pension.[31.]

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1. *Asst Customs Collector, Bombay v LR Melwani*, AIR 1970 SC 962 , 965 : 1970 Cr LJ 885 .
14. Ins. by Act No. 45 of 1978, section 33 (w.e.f. 18-12-1978).
15. *State of Punjab v Sarwan Singh*, AIR 1981 SC 1054 : 1981 Cr LJ 722 : (1981) 3 SCC 34 . *M Chandran v F Fanthome*, 2003 Cr LJ 2173 (Sikk), complaint of defamation filed long time after knowledge of the existence of the document, barred by limitation, accused entitled to be discharged.
16. *Ibid*.
17. *Mahipal Bahadur Singh v State of WB*, 1986 Cr LJ 185 (Cal).
18. *Delhi Bitumen Sales Agency v State of Punjab*, 1989 Cr LJ 722 (P&H).
19. *Mahindra Nath Das v Public Prosecutor*, 1979 Cr LJ 1465 (Cal).
20. *GD Iyer v State*, 1978 Cr LJ 1180 (Del).
21. *K Kasappa Naidu v State of Andhra Pradesh*, 1992 Cr LJ 1214 (AP); *Meenakshi Industries v G Guruswamy*, 1992 Cr LJ 2115 (Mad); *State of Karanataka v BS. Vijay Murthy*, 1992 Cr LJ 1670 (Kant).
22. *K Ch Pandu Ranga Rao v The Secretary, Agricultural Appellate Committee Ongole*, 1985 Cr LJ 176 (AP).
23. *Sulochana v State Registrar of Chits, Madras*, 1978 Cr LJ 116 (Mad).
24. *Japan Sahoo v Chandra Sekhar Mohanty*, AIR 2007 SC 2762 : (2007) 7 SCC 394 : 2007 Cr LJ 4068 .
25. *Bhaskar Hanmatse Meharwade v State of Karnataka*, 1992 Cr LJ 3985 (Knt).
26. *State of HP v Tara Dutt*, AIR 2000 SC 297 : 2000 Cr LJ 485 : (2000) 1 SCC 230 at p 234 : AIR 2000 SC 297 : JT 1999 (9) SC 215 : 1999 (7) Scale 183 .
27. *Ibid*.
28. *State of Punjab v Sarwan Singh,* (1981) 3 SCC 34 : AIR 1981 SC 1054 : 1981 Cr LJ 722 .

29. *Bhattacharjee v Sarathi Choudhary,* (2016) 2 SCC 705 : 2016 Cr LJ 330 : 2015 (12) Scale 521 .

30. *Inderjit Singh Grewal v State of Punjab,* (2011) 12 SCC 588 : 2012 Cr LJ 309 : 2011 (9) Scale 295 .

31. *State of Maharashtra v Keshav Ramchandra Pungare*, AIR 1999 SC 3846 : (1999) 9 SCC 479 . The trial was held to be not barred by limitation. The provisions of the Act do not stand suspended by limitation prescribed by pension Rules.

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The general rule prescribed in the maxim *nullum tempus occurrit regi*—lapse of time does not bar the right of the Crown—shows that, in general, the rule of equity, *vigilantibus et non dormientibus jura subveniunt* (the law assists those that are vigilant with their rights and not those that sleep thereupon), does not apply to the Crown. The prosecution in criminal matter is generally launched by the State, as a criminal offence is considered an injury caused not only to the person but also to the society. In *Asst Customs Collector, Bombay v LR Melwani*,[1.] the Supreme Court said: "The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint". However, long delay on the specious plea of *nullum tempus occurrit regi* (no time runs against the king) may lead to serious negligence on the part of the inquiring and prosecuting agencies, forgetfulness on the part of prosecution and defence witnesses and unnecessary mental anguish to the person accused. What is more, infliction of punishment long after the commission of offence impairs its utility as social retribution to the offender.

This Chapter comprising of sections 467 to 473 has been newly added to obviate this lacuna. It prescribes different periods of limitation for taking cognizance depending upon the gravity of the offence (section 468). The Joint Committee of Parliament said: "At present, there is no period of limitation for criminal prosecution and a Court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been provided for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission". Section 469 lays down as to when the period of limitation should begin to run in relation to an offence. Section 470 prescribes certain rules regarding exclusion of time while computing the period of limitation. Section 471 provides for the exclusion of the day when the Court is closed. Section 472 lays down the period of limitation in cases of continuing offences. The last section in the Chapter, *viz.* section 473, lays down as to when the period of limitation may be extended on a proper explanation of the delay or in the interests of justice.

[s 469] Commencement of the period of limitation —

(1) **The period of limitation, in relation to an offender, shall commence,—**

(a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) **In computing the said period, the day from which such period is to be computed shall be excluded.**

COMMENTS

This section fixes the day from which the period of limitation laid down under the previous section should begin to run. In general, the period of limitation should run from the date of the offence. To this, there are two exceptions: (1) If the aggrieved party or the police officer was not aware of the commission of the offence, then the earliest day on which either of them becomes aware of such offence, will be the date for the purpose of commencement of limitation. (2) Similarly, if the identity of the offender was not known, then also the first day on which either the aggrieved person or the police officer comes to know of his identity will be the date of commencement of limitation. The provision is made so that an offender may not escape punishment by absconding for the statutory period. For computation purposes, the first day will be excluded. The limitation would start from the date of the filing of the defamatory complaint and not from the date of the dismissal of that complaint, when the subsequent complaint is filed after the dismissal of the previous complaint.[32.] The Material date is the date when the complaint is presented to the Court and not the date on which the process is issued.[33.]

In *Sarah Mathew v Institute of Cardio Vascular Diseases,* A Five-Judge Constitution Bench of the Supreme Court has held that the bar of limitation continued in section 468 of the Code applies, if the complaint is filed beyond limitation and not if cognizance is taken by the Court beyond limitation. The Court observed that taking the date of cognizance as material date would bring in uncertainty and would mean denying justice to diligent complainant for the fault of Court. Since cognizance is entirely an act of the Magistrate and taking cognizance may be delayed because of several reasons, it may be delayed because of systemic reasons or it may be delayed because of the Magistrate's personal reasons. And law cannot be expected to put the burden on the complainant to explain something for which he is not responsible.[34.]

1. *Asst Customs Collector, Bombay v LR Melwani*, AIR 1970 SC 962 , 965 : 1970 Cr LJ 885 .
32. *Mahendra Kumar Lohia v Sitaram More*, 1992 Cr LJ 660 (Gau).
33. *AR Nerkar (Dr) v RS Madir*, 1991 Cr LJ 557 (Bom).
34. *Sarah Mathew v Institute of Cardio Vascular Diseases,* AIR 2014 SC 448 : (2014) 2 SCC 62 : 2014 Cr LJ 586 (SC) (Five-Judge Constitution Bench); *Bharat Damodar Kale v State of Andhra Pradesh,* AIR 2003 SC 4560 : (2003) 8 SCC 559 ; *Japani Sahoo v Chandra Shekhar Mohanty,* AIR 2007 SC 2762 : (2007) 7 SCC 394 .

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The general rule prescribed in the maxim *nullum tempus occurrit regi*—lapse of time does not bar the right of the Crown—shows that, in general, the rule of equity, *vigilantibus et non dormientibus jura subveniunt* (the law assists those that are vigilant with their rights and not those that sleep thereupon), does not apply to the Crown. The prosecution in criminal matter is generally launched by the State, as a criminal offence is considered an injury caused not only to the person but also to the society. In *Asst Customs Collector, Bombay v LR Melwani*,[1.] the Supreme Court said: "The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint". However, long delay on the specious plea of *nullum tempus occurrit regi* (no time runs against the king) may lead to serious negligence on the part of the inquiring and prosecuting agencies, forgetfulness on the part of prosecution and defence witnesses and unnecessary mental anguish to the person accused. What is more, infliction of punishment long after the commission of offence impairs its utility as social retribution to the offender.

This Chapter comprising of sections 467 to 473 has been newly added to obviate this lacuna. It prescribes different periods of limitation for taking cognizance depending upon the gravity of the offence (section 468). The Joint Committee of Parliament said: "At present, there is no period of limitation for criminal prosecution and a Court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been provided for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission". Section 469 lays down as to when the period of limitation should begin to run in relation to an offence. Section 470 prescribes certain rules regarding exclusion of time while computing the period of limitation. Section 471 provides for the exclusion of the day when the Court is closed. Section 472 lays down the period of limitation in cases of continuing offences. The last section in the Chapter, *viz.* section 473, lays down as to when the period of limitation may be extended on a proper explanation of the delay or in the interests of justice.

[s 470] Exclusion of time in certain cases —

(1) **In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender, shall be excluded:**

***Provided* that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.**

(2) **Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.**

(3) **Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.**

Explanation.—**In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.**

(4) **In computing the period of limitation, the time during which the offender—**

(a) has been absent from India or from any territory outside India which is under the administration of the Central Government, or

(b) has avoided arrest by absconding or concealing himself,

shall be excluded.

COMMENTS

After laying down certain periods of limitation for launching prosecution and providing for the date or the day from which the periods of limitation should begin to run, it is appropriate that provision should also be made for exclusion of time in certain cases. The section appears to have been enacted on the analogy of sections 14 and 15 of the Limitation Act, 1963. In order that sub-section (1) should apply to a particular case, (1) another prosecution with due diligence, (2) in good faith, (3) relating to the same facts, should be prosecuted in a Court which from the defect of jurisdiction or causes of like nature, is unable to entertain it. Whether the prosecuting agency had exercised due diligence or acted in good faith would depend upon the facts and circumstances of each case. Any finding recorded would be a finding of fact[35.] and the higher Court would not ordinarily interfere with such finding. The important point to be considered is whether the earlier prosecution was founded on the very same facts which was the basis of the subsequent prosecution.[36.] What is to be seen is the substance of allegations in both the prosecutions.

Where a complaint in respect of the dishonour of a cheque was returned because of want of territorial jurisdiction, it was held that the time occupied from the date of presentation of the complaints in a wrong forum till their return has to be excluded. But the subsequent period from the date of return till presentation of the complaint before the appropriate forum cannot be excluded. There is no power in the Court to that effect.[37.]

[s 470.1] Burden of proof —

The burden of proof would be on the prosecuting agency to prove to the satisfaction of the Court that it acted diligently or in good faith i.e., exercised all due care and caution.[38.]

1. *Asst Customs Collector, Bombay v LR Melwani*, AIR 1970 SC 962 , 965 : 1970 Cr LJ 885 .

35. *Raghavayya v Vasudevayya*, AIR 1944 Mad 47 .

36. *Dund Bahadur v Deo Nandan Prasad*, (1912) 17 Cal LJ 596 : 20 IC 513.

37. *Rayala Sima Agro Enterprises v Gujarat Agro Industries*, 2003 Cr LJ 1627 (AP).

38. *Gnanacharya v Saravanaperumal*, AIR 1941 Mad 319 (FB).

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The general rule prescribed in the maxim *nullum tempus occurrit regi*—lapse of time does not bar the right of the Crown—shows that, in general, the rule of equity, *vigilantibus et non dormientibus jura subveniunt* (the law assists those that are vigilant with their rights and not those that sleep thereupon), does not apply to the Crown. The prosecution in criminal matter is generally launched by the State, as a criminal offence is considered an injury caused not only to the person but also to the society. In *Asst Customs Collector, Bombay v LR Melwani*,[1] the Supreme Court said: "The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint". However, long delay on the specious plea of *nullum tempus occurrit regi* (no time runs against the king) may lead to serious negligence on the part of the inquiring and prosecuting agencies, forgetfulness on the part of prosecution and defence witnesses and unnecessary mental anguish to the person accused. What is more, infliction of punishment long after the commission of offence impairs its utility as social retribution to the offender.

This Chapter comprising of sections 467 to 473 has been newly added to obviate this lacuna. It prescribes different periods of limitation for taking cognizance depending upon the gravity of the offence (section 468). The Joint Committee of Parliament said: "At present, there is no period of limitation for criminal prosecution and a Court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been provided for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission". Section 469 lays down as to when the period of limitation should begin to run in relation to an offence. Section 470 prescribes certain rules regarding exclusion of time while computing the period of limitation. Section 471 provides for the exclusion of the day when the Court is closed. Section 472 lays down the period of limitation in cases of continuing offences. The last section in the Chapter, *viz.* section 473, lays down as to when the period of limitation may be extended on a proper explanation of the delay or in the interests of justice.

[s 471] Exclusion of date on which Court is closed —

Where the period of limitation expires on a day when the Court is closed, the Court may take cognizance on the day on which the Court reopens.

Explanation.—**A Court shall be deemed to be closed on any day within the meaning of this section, if, during its normal working hours, it remains closed on that day.**

1. *Asst Customs Collector, Bombay v LR Melwani*, AIR 1970 SC 962 , 965 : 1970 Cr LJ 885 .

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[s 472] Continuing offence —

In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

COMMENTS

Held that the extension of the period of limitation is a discretionary power of the Court.[39.]

1. *Asst Customs Collector, Bombay v LR Melwani*, AIR 1970 SC 962 , 965 : 1970 Cr LJ 885 .

39. *Bombay Pharma Products v State of Madhya Pradesh*, 1991 Cr LJ 707 (MP).

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[s 473] Extension of period of limitation in certain cases —

Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

[s 473.1] **State Amendment**

Maharashtra.—*Maharashtra Act XXIV of 1976*. In its application to the State of Maharashtra, nothing in Chapter XXXVI of the Code shall apply to certain offences, namely:

(i) any offence punishable under any of the enactments specified in the Schedule, or

(ii) any other offence, which under the provisions of that Code, may be tried along with such offences, and every offence referred to in Clause (i) or Clause (ii) may be taken, cognizance of by the Court having jurisdiction as if the provisions of that chapter were not enacted.

The Schedule

(See Section 2)

(1) The Bombay Sale of Motor Spirit Taxation Act, 1958 (Bom. LXVI of 1958).

(2) The Bombay Sales Tax Act, 1959 (Bom. LI of 1959).

(3) The Maharashtra Purchase Tax on Sugarcane Act, 1962 (Maharashtra IX of 1962).

(4) The Maharashtra Agricultural Income Tax Act, 1962 (Maharashtra XLI of 1962).

(5) The Maharashtra State Tax on Profession, Traders, Callings and Employments Act, I975 (Maharashtra XVI of 1975).

Maharashtra Act XLIV of 1977.—" **2. Extended period of limitation for offences under certain taxation laws of Maharashtra.—**(1) Notwithstanding anything contained in sub-section (2) or section 468 of the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the period of limitation for taking cognizance of any offence punishable under any of the enactments, specified in the Schedule, or of any other offence, which under the provisions of that Code, may be tried along with such offence, shall be one year.

(2) Save as otherwise provided by sub-section (1), the provisions of Chapter XXXVI of the said Code shall apply for taking cognizance of the offences mentioned in sub-section (1), as they apply to other offences mentioned in section 468 of the said Code.

The Schedule

(See Section 2)

1. The Bombay Motor Vehicles Tax Act, 1958 (Bom. LXV of 1958).
2. The Bombay Motor Vehicles (Taxation of Passengers) Act, 1958 (Bom. LXVII of 1958).
3. The Maharashtra Tax on Goods (Carried by Road) Act, 1962 (Mah. XXXIII of 1962).

*Maharashtra Act XXII of I982—***"2. Extended period of limitation for offences under certain taxation laws of Maharashtra.—**(1) Notwithstanding anything contained in sub-section (2) of section 468 of the Code of Criminal Procedure, 1973 (II of 1974), or in any other law for the time being in force, the period of limitation for taking cognizance by the Court of an offence punishable under any of the enactments specified in the Schedule, shall be—

(a) three years, where the total amount of tax or duty paid or payable in

the case of the said offence is twenty-five thousand rupees or more; and

(b) one year, in other cases.

(2) Save as otherwise provided by sub-section (1), the provisions of Chapter XXXV1 of the said Code (including sub-section (3), of section 468 thereof) shall apply for taking cognizance of the offence mentioned in sub-section (1), as they apply to other offences mentioned in section 468 of the said Code.

The Schedule

(See Section 2)

1. The Bombay Entertainments Duty Act, 1923 (Bom. I of 1923).
2. The Bombay Stamp Act, 1958 (Bom LX of 1958).
3. The Maharashtra Advertisements Tax Act, 1967 (Mah. XVIII of l967).

COMMENTS

Section 468 bars a Court from taking cognizance of any offence if it is beyond the prescribed period of limitation laid down under sub-section (2) of that section; this section, however, lays down two exceptions. (1) If proper and satisfactory explanation of the delay is forthcoming or (2) it is in the interest of justice, the Court can take cognizance even beyond the period fixed by section 468(2). The Court is given discretion to excuse the delay and that only when the delay is properly explained, or the interest of justice so requires. The discretion should be judicially exercised and not in an arbitrary manner. Section 473 should be liberally construed but accused must be heard before condoning delay.[40.]

A Magistrate can exercise power to condone delay even without an application by the prosecution in this regard and can take cognizance of an offence ignoring the bar of section 468 CrPC.[41.] Where the accused was not given an opportunity of hearing before condoning delay and taking cognizance beyond the period of limitation, the High Court quashed the order of condonation and cognizance as the order affected the valuable right of the accused.[42.] Section 473 enables the Court to condone delay provided that the Court is satisfied with the explanation furnished by the prosecution/complainant and where, in the interests of justice, extension of period of limitation is called for. The principle of condonation of delay is based on the general rule of the criminal justice system which states that a crime never dies. This position was reiterated by the Supreme Court in *Udaishankar Awasthi v State of UP.*[43.]

[s 473.2] Mode of exercising Court's power of condonation —

The power of the Court has to be exercised judicially and on the basis of the well-recognised principles. A speaking order would be necessary though the absence of statement of reasons may not be a vitiating factor in itself. The Court said:

The discretion conferred on the Court by section 473 Cr.P.C. to take cognizance after the expiry of the period of limitation under the conditions stated therein has to be exercised judicially and on well-recognised principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same

must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence. However, the provisions are of no application to the instant case since for the offences charged, no period of limitation has been provided in view of the imposable punishment thereunder.[44.]

[s 473.3] Wrong remission —

Where the circumstances are such that the delay deserves to be condoned under section 473, a wrong remission given under section 470(3) can be deemed to be valid under section 473.[45.]

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1. *Asst Customs Collector, Bombay v LR Melwani*, AIR 1970 SC 962 , 965 : 1970 Cr LJ 885 .
40. *Appu Ramani v State*, 1993 Cr LJ 1974 (AP).
41. *Ashutosh Choudhry v State*, 1996 Cr LJ 2231 .
42. *Mangu Ram v State of Rajasthan*, 1993 Cr LJ 1972 (Raj).
43. *Udaishankar Awasthi v State of UP,* (2013) 2 SCC 435 : JT 2013 (1) SC 539 : 2013 (1) Scale 212 .
44. *State of HP v Tara Dutt*, (2000) 1 SCC 230 at pp 235–236 : AIR 2000 SC 297 : 2000 Cr LJ 485 . The Court also pointed out that section 473 was not attracted where the accused was charged with major as well as minor offences and the conviction was only for minor offences.
45. *Rakesh Kumar Jain v State*, AIR 2000 SC 2754 : 2000 Cr LJ 3973 : (2000) 7 SCC 656 .

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CHAPTER XXXVII MISCELLANEOUS

[s 474] Trials before High Courts —

When an offence is tried by the High Court otherwise than under section 407, it shall, in the trial of the offence, observe the same procedure as a Court of Session would observe, if it were trying the case.

COMMENTS

This provision declares that where a High Court itself tries any offence which has not come to it by way of transfer under clause (iv) of sub-section (1) of section 407 the same procedure as is required to be followed by the Court of Session in trying an offence should be observed by the High Court. The cases contemplated under this section probably are those in which important question of law or interpretation of any Article of the Constitution is involved or those which may be specifically required by the Government to be tried by it, having regard to its importance and widespread ramification.

The Code of Criminal Procedure, 1973

CHAPTER XXXVII MISCELLANEOUS

[s 475] Delivery to commanding officers of persons liable to be tried by Court-martial —

(1) **The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.**

***Explanation.*— In this section—**

(a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company.

(b) "Court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) **Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.**

(3) **A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial.**

COMMENTS

Legal provisions of the nature of this section which have the result of taking away the jurisdiction of ordinary Criminal Courts with respect to a certain class of people should be construed very strictly, and jurisdiction should not be given up unless the plain meaning of the words of the statute so requires. There is no scope for extension by analogy of a principle of this character.[1.] Suitable provisions for avoidance of conflict of jurisdiction between the criminal Courts and Court-martial have been made by the Central Government under the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952. Under section 125 of the Army Act, 1950, discretion is given

to the officer mentioned therein to decide the question where the proceedings should be instituted; but if the designated officer does not so exercise his discretion, it will be open to the Criminal Court to exercise its criminal jurisdiction as provided by law.[2.]

[s 475.1] "Liable to be tried either by a Court... or by a Court-martial" —

The offence should be an offence of which cognizance can be taken by an ordinary Criminal Court as well as a Court-martial. The phrase is intended to refer to initial jurisdiction of the two Courts to take cognizance of the case and not the jurisdiction to decide the case on merits.[3.]

Where a personnel of the Border Security Force(BSF) committed offence under sections 352/323/307 IPC while he was absent from duty without any leave, it was held that where an army personnel, a member of the BSF, commits an offence, Competent Authority of the BSF has to exercise its discretion under section 80 of the Border Security Force Act, 1968, read with rule 41(1)(ii) of the Criminal Courts and Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969, to decide whether the accused should be tried by the BSF Court or by the regular Criminal Court. Both the forums have concurrent jurisdiction. Once such decision is made by the Competent Authority that the accused be tried by the BSF Court, he has no option to claim trial by regular Criminal Court. In case, a Magistrate takes cognizance of an offence, he should issue notice to the BSF authorities, and if they ask for handing over the accused to them for trial by the BSF Court, the Magistrate should hand him over to them and shelve the proceedings.

If a Magistrate proceeds in the matter, or even commits the case to the Court of Sessions, without giving such notice to the BSF authorities, the entire proceedings shall be void and *non-est*.[4.] Where the naval authority requested the Magistrate to allow the accused to be tried under the Naval Law, the Magistrate had no choice but to stay the proceedings and deliver the accused to the naval authorities and there was no necessity to record reasons therefore.[5.] Where a Magistrate committed a case involving an army man (on leave) under section 306 IPC to the Sessions Court, the Kerala High Court held the committal to be illegal and quashed it, and remanded the case back to the Magistrate to pass a reasoned order in accordance with section 3(b) of the Criminal Courts and Court Martial (Adjustment) of Jurisdiction Rules, 1978, read with section 475 of CrPC and section 125 Army Act after adopting the due procedure laid thereunder.[6.]

[s 475.2] "Magistrate shall have regard" —

The provisions are mandatory.[7.]

The Explanation which defines the two expressions "Court-martial" and "Unit" is inclusive and not exhaustive.

[s 475.3] Order for production of detinue before Court martial [*Sub-section (3)*]. —

The sub-section gives discretionary power to the High Court to direct that a prisoner detained in any jail situated within the State be sent to the Court-martial either for trial or for his examination regarding any matter pending before the Court-martial.

An application was filed for separation of trial on the ground that the accused was an army personnel. The offence was triable by both, the ordinary criminal Courts and Court martial. An objection to the continuation of proceedings before the ordinary criminal Court was made only before the sessions Court and that too at the last stage of the final arguments. The Court rejected the application.[8.]

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1. *Blythe v The King*, (1950) ILR 2 Cal 45 : AIR 1949 Cal 641 .
2. *Joginder Singh v State of Himachal Pradesh*, AIR 1971 SC 500 : 1971 Cr LJ 511 : (1971) 3 SCC 86 : AIR 1970 SC 500 .
3. *Delhi Spl Pol Estb v SK Loraiya*, AIR 1972 SC 2548 : 1973 Cr LJ 33 : (1972) 2 SCC 692 ; *Som Datt Datta v Union of India (UOI)*, AIR 1969 SC 414 : 1969 Cr LJ 663 .
4. *Gajendra Singh v State of Rajasthan*, 1995 Cr LJ 3347 (Raj).
5. *Mangal Singh Bhatti v UOI*, 1993 Cr LJ 3070 (Ker).
6. *Re State of Kerala*, 1996 Cr LJ 1549 (Ker).
7. *Delhi Spl Pol Estb v SK Loraiya,* AIR 1972 SC 2548 : 1973 Cr LJ 33 : (1972) 2 SCC 692 , *supra; Som Datt Datta v UOI (UOI),* AIR 1969 SC 414 : 1969 Cr LJ 663 , *supra.*
8. *Umesh Singh v State of Bihar*, 2003 Cr LJ 2215 (Pat).

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CHAPTER XXXVII MISCELLANEOUS

[s 477] Power of High Court to make rules —

(1) **Every High Court may, with the previous approval of the State Government, make rules—**

(a) as to the persons who may be permitted to act as petition-writers in the Criminal Courts subordinate to it;

(b) regulating the issue of licences to such persons, the conduct of business by them, and the scale of fees to be charged by them;

(c) providing a penalty for a contravention of any of the rules so made and determining the authority by which such contravention may be investigated and the penalties imposed;

(d) any other matter which is required to be, or may be, prescribed.

(2) **All rules made under this section shall be published in the Official Gazette.**

COMMENTS

This section deals with the power of the High Court to make rules in respect of petition writers. Such rules may be made for (a) dealing with persons who may be permitted to act as petition writers, (b) for regulating issue of licences to such persons, (c) for providing penalty for contravention of any of the rules and (d) for determining the authority which should investigate the contravention of any of the rules and impose penalty. The rules are required to be published in the Official Gazette, and it is only then that they can be said to have been properly published. Any other mode of publication will not have any sanctity.

CHAPTER XXXVII MISCELLANEOUS

9.[[s 478] Power to alter functions allocated to Executive Magistrates in certain cases.—

If the Legislative Assembly of a State by a resolution so permits, the State Government may, after consultation with the High Court, by notification, direct that references in sections 108, 109, 110, 145 and 147 to an Executive Magistrate shall be construed as references to a Judicial Magistrate of the first class.]

[s 478.1] **State Amendments**

Andaman and Nicobar Islands, Dadra and Nagar Haveli and Lakshadweep Islands.— *The following amendments were made by Regulation 1 of 1974, section 6 (w.e.f. 30-3-1974).*

S 478.—In its application to the UT of Andaman and Nicobar Islands, Dadra and Nagar Haveli and Lakshadweep Islands, in section 478, omit the words "if the State Legislature by a resolution so requires".

Maharashtra.— *The following amendments were made by Maha. Act 1 of 1978, section 4 (w.e.f. 15-4-1978).*

S 478.—In its application to the State of Maharashtra, in section. 478, for the words "to an Executive Magistrate shall be construed", substitute the words "to an Executive Magistrate in the areas of the State outside Greater Bombay shall be construed".

COMMENTS

This provision confers on the State Government power to alter the functions of the Judicial Magistrates and Executive Magistrates regarding the security proceedings under sections 108, 109 and 110 and disputes regarding immoveable properties under sections 145 and 147, respectively. Two safeguards are provided in this respect: (1) the initial decision to alter the arrangement has to be taken by the Legislature and, after the same is done, (2) the State Government should consult the High Court.

9. Subs. by Act No. 63 of 1980, section 8, for section 478 (w.r.e.f. 23-9-1980). Earlier section 478 was amended by Act 45 of 1978, sec. 34 (w.e.f. 18-12-1978).

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CHAPTER XXXVII MISCELLANEOUS

[s 479] Cases in which Judge or Magistrate is personally interested —

No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

***Explanation.*—A Judge or Magistrate shall not be deemed to be a party to, or personally interested in, any case by reason only that he is concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case.**

COMMENTS

The principle underlying this section is embodied in the saying: "No person can be a Judge in his own cause" (*Nemo judex in causa sua* or *Nemo debet esse judex in propria cause*). The disqualification consists in being either (1) a party to, or (2) personally interested in, a case, but it can be cured by obtaining beforehand permission of the superior Court. The thing prohibited is either holding a trial or hearing an appeal from his own judgment or order. It is one of the oldest and plainest rules of justice and of common-sense that no man shall sit as a Judge in a case in which he has a substantial interest.[10.] No Judge can act in any matter in which he has any pecuniary interest, nor where he has an interest, though not a pecuniary one, sufficient to create a real bias.[11.] The reason of the rule is, that a person who, by his interest, pecuniary or personal, is likely to have a bias in the matter of the prosecution, ought not to sit as a Judge.[12.]

Further, no Judge or Magistrate, except a High Court Judge, can try an offence referred to in section 195, when it is committed (1) before himself, or (2) in contempt of his authority, or (3) is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding. The only exceptions are offences provided for in sections 345 and 349 (section 352).

The Supreme Court has held that merely by giving sanction for prosecution, the Magistrate does not become personally interested in the case, and the trial and conviction are not illegal.[13.]

[s 479.1] Scope —

The provisions of the Code are not applicable to summary proceedings taken for punishing a contempt, and therefore, this section does not apply because proceedings for punishing contempt are taken not with a view to protect the Court as a whole or the individual Judges of the Court from a repetition of the attack but with a view to protect the public and specially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the Court be

undermined or impaired. The gravamen of the offence is an endeavour to shake the confidence of the public in the Court.[14.]

[s 479.2] "Any case" —

The phrase includes the hearing of an appeal.[15.]

[s 479.3] "Party, or personally interested" —

The phrase "party, or personally interested" is a wide one and includes all cases where the judgment is likely to be biased or is calculated to inspire want of confidence in the parties. There are, however, two exceptions, *viz.*, (1) where he is concerned in a public capacity; or (2) where he has either (a) viewed the scene of offence or other material place, or (b) made an inquiry in connection with the case.

The word "interested" does not imply mere intellectual interest, but something of the nature of an expectation of an advantage to be gained or of a loss or some disadvantage to be avoided, by the person who is said to be interested in the case.[16.] The phrase "personally interested" does not mean merely "privately interested" or "interested as a private individual", but includes an interest taken by the Magistrate in initiating and directing the whole proceedings.[17.] The phrase cannot refer to any very remote interest in the matter and must refer to some particular and immediate personal interest in the case and its results.[18.] It is not a mere interest in a case or in the circumstances of a case which disqualifies a Magistrate or a Judge from trying a case, but that which disqualifies him must be a substantial interest giving rise to a real bias and not merely to a possibility of a bias.[19.] Pecuniary interest even to a small extent (e.g. a share in a joint stock company) is a sufficient disqualification independent of the question whether there really is bias or not.[20.] The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question, one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigating parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security.[21.]

[s 479.4] Judge or Magistrate not to be deemed a party or personally interested [Explanation] —

Under the Explanation, a Magistrate or a Judge who is merely concerned with a case by reason of his discharging some other public function or being concerned with it in some public capacity is not on that ground alone to be deemed to be personally interested. The Explanation does not apply when the Magistrate himself has directed the prosecution.[22.]

[s 479.5] Disqualification —

In the following cases, the Magistrate was disqualified from trying a case:—Where a Magistrate initiated and directed the proceedings, dispersed the unlawful assembly and collected the evidence[23.]; where a Magistrate directed investigations of the police preliminary to a trial[24.]; where a Magistrate was the Chairman of the Municipal Committee concerned with the prosecution[25.]; where a Magistrate was a shareholder of the prosecuting[26.] or the accused company[27.]; where a Magistrate was a servant of the complainant[28.]; where a Magistrate was himself one of those obstructed by the driving of the accused on the wrong side of a road[29.]; where a Magistrate found the accused committing an offence in his presence and had the accused arrested[30.]; and where a Magistrate was a witness in the case.[31.]

There is a distinction between a passive interest and an active interest, and it is only in the latter case that the disqualification mentioned in this section arises.[32.]

[s 479.6] Recusal by a Judge —

What section 479 contemplates is that no Judge or Magistrate for the purposes of CrPC shall not try or commit for trial any case to or in which he is a party, or personally interested, and he shall not hear an appeal from any judgment or order passed or made by himself. The next step is what is popularly termed as a "recusal by judge" in courts. A judge may recuse from hearing a matter on own his own or on a request made by a party to the proceeding to avoid any allegations of biasness or preconceived notions. The question that whether a Judge hearing a matter should recuse, even though the prayer for recusal is found to be unjustified and unwarranted arose before a Constitution Bench comprising of Justices Khehar, Lokur, Chelameshwar, Kurian Joseph and AKGoel when a prayer for recusal of Justice Khehar was sought after a similar prayer for recusal of Justice Anil R Dave succeeded by Fali S Nariman. While refusing to recuse, Justice Khehar in *Supreme Court Advocates-on-Record–Association v UOI*[33.] held that it was his personal decision which was supported by Justice Lokur who wrote that when an application for recusal is made, it is made to a judge and not to the bench. Justices Chelameshwar and Kurian Joseph in their separate opinions wrote that reasons must be recorded for recusal and stressed upon need for substantive rules in this regard.

[s 479.7] No disqualification —

In the following cases, the Magistrate was not disqualified from trying a case:—Where the Magistrate was the master of the complainant[34.]; where the Magistrate was in charge of the opium administration of a district[35.]; where he held a preliminary inquiry under section 202;[36.] where a District Magistrate, who as Collector was representative of the Court of Wards, tried a case in which the Court of Wards was interested;[37.] and where a Magistrate, who had two cross-cases of riot pending before him, on the trial of the first case, expressed opinion to some extent unfavourable to the accused in the second case.[38.]

10. *Bholanath Sen*, (1876) 2 Cal 23 , 27.
11. *Aloo Nathu v Gagubha Dipsangji*, (1894) 19 Bom 608, 610.
12. *Wood v Corp of the Town of Calcutta*, (1881) 7 Cal 322 , 327.
13. *Rameshwar Bhartia v The State of Assam*, (1953) SCR 126 : AIR 1952 SC 405 : 1953 Cr LJ 163 .
14. *Re KL Gauba*, (1942) 23 Lah 411 (FB) : AIR 1942 Lah 105 .
15. *Nistarini Debi v Ghose*, (1985) 23 Cal 44 .
16. *Emperor v Cholappa*, (1906) 8 Bom LR 947 , 949; *Ambika Prasad v State of Uttar Pradesh*, 1992 Cr LJ 1478 (All).
17. *Girish Chunder Ghose v The Queen-Empress*, (1893) 20 Cal 857 , 865; *Rameswar Bhartia v The State of Assam*, (1953) 5 Assam 1.
18. *Ganeshi*, (1893) 15 All 192 , 194 FB; *Queen-Empress v Narain Singh*, (1900) ILR 22 All 340; *Rodrigues*, (1895) 20 Bom 502, 504.
19. *Maung Po Kywe*, (1939) Ran 251.
20. *Parashuram Dataram Shamdasani v Hugh Golding Cocke*, (1929) 31 Bom LR 925 : ILR 1929 53 Bom 716 : AIR 1929 Bom 404 .
21. *Serjeant v Dale*, (1877) 2 QBD 558 , 567.
22. *Emperor v Gundo Chikko Kulkarni*, (1921) 23 Bom LR 842 ; *Re Mudkaya*, (1926) 28 Bom LR 1302 .
23. *Girish Chunder Ghose v The Queen-Empress*, (1893) 20 Cal 857 .
24. *Sudhama Upadhya v Queen-Empress*, (1895) 23 Cal 328 .
25. *Kharac Chand Pal v Tarack Chunder Gupta*, (1884) 10 Cal 1030 ; *Nistarini Debi v Ghose*, (1895) 23 Cal 44 ; *Queen-Empress v Pherozsha Pestonji*, (1893) 18 Bom 442; *Bisheshar Bhattacharya v Emperor*, (1910) ILR 32 All 635.
26. *Re Rodrigues*, (1895) 20 Bom 502.
27. *Parashuram Dataram Shamdasani v Hugh Golding Cocke*, (1929) 31 Bom LR 925 : ILR 1929 53 Bom 716 : AIR 1929 Bom 404 .
28. *Wood v Corp of the Town of Calcutta*, (1881) 7 Cal 322 .
29. *Lahana*, (1887) Unrep CRC 321.
30. *Venkana*, (1887) Unrep CRC 339.
31. *The Empress v Donnelly*, (1877) 2 Cal 405 .
32. *Sudhindra Nath Dutt v The State*, (1959) ILR 1 Cal 6 : AIR 1957 Cal 677 : 1957 Cr LJ 1245 .
33. *Supreme Court Advocates-on-Record –Association v UOI,* (2016) 5 SCC 808 .
34. *Re Basapa*, (1884) 9 Bom 172; *Sahadev*, (1890) 14 Bom 572.
35. *Ganeshi*, (1893) 15 All 192 (FB).
36. *Ananda Chunder Singh v Basu Mudh*, (1896) 24 Cal 167 .
37. *Amrit Majhi v Emperor*, (1919) ILR 46 Cal 854.
38. *Emperor v Hargobind*, (1911) ILR 33 All 583.

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CHAPTER XXXVII MISCELLANEOUS

[s 480] Practising pleader not to sit as Magistrate in certain Courts —

No pleader who practises in the Court of any Magistrate shall sit as a Magistrate in that Court or in any Court within the local jurisdiction of that Court.

[s 480.1] **State Amendment**

Karnataka.— *The following amendments were made by Karnataka Act 35 of 1984, section 2 (w.e.f. 2-7-1984).*

S 480A.—Insertion of new Section 480A. In its application to the State of Karnataka for the purposes hereinafter appearing after Section 480 of the following section shall be inserted;

"**480A. Other powers of Magistrate.—**Any Judicial Magistrate or Executive Magistrate shall be entitled to attest, verify or authenticate any document brought before him for the purpose of attestation, verification or authentication, as the case may be, and to affix seals thereon, as may be prescribed by any law for the time being in force."

COMMENTS

The section means that a pleader cannot both be a Magistrate and act as pleader in the Court at the same time. There is no objection to a pleader practising in the Court being appointed as a Magistrate in such Court provided, he gives up his practice while he is on the [bench1]. However, judicial propriety commands that one who has practised as a pleader in that court should not act or plead before that court.

Section 480 holds that a pleader as defined in section 2(q) of the Code cannot both be a Magistrate and act as a pleader in the Court at the same time.

Three other relevant provisions from other statute books are: Article 124(7) of the Constitution which states that "No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India, Article 220 of the Constitution which states that No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High *Courts"*.

Explanation- In this article, the expression High Court does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution

And section 32 of the Advocates Act, 1961, which states that "Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case".

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CHAPTER XXXVII MISCELLANEOUS

[s 481] Public servant concerned in sale not to purchase or bid for property —

A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property.

COMMENTS

See section 169 of the Indian Penal Code, 1860, which provides punishment for the offence.

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CHAPTER XXXVII MISCELLANEOUS

[s 482] Saving of inherent powers of High Court —

Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

COMMENTS

This section has not given increased powers to the High Court which it did not possess before the section was enacted. It gives no new powers. It only provides that those which the Court already inherently possessed shall be preserved, and is inserted lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Code and that no inherent power had survived the passing of the Code.[39.] Though the jurisdiction exists and is wide in its scope, it is a rule of practice that it will only be exercised in exceptional cases.[40.] The Supreme Court has held that the following principles would govern the exercise of the inherent jurisdiction of a High Court given by section 482: (1) the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party; (2) it should be exercised very sparingly to prevent abuse of the process of any Court or otherwise to secure the ends of justice; (3) it should not be exercised as against the express bar of the law engrafted in any other provision of the Code.[41.] In the exercise of inherent powers, the Court does not function as a Court of appeal or revision. This power cannot be exercised to stifle a legitimate prosecution.[42.] Inherent powers cannot be exercised to review judgment. The accused was convicted in this case for bribery. Some of his property was directed to be sold by auction. That was in addition to the sentence of imprisonment and fine. An appeal against this was dismissed. An application was made by the legal heirs of the accused for permission to deposit certain sums in lieu of auction sale of property. This was held to be not tenable before the Appellate Court.[43.]

The bar under section 397(2) of the Code is applicable to the revisional powers only and not to the inherent powers in these cases, where the aggrieved party challenges the maintainability of proceedings as such on other grounds. Accordingly, the proceedings under section 145 launched by the defendant in a civil suit in respect of the same disputed property in respect of which *status quo* was ordered to be maintained were quashed.[44.] The inherent power overrides the express bar against revision provided under section 341 of the Code.[45.] Similarly, the power under section 382 is not subject to the limitations imposed on the power of revision conferred by section 397.[46.] It cannot be invoked with respect to any matter covered by the specific provisions of the Code or if its exercise would be inconsistent with any of the specific provisions of the Code,[47.] or when there is another remedy available, e.g., a civil proceeding[48.] or revision,[49.] or when a remedy is available to the applicant to approach the Supreme Court under Article 137 of the Constitution to review High Court's order dismissing petition for special leave,[50.] or when the powers of the High Court are

expressly limited to a particular matter under an Act.[51.] Where the petitioner has filed Special Leave Petition under Article 136 of the Constitution against the dismissal of his appeal against conviction, the order of conviction may be suspended under this section, as section 389(3) is not applicable in this case, as it applies only where there is a right of appeal.[52.] Where the High Court has no jurisdiction in revision to interfere with any judgment, order or sentence passed by a Judge of the High Court in the exercise of its original criminal jurisdiction, the provisions of this section cannot be invoked since the question there is one of jurisdiction.[53.]

In *Dhariwal Tobacco Products Ltd v State of Maharashtra*,[54.] a two-judge bench of the Supreme Court had concurred with the proposition of law that availability of alternative remedy of criminal revision under section 397 of CrPC by itself cannot be a good ground to dismiss an application under section 482 of CrPC. But in the case of *Mohit alias Sonu v State of Uttar Pradesh*,[55.] contrary view was taken that when an order under assail is not interlocutory in nature and is amenable to the revisional jurisdiction of the High Court, then there should be a bar in invoking the inherent jurisdiction of the High Court. In view of such conflict, these cases were directed to be placed before the Hon'ble Chief Justice for reference to a larger Bench.

A three-judge bench[56.] held that section 482 begins with a *nonobstante* clause, i.e., "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." Since section 397 of CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under section 482 of CrPC only to petty interlocutory orders. It was held that the case of *Mohit alias Sonu*[57.] in respect of inherent power of the High Court in section 482 of the CrPC does not state the law correctly.

The accused cannot be denied speedy trial simply because he did not ask for or insist upon a speedy trial.[58.]

This section closely resembles section 151 of the Civil Procedure Code. In *CBI v Maninder Singh*,[59.] it was held that the power under section 482 of CrPC must be used very sparingly and especially in economic offences, merely because the party had reached a settlement with the bank cannot be a ground for quashing criminal proceedings.

The High Court can quash an FIR or a complaint in exercise of its powers under Article 226 of the Constitution of India or under section 482 CrPC:

(1) Where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety, do not *prima facie* constitute any offence or make out a case against the accused.

(2) Where the allegations in the FIR and other materials accompanying FIR do not disclose a cognizable offence justifying an investigation under section 156(1) of CrPC except an order of a Magistrate under section 155(2) CrPC.

(3) Where uncontroverted allegations in the FIR or the complaint and the evidence collected in support do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently

improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in the of CrPC or the concerned Act to the institution of criminal proceeding or where there is specific provision in the of CrPC or concerned Act providing efficacious redress.

(7) Where a criminal proceeding is manifestly attended with *mala fide* or where proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

The Supreme Court further laid down in this connection as under:

> We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.[60.]

[s 482.1] Power to be exercised *ex debito justitiae*.—

The power under the section should be exercised *ex debito justitiae* to prevent abuse of process of Court. But it should not be exercised to stifle legitimate prosecution. The power has to be exercised very sparingly and with circumspection and that too in the rarest of the rare cases.[61.] The provisions of Articles 226, 227 and section 482 are meant to advance justice and not to frustrate it.[62.] The High Court should not assume the role of a trial Court and embark upon an inquiry as to the reliability of the evidence and sustainability of the accusation on a reasonable appreciation of such evidence. Power should be exercised sparingly, with caution and circumspection. The

Supreme Court found error in the order of the High Court in quashing the complaint in this case. The Supreme Court said[63.]:

> In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under section 482. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is *mala fide*, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the *mala fides* of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person. The allegation of *mala fides* against the informant is of no consequence and cannot by itself be the basis for quashing the proceedings.[64.]

The Supreme Court also has settled that High Courts should not entertain writ petitions under Articles 226 and 227 and petitions under section 482 for granting or rejecting request for bail which is the function of lower courts.[65.]

[s 482.2] Quashing of FIR —

Inherent power under section 482 in a matter of quashment of FIR has to be exercised sparingly and with caution and when and only when such exercise is justified by the test specifically laid down in the provision itself. The power under section 482 is very

wide and conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the Court and the said power is not to be used to choke or smother a legitimate prosecution[66].

[s 482.3] Inherent power not affected by provision in section 397(3) —

The High Court's power under section 482 is not affected by the provision in section 497(3). The Supreme Court said:

Even if it is an interlocutory order, the High Court's inherent jurisdiction under section 482 is not affected by the provisions of section 397(3) CrPC. That the High Court may refuse to exercise its jurisdiction under section 482 on the basis of self-imposed restriction is a different aspect. It cannot be denied that for securing the ends of justice, the High Court can interfere with the order which causes miscarriage of justice or is palpably illegal or is unjustified.[67].

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39. *The State of Uttar Pradesh v Mohammad Naim*, AIR 1964 SC 703 : (1964) 1 Cr LJ 549 ; *Emperor v Khwaja Nazir Ahmed*, (1945) 47 Bom LR 245 PC.

40. *SC Mitra v Raja Kali Charan*, (1928) ILR 3 Luck 287 : AIR 1928 Oudh 104 ; *Bikaru*, (1947) 22 Luck 391 ; *Dr Rajagopala Rao v State of Andhra Pradesh*, AIR 1960 AP 184 : 1960 Cr LJ 455 ; *KC Sonreka v State of Uttar Pradesh*, AIR 1963 All 33 : 1963 Cr LJ 38 ; *Kurukshetra University v State of Haryana*, 1977 Cr LJ 1900 : AIR 1977 SC 2229 : (1977) 4 SCC 451 .

41. *Madhu Limaye v State of Maharashtra*, AIR 1978 SC 47 : 1978 Cr LJ 165 : (1977) 4 SCC 571 ; *Amarnath v Haryana*, AIR 1977 SC 2185 : 1977 Cr LJ 1891 ; *LV Jadhav v Shankarrao Abasaheb Pawar*, AIR 1983 SC 1219 : 1983 Cr LJ 1501 ; *Mohan Singh v State*, 1993 Cr LJ 3193 (Raj—FB). *Randhir Singh Rana v State (Delhi Admn)*, AIR 1997 SC 639 : 1997 Cr LJ 779 : (1997) 1 SCC 361 , the inherent power is vested in the High Courts only and not in subordinate criminal Courts. *Mohinder Kumar v State of Haryana*, 2000 Cr LJ 4995 (1) (SC) : JT 2000 (7) SC 438 : (2001) 10 SCC 605 , matter referred to Full Bench, in view of the pendency before the FB, the High Court did not dispose of the matter following the decision of *DB Baij Nath Jha v Sitaram*, AIR 2008 SC 2778 : (2008) 8 SCC 77 , no inflexible rule can be laid down which would govern exercise of powers. The Court is not sitting under this section as a Court of Appeal or Revision. Inherent powers are very wide, but the Court has to exercise them sparingly, carefully and with caution.

42. *State of AP v Aravapally Venkanna*, AIR 2009 SC 1863 : (2009) 13 SCC 443 ; *KLE Society v Siddalingesh*, AIR 2008 SC 1702 : (2008) 4 SCC 541 , the Court has to be cautious and careful in the exercise of this power. Complaint by a peon on number of baseless grounds quashed.

43. *N Naveen Kumar v State of AP*, AIR 2009 SC 241 : 2009 Cr LJ 382 : (2008) 9 SCC 800 .

44. *Charan Singh v SDM, Jalandhar*, 1992 Cr LJ 671 (P&H).

45. *Lalit Mohan Mondal v Dehoyendra Nath Chatterjee*, AIR 1982 SC 785 : 1982 Cr LJ 625 : (1982) 3 SCC 219 .

46. *Raj Kapoor v State (Delhi Admn)*, 1980 Cr LJ 202 : AIR 1980 SC 258 : (1980) 1 SCC 43 .

47. *Pampapathy v State of Mysore,* AIR 1967 SC 286 : 1967 Cr LJ 287 ; *Chitawan v Mahboob*, 1970 Cr LJ 378 ; *Mahesh v State*, 1971 Cr LJ 1674 (FB).

48. *Re Lloyds Bank*, (1934) 36 Bom LR 88 : AIR 1934 Bom 74 .

49. *Agra Elec Supply Co v State of UP*, AIR 1960 All 176 : 1960 Cr LJ 300 ; *Sankalchand v Khengaram*, 1969 Cr LJ 1501 : AIR 1969 Guj 342 ; *Abdul Wahid v State of Uttar Pradesh*, 1970 Cr LJ 1285 .

50. *Sadhu Singh v State*, AIR 1962 All 193 .

51. *Vishnu*, (1942) Nag 107.

52. *B Subbaiah v State of Karnataka*, 1992 Cr LJ 3740 (Knt).

53. *The State v Haridas Mundra*, AIR 1974 Cal 485 : 1970 Cr LJ 1341 (FB).

54. *Dhariwal Tobacco Products Ltd v State of Maharashtra,* (2009) 2 SCC 370 : AIR 2009 SC 1032 : 2009 Cr LJ 974 .

55. *Mohit alias Sonu v State of Uttar Pradesh,* (2013) 7 SCC 789 : AIR 2013 SC 2248 : JT 2013 (9) SC 205 : 2013 (7) Scale 620 .

56. *Prabhu Chawla v State of Rajasthan,* AIR 2016 SC 4245 : 2016 (8) Scale 545 .

57. *Supra.*

58. *AR Antulay v RS Nayak*, AIR 1992 SC 1701 : 1992 Cr LJ 2717 : (1992) 1 SCC 225 .

59. *CBI v Maninder Singh,* (2016) 1 SCC 389 : AIR 2015 SC 3657 : 2015 Cr LJ 4534 : 2015 (9) Scale 365 .

60. *State of Haryana v Bhajan Lal*, 1992 AIR SCW 237 : AIR 1992 SC 604 : (1992) Supp 1 SCC 335; quoted in *Rupan Deol Bajaj v Kanwar Pal Singh Gill*, AIR 1996 SC 309 : 1996 Cr LJ 381 : (1995) 6 SCC 194 .

61. *Dhruvaram Murlidhar Sonar v State of Maharashtra,* AIR 2019 SC 327 ; *Anand Kumar Mohatta v State (Govt. of NCT of Delhi) Department of Home,* AIR 2019 SC 210 .

62. *State of Maharashtra v Arun Gulab Gawali*, AIR 2010 SC 3762 : (2010) 9 SCC 701 .

63. *State of Karnataka v M Devendrappa*, AIR 2002 SC 671 : 2002 Cr LJ 998 : (2002) 2 CHN (Supp) 21 : (2002) 3 SCC 89 .

64. *Trilok Nath Mittal v UOI*, 2003 Cr LJ 184 (All), charge under Customs Act, not substantiated *Shaiffullah Rahim Khan v High Court of Karnataka* : 2002 Cr LJ 4774 , the power under the section should not be truncated or restricted merely on the basis of apprehension that it may be invoked unnecessarily. *Suraj Narayan Tiwary v State of Jharkhand*, 2002 Cr LJ 4458 (Jhar), proceeding quashed where process was proved to have been not served. *Nilima Barman v Ratina Barman*, 2002 Cr LJ 1865 (Gau), co-owners of land cannot complain of encroachment under section 145 by one of the them. Complaint quashed. *Mast Ram v Shanti Devi*, 2002 Cr LJ 1616 (HP), inability of the wife to maintain herself and the fact of her husband not providing her maintenance are not to be considered under section 482, hence no quashing. *Seema v Satish Sachdeve*, 2002 Cr LJ 2125 (P&H), offences under sections 405 and 420, IPC, not proved, complaint quashed. *Sunil Kumar v Escorts Yamaha Motors Ltd*, AIR 2000 SC 27 : 2000 Cr LJ 174 : JT 1999 (8) SC 413 : 1999 (6) Scale 633 : (1999) 8 SCC 468 , offence of cheating or of criminal breach of trust not disclosed in the FIR, it appeared that the FIR was lodged to pre-empt the filing of complaint under section 138, NI Act, quashed. *Divine Retreat Centre v State of Kerala*, AIR 2008 SC 1614 : (2008) 3 SCC 542 : 2008 Cr LJ 1891 , inherent powers are not unlimited. The Supreme Court explained the circumstances in which they are to be exercised.

65. *Nazma v Javed @Anjum,* (2013) 1 SCC 376 : 2012 (10) Scale 494 .

66. *State of Telangana v Habib Abdullah Jeelani,* AIR 2017 SC 373 : [2017] 1 MLJ (Crl) 375 : LNIND 2017 SC 19 .

67. *Puran v Rambilas*, (2001) 6 SCC 338 : AIR 2001 SC 2023 : 2001 Cr LJ 2566 .

The Code of Criminal Procedure, 1973

CHAPTER XXXVII MISCELLANEOUS

[s 483] Duty of High Court to exercise continuous superintendence over Courts of Judicial Magistrates —

Every High Court shall so exercise its superintendence over the Courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates.

COMMENTS

This is a new section which imposes on the High Court a duty to exercise continuous superintendence over the Courts of Judicial Magistrates subordinate to it in order to see that the cases are expeditiously and properly disposed of by such Magistrates. Though a second revision is not allowed because of the provision in section 397(3), the High Court has the inherent power under section 482 and the power of continuous superintendence under section 483, and in the exercise of these powers, even such an application may be allowed.[68.]

68. *Prem Chand Mahto v Laxmi Devi*, 2003 Cr LJ 3342 (Jhar). *Krishnan v Krishnaveni*, 1997 Cr LJ 1519 : AIR 1997 SC 987 : (1997) 4 SCC 241 , the High Court can entertain a second revision in cases of grave miscarriage of justice, or abuse of process of Court, *etc.*, by exercising inherent powers under sections 482 and 483.

The Code of Criminal Procedure, 1973

CHAPTER XXXVII MISCELLANEOUS

[s 484] Repeal and savings —

(1) **The Code of Criminal Procedure, 1898 (5 of 1898), is hereby repealed.**

(2) **Notwithstanding such repeal,—**

(a) **if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), as in force immediately before such commencement (hereinafter referred to as the old Code), as if this Code had not come into force:**

Provided **that every inquiry under Chapter XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;**

(b) all notifications published, proclamations issued, powers conferred, forms prescribed, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the old Code and which are in force immediately before the commencement of this Code, shall be deemed, respectively, to have been published, issued, conferred, prescribed, defined, passed or made under the corresponding provisions of this Code;

(c) any sanction accorded or consent given under the old Code in pursuance of which no proceeding was commenced under that Code, shall be deemed to have been accorded or given under the corresponding provisions of this Code and proceedings may be commenced under this Code in pursuance of such sanction or consent;

(d) the provisions of the old Code shall continue to apply in relation to every prosecution against a Ruler within the meaning of Article 363 of the Constitution.

(3) **Where the period prescribed for an application or other proceeding under the Old Code had expired on or before the commencement of this Code, nothing in this Code shall be construed as enabling any such application to be made or proceeding to be commenced under this Code by reason only of the fact that a longer period therefor is prescribed by this Code or provisions are made in this Code for the extension of time.**

[s 484.1] **State Amendment**

Uttar Pradesh.— *The following amendments were made by UP Act 1 of 1984, section 11 (w.e.f. 1-5-1984).*

S 484(2)(a).—In its application to the State of Uttar Pradesh, in section 484, in sub-section (2), in clause (a), after the proviso the following further proviso shall be inserted,

"*Provided further* that the provisions of section 326 of this Code as amended by the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 shall apply also to every trial pending in a Court of Session at the commencement of this Code and also pending at the commencement of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1983."

The following amendments were made by UP Act 16 of 1976, section 10 (w.e.f. 1-5-1976).

S 484(2)(e).—In its application to the State of Uttar Pradesh, in section 482, in sub-section (2), after clause (d), the following shall always be deemed to have been inserted.—

"(e) the provisions of the United Provinces Borstal Act, 1938, the United Provinces First Offenders Probation Act, 1938 and the Uttar Pradesh Children Act, 1951, shall continue in force in the State of Uttar Pradesh until altered or repealed or amended by the competent Legislature or other competent authority, and accordingly, the provisions of section 360 of this Code shall not apply to that State, and the provision of section 361 shall apply with the substitution of references to the corresponding Acts in force in that State."

COMMENTS

By sub-section (1) of this section, the Code of Criminal Procedure, 1898, is repealed. The savings provisions are contained in sub-section (2). It provides by clause (a) that if immediately before 1 April 1974, that is, the date on which the present Code came into force, there was any appeal, application, trial, inquiry or investigation pending, then such appeal, application, trial, inquiry or investigation *shall be disposed of*, continued, held or made, as the case may be, in accordance with the provisions of the old Code. However, to this there is a proviso which takes out committal proceedings (Chapter XVIII of the old Code) from the purview of the old Code, if such committal proceeding was pending at the commencement of the present Code. The same should be disposed of under the new Code. In the case of sanction accorded or consent given under the old Code, the same should be treated as being accorded or given under the corresponding provisions of the present Code, and proceedings *may be commenced* under the present Code in pursuance of such sanction or consent (sub-section 2(c)]. Obviously therefore, if in pursuance of such sanction or consent under the old Code proceedings have already been started under the old Code, the corresponding provision of the new Code cannot be attracted to such proceedings. By clause (d) of sub-section (2), it is provided that the provisions of the old Code shall continue to apply in relation to every prosecution against a Ruler. Sub-sections (3) provides that if a period prescribed for an application or other proceeding under the old Code has already expired on or before the commencement of the present Code, then the person concerned cannot avail himself of any extended period which might be available to him under the present Code.

Thus, it is clear from these provisions that whenever the Parliament wanted to apply the provisions of the new Code or wanted the provisions of the old Code to be continued in spite of the enactment of the new Code, it has specifically so stated. When a case was pending in the Court of the Judicial Magistrate, when the new Code

came into force, he rightly committed the case to the Court of Sessions. But the transfer of the case by the Sessions Judge to the file of Chief Judicial Magistrate was illegal and consequently the trial and conviction by the CJM was also illegal. The Sessions Judge ought to have tried the case himself as he had no power to transfer the case to the CJM.[69.]

[s 484.2] Right of appeal: Forum of appeal —

In a Full-Bench case before the High Court of Gujarat, the facts were as follows: The accused-appellants were charge-sheeted before the City Magistrate on 25 August 1973, their plea was recorded on 10 December 1973, evidence was recorded on 8 April 1974 and conviction was made on the same date. The accused filed an appeal from the order of conviction to the High Court instead of to the Court of Session. The question was whether as the prosecution was instituted prior to 1 April 1974, the High Court will hear the appeal or as the order of conviction was passed after 1 April 1974, the Sessions Judge, as under the new Code, should hear the appeal.

According to the High Court, there are four categories of persons who, on the date of the coming into force of the new Code, may be interested in the right of appeal to the High Court against the order of the Presidency Magistrate: (1) Persons aggrieved by a judgment and order of conviction passed by the Presidency Magistrate before the commencement of the new Code and who have filed their appeals in pursuance of the provisions of the old Code in the High Court: there may be more than one accused person in such a case, some of them filing appeals against the order of conviction to the High Court prior to the coming into effect of the new Code and others filing such appeals after the coming into force of the new Code either because their period of limitation was still subsisting or because they did not receive certified copies of judgment in time. (2) Persons against whom trial Court has taken cognizance of the prosecution before 1 April 1974 but has held trial and passed judgment and order of conviction after 1 April 1974. (3) Persons against whom cognizance has been taken after 1 April 1974 in respect of an offence committed prior to the coming into effect of the new Code and convicted thereafter, i.e., after 1 April 1974. (4) Persons who have committed an offence after 1 April 1974 and convicted thereafter.

According to the High Court, the first two categories of cases will be governed by sub-section (2)(a) and will have to be disposed of finally in accordance with the provisions of the old Code, as if the new Code has not come into effect. This is so because the right of appeal is a substantive right and not a procedural one, and such right gets vested from the day of the commencement of the proceeding, and an appeal is nothing but a continuation of the proceeding. The forum to file an appeal is also determined as soon as the action is instituted. Therefore, according to the High Court, in the case before it, the right of appeal was to the High Court and not to the Sessions Court. The other two categories will not be governed by the provisions of sub-section (2)(a) and will, therefore, be governed by the provisions of the new Code.[70.]

The words "disposed of" means finally disposed of.[71.]

[s 484.3] Saving of certain matters under preceding Code [*Sub-section (2)(b)*]. —

The subsection provides that, notwithstanding the repeal of the old Code, all... sentences passed... which are in force immediately before the commencement of this Code, *shall be deemed*,... to have been passed under the corresponding provisions of this Code. This is a case of legal fiction created by the deeming provision and where a legal fiction is created, full effect must be given to it, and it should be carried to its

logical conclusion. Therefore, where a person has been sentenced under the old Code and his sentence is deemed to be under the present Code, then obviously, the legal fiction will demand that that person should also get the benefit of section 428, which he would have got had he been actually sentenced under the new Code. An accused person sentenced under the old Code can, therefore, avail himself of set-off for the period for which he was detained during the investigation, inquiry and trial permitted under the beneficial provision of section 428 of the new Code.[72.] Section 484 on its plain construction means that the old Code shall apply to appeals, applications, trials, inquiry or investigation pending immediately before the date on which the new Code came into force. It does not exclude the old Code from application so far as the appeals or revision to be filed after the commencement of the new Code against the orders passed before the coming into force of such new Code.[73.] The word "application" includes a petition of complaint. Where a complaint was filed long before the coming into force of the new Code was examined and remained pending on the date of the coming into force of the new Code, it was sent for investigation under section 202 of the old Code and proceedings were started. It was held that the proceedings were valid.[74.] Where a case committed to the Court of Session was pending for trial on 1 April 1974, it was held that it was liable to be tried in accordance with the old Code.[75.] Cases pending before the Executive Magistrates on 1 April 1974 could continue as under the old Code.[76.]

A revision petition filed after the coming into force of the new Code against a trial held before is not a continuation of the old proceedings and hence section 484(2)(a) does not apply. The revision petition was therefore held to be governed by the new Code.[77.] Where a Magistrate had ordered the police to make an inquiry under section 156(3) of the old Code in a private complaint and the final report of the police came after the coming into force of the new Code, it was held that the new Code would apply to the subsequent proceedings.[78.] An order for maintenance under section 488 of the old Code in favour of a major son was deemed to be an order under section 125 of the new Code and did not therefore cease to have effect.[79.] A revision application under section 435 of the old Code pending at the commencement of the new Code had to be disposed of in accordance with the old Code by virtue of section 484.[80.] Where there was an inconsistency between a State Act and the old Code and assent of the President as required by Article 254 of the Constitution had been obtained, it was held that fresh assent of the President with reference to the new Code was not necessary.[81.] Provisions concerning bail substantially are the same in the old and the new Codes. Therefore, if the accused was released on bail under the old Code and was found to have jumped the bail and was generally found to engage in a conduct which did not facilitate the proper conduct of the case, the High Court was completely within its power to deny him bail under the provisions of the new Code.[82.]

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69. *State of Karnataka v Laxman Wamanappa Dalawai*, 1992 Cr LJ 2833 (Knt); *State of UP v Raj Kumar*, 1996 Cr LJ 4283 (All).

70. *Hiralal Nansa Bhavsar v The State of Gujarat*, (1974) 15 Guj LR 725 (FB): 1976 Cr LJ 84.

71. *Ibid*.

72. *BP Andre v Supdt, Central Jail*, AIR 1975 SC 164 : (1975) 1 SCC 192 : 1975 Cr LJ 182 ; affirming *Narayanan Nambeesan v State*, (1974) 76 Bom LR 690 .

73. *Firm Chironjilal Ramjibhai v Chunarmal Motiram*, 1976 Cr LJ 437 (MP).
74. *Ladd Lal Sahu v Dharnidh Sahu*, 1984 Cr LJ 1839 (Pat—FB).
75. *Karnataka v KM Annegowda*, AIR 1977 SC 357 : 1977 Cr LJ 220 : (1977) 1 SCC 417 .
76. *Ram Kishan Agarwal v State of Uttar Pradesh*, 1976 Cr LJ 1984 (All).
77. *Dhanraj Jain v BK Biswas*, 1976 Cr LJ 1297 (Cal).
78. *K Keshavamurthy v State of Karnataka*, 1976 Cr LJ 761 (Kant).
79. *Jagir Singh v Ranbir Singh*, AIR 1979 SC 381 : 1979 Cr LJ 318 : (1979) 1 SCC 560 .
80. *P Philip v Director, Enforcement, New Delhi*, AIR 1976 SC 1185 : 1976 Cr LJ 920 : (1976) 2 SCC 174 .
81. *Ananta Singh v State of West Bengal*, 1976 Cr LJ 1609 (Cal—DB).
82. *Sukar Narayan Bakhia v Rajnikant R. Shah*, 1982 Cr LJ 2148 (Guj).

The Code of Criminal Procedure, 1973

THE FIRST SCHEDULE CLASSIFICATION OF OFFENCES

Explanatory Note.—(1) In regard to offences under the Indian Penal Code, the entries in the second and third columns against a section the number of which is given in the first column are not intended as the definition of, and the punishment prescribed for, the offence in the Indian Penal Code, but merely as indication of the substance of the section.

(2) In this Schedule, (i) the expressions "Magistrate of the first class" and "Any Magistrate" include Metropolitan Magistrates but not Executive Magistrates; (ii) the word "cognizable" stands for "a police officer may arrest without warrant"; and (hi) the word "non- cognizable" stands for "a police officer shall not arrest without warrant".

L—OFFENCES UNDER THE INDIAN PENAL CODE

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
		CHAPTER V—ABETMENT			
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	Same as for offence abetted.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non- bailable.	Court by which offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Same as for offence abetted.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non- bailable.	Court by which offence abetted is triable.
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso.	Same for offence intended to be abetted.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non- bailable.	Court by which offence abetted is triable.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Same as for offence committed.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable.	Court by which offence abetted is triable.
114	Abetment of any offence, if abettor is present when offence is committed.	Same as for offence committed.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable	Court by which offence abetted is triable.
115	Abetment of an offence, punishable with death or imprisonment for life, if the offence be not committed in consequence of the abetment.	Imprisonment for 7 years and fine.	According as offence abetted is cognizable or non-cognizable.	Non-bailable	Court by which offence abetted is triable.
	If an act which causes harm to be done in consequence of the abetment.	Imprisonment for 14 years and fine.	According as offence abetted is cognizable or non-cognizable.	Non-bailable	Court by which offence abetted is triable.
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Imprisonment extending to a quarter part of the longest term provided for the offence, or fine, or both.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable.	Court by which offence abetted is triable.
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Imprisonment extending to half of the longest term provided for the offence, or fine or both.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable.	Court by which offence abetted is triable.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
117	Abetting the commission of an offence by the public, or by more than ten persons.	Imprisonment for 3 years, or fine, or both.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable.	Court by which offence abetted is triable.
118	Concealing a design to commit an offence punishable with death or imprisonment for life, if the offence be committed.	Imprisonment for 7 years and fine.	According as offence abetted is cognizable or non-cognizable.	Non-bailable	Court by which offence abetted is triable.
	If the offence be not committed.	Imprisonment for 3 years and fine.	According as offence abetted is cognizable or non-cognizable.	Bailable	Court by which offence abetted is triable.
119	A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed.	Imprisonment extending to half of the longest term provided for the offence, or fine, or both.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable.	Court by which offence abetted is triable.
	If the offence be punishable with death or imprisonment for life.	Imprisonment for 10 years.	According as offence abetted is cognizable or non-cognizable.	Non-bailable	Court by which offence abetted is triable.
	If the offence be not committed.	Imprisonment extending to a quarter part of the longest term provided for the offence, or fine, or both.	According as offence abetted is cognizable or non-cognizable.	Bailable	Court by which offence abetted is triable.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
120	Concealing a design to commit an offence punishable with imprisonment, if offence be committed.	Imprisonment extending to a quarter part of the longest term provided for the offence, or fine, or both.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable.	Court by which offence abetted is triable.
	If the offence be not committed	Imprisonment extending to one-eighth part of the longest term provided for the offence, or fine, or both.	According as offence abetted is cognizable or non-cognizable.	Bailable	Court by which offence abetted is triable.
	CHAPTER VA—CRIMINAL CONSPIRACY				
120B	Criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of 2 years or upwards.	Same as for abetment of the offence which is the object of the conspiracy.	According as the offence which is the object of conspiracy is cognizable or non-cognizable.	According as offence which is object of conspiracy is bailable or nom bailable.	Court by which abetment of the offence which is the object of conspiracy is triable.
	Any other criminal conspiracy.	Imprisonment for 6 months, or fine, or both.	Nomcognizable	Bailable	Magistrate of the first class
	CHAPTER VI— OFFENCES AGAINST THE STATE				
121	Waging or attempting to wage war, or abetting the waging of war, against the Government of India.	Death, or imprisonment for life and fine.	Cognizable	Nombailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
121	Waging or attempting to wage war, or abetting the waging of war, against the Government of India.	Death, or imprisonment for life and fine.	Cognizable	Nombailable	Court of Session.
121A	Conspiring to commit certain offences against the State.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Nombailable	Court of Session.
122	Collecting arms, etc., with the intention of waging war against the Government of India.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Nombailable	Court of Session.
123	Concealing with intent to facilitate a design to wage war.	Imprisonment for 10 years and fine.	Cognizable	Nombailable	Court of Session.
124	Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Imprisonment for 7 years and fine.	Cognizable	Nombailable	Court of Session.
124A	Sedition.	Imprisonment for life and fine, or imprisonment for 3 years and fine, or fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
125	Waging war against any Asiatic power in alliance or at peace with the Government of India, or abetting the waging of such war.	Imprisonment for life and fine, or imprisonment for 7 years and fine, or fine.	Cognizable	Non-bailable	Court of Session.
126	Committing depredation on the territories of any power in alliance or at peace with the Government of India.	Imprisonment for 7 years and fine, and forfeiture of certain property.	Cognizable	Non-bailable	Court of Session.
127	Receiving property taken by war or depredation mentioned in sections 125 and 126.	Imprisonment for 7 years and fine, and forfeiture of certain property.	Cognizable	Non-bailable	Court of Session.
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
129	Public servant negligently suffering prisoner of State or war in his custody to escape.	Simple imprisonment for 3 years and fine.	Cognizable	Bailable	Magistrate of the first dass.
130	Aiding escape of rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
CHAPTER VII—OFFENCES RELATING TO THE ARMY, NAVY AND AIR FORCE					
131	Abetting mutiny, or attempting to seduce an officer, soldier sailor or airman from his allegiance or duty.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
132	Abetment of mutiny, if mutiny is committed in consequence thereof.	Death, or imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
133	Abetment of an assault by an officer, soldier, sailor or airman on his superior officer, when in the execution of his office.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
134	Abetment of such assault, if the assault is committed.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
135	Abetment of the desertion of an officer, soldier, sailor or airman	Imprisonment for 2 years, or fine, or both	Cognizable	Bailable	Any Magistrate.
136	Harbouring such an officer, soldier, sailor or airman who has deserted.	Imprisonment for 2 years, or fine, or both	Cognizable	Bailable	Any Magistrate.
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof.	Fine of 500 rupees	Non-cognizabk	; Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
138	Abetment of act of insubordination by an officer, soldier, sailor or airman, if the offence be committed in consequence.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.
140	Wearing the dress or carrying any token used by a soldier, sailor or airman with intent that it may be believed that he is such a soldier, sailor or airman.	Imprisonment for 3 months, or fine of 500 rupees, or both.	Cognizable	Bailable	Any Magistrate.
	CHAPTER VIII—OFFENCES AGAINST THE PUBLIC TRANQUILLITY				
143	Being member of an unlawful assembly.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.
144	Joining an unlawful assembly armed with any deadly weapon.	Imprisonment for 2 years, or fine, or both	Cognizable	Bailable	Any Magistrate.
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Imprisonment for 2 years, or fine, or both	Cognizable	Bailable	Any Magistrate.
147	Rioting.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
148	Rioting armed with deadly weapon.	Imprisonment for 3 years, or fine or both.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	The same as for the offence.	According as offence is cognizable or nomcognizable.	According as offence is bailable or non- bailable.	The Court by which the offence is triable.
150	Hiring, engaging or employing persons to take part in an unlawful assembly.	The same as for a member of such assembly, and for any offence committed by any member of such assembly.	Cognizable	According as offence is bailable or non-bailable.	The Court by which the offence is triable.
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.
152	Assaulting or obstructing public servant when suppressing riot, etc.	Imprisonment for 3 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed.	Imprisonment for 1 year, or fine, or both.	Cognizable	Bailable	Any Magistrate.
	If not committed.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
153A	Promoting enmity between classes.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	Promoting enmity between classes in place of worship, etc.	Imprisonment for 5 years and fine.	Cognizable	Non-Bailable	Magistrate of the first class.
[1][153AA	Knowingly carrying arms in any procession or organising or holding or taking part in any mass drill or mass training with arms.	Imprisonment for 6 months and fine of 2,000 rupees	Cognizable	Non-Bailable	Any Magistrate.]
153B	Imputations, assertions prejudicial to national integration.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-Bailable	[2][Magistrate of the first class.]
	If committed in a place of public worship etc.	Imprisonment for 5 years and fine.	Cognizable	Non-Bailable	Magistrate of the first class.
154	Owner or occupier of land not giving information of riot, etc.	Fine of 1,000 rupees.	Non-cognizable	Bailable	Any Magistrate.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Fine.	Non-cognizable	Bailable	Any Magistrate.
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Fine.	Non-cognizable	Bailable	Any Magistrate.
157	Harbouring persons hired for an unlawful assembly.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
158	Being hired to take part in an unlawful assembly or riot.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.
	Or to go armed.	Imprisonment for 2 years, or fine or both.	Cognizable	Bailable	Any Magistrate.
160	Committing affray.	Imprisonment for one month, or fine of 100 rupees, or both.	Cognizable	Bailable	Any Magistrate.
	CHAPTER IX—OFFENCES BY OR RELATING TO PUBLIC SERVANTS				
[3].161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-Bailable	Magistrate of the first class.
[4].162	Taking a gratification in order, by corrupt or illegal means, to influence a public servant.	Imprisonment for 3 years, or fine, or both.	Cognizable	NomBailable	Magistrate of the first class.
[5].163	Taking a gratification for the exercise of personal influence with a public servant.	Simple imprisonment for 1 year, or fine, or both.	Cognizable	Non-Bailable	Magistrate of the first class.
[6].164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
[7]165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-Bailable	Magistrate of the first class.
[8]165A	Punishment for abetment of offences punishable under section 161 or section 165.	Imprisonment for 3 years, or fine, or both.	Cognizable	NomBailable	Magistrate of the first class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Simple imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
[9][166A	Public servant disobeying direction under law	Imprisonment for minimum 6 months which may extend to 2 years and fine	Cognizable	Bailable	Magistrate of the first class.]
[10][166B	Non-treatment of victim by hospital	Imprisonment for 1 year or fine or both	Non-cognizable	Bailable	Magistrate of the first class.]
167	Public servant framing an incorrect document with intent to cause injury.	Imprisonment for 3 years, or fine or both.	Cognizable	Bailable	Magistrate of the first class.
168	Public servant unlawfully engaging in hade.	Simple imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
169	Public servant unlawfully buying or bidding for property.	Simple imprisonment for 2 years, or fine, or both and confiscation of property, if purchased.	Non-cognizable	Bailable	Magistrate of the first class.
170	Personating a Public servant.	Imprisonment for 2 years, or fine, or both.	Cognizable	Non-bailable	Any Magistrate.
171	Wearing garb or carrying token used by public servant with fraudulent intent.	Imprisonment for 3 months, or fine of 200 rupees, or both.	Cognizable	Bailable	Any Magistrate.
	CHAPTER IXA—OFFENCES RELATING TO ELECTIONS				
171E	Bribery.	Imprisonment for 1 year, or fine, or both, or if treating only, fine only.	Non-cognizable	Bailable	Magistrate of the first class.
171F	Undue influence at an election.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
	Personation at an election.	Imprisonment for 1 year, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
171G	False statement in connection with an election.	Fine.	Nomcognizable	Bailable	Magistrate of the first class.
171H	Illegal payments in connection with elections.	Fine of 500 mpees.	Nomcognizable	Bailable	Magistrate of the first class.
171-1	Failure to keep election accounts.	Fine of 500 mpees.	Nomcognizable	Bailable	Magistrate of the first class.
	CHAPTER X—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS				
172	Absconding to avoid service of summons or other proceeding from a public servant.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Nomcognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	If summons or notice require attendance in person, etc., in a Court of Justice.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Nomcognizable	Bailable	Any Magistrate.
173.	Preventing the service or the affixing of any summons of notice, or the removal of it when it has been affixed, or preventing a proclamation,	Simple imprisonment for 1 month or fine of 500 rupees, or both.	Nomcognizable	Bailable	Any Magistrate.
	If summons, etc., require attendance in person, etc., in a Court of Justice.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Nomcognizable	Bailable	Any Magistrate.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Nomcognizable	Bailable	Any Magistrate.
	If the order requires personal attendance, etc., in Court of Justice.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
[11.][174A	Failure to appear at specified place and specified time as required by a proclamation published under subsection (1) of section 82 of this Code.	Imprisonment for 3 years or with fine, or with both.	Cognizable	Non-bailable	Magistrate of the first class.
	In a case where declaration has been made under sub-section (4) of section 82 of this Code pronouncing a person as proclaimed offender.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.]
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document.	Simple imprisonment for 1 month, or fine of 500 rupees or both.	[12.][Non-cognizable]	[13.][Bailable]	The Court in which the offence is committed, subject to the provisions of Chapter XXVI; or, if not committed in a Court, any Magistrate.
	If the document is required to be produced in or delivered to a Court of Justice.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Non-cognizable	Bailable	The Court in which the offence is committed, subject to the provision of Chapter XXVI; or, if not committed in a Court, any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.
	If the notice or information required respects the commission of an offence, etc.	Simple imprisonment for 6 months, or fine of 1,000 rupees or both.	Non-cognizable	Bailable	Any Magistrate.
	If the notice or information is required by an order passed under sub-section (1) of section 356 of this Code.	Imprisonment for 6 months, or fine of 1,000 rupees, or both	Non-cognizable	Bailable	Any Magistrate.
177	Knowingly furnishing false information to a public servant.	Imprisonment for 6 months, or fine of 1,000 rupees, or both	Non-cognizable	Bailable	Any Magistrate.
	If the information required respects the commission of an offence, etc,	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
178	Refusing oath when duly required to take oath by a public servant.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	Non-cognizable	Bailable	The Court in which the offence is committed, subject to the provisions of Chapter XXVI; or, if not committed in a Court, any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
179	Being legally bound to state truth, and refusing to answer questions.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Non-cognizable	Bailable	The Court in which the offence is committed, subject to the provision of Chapter XXVI; or, it not committed in a Court, any Magistrate.
180	Refusing to sign a statement made to a public servant when legally required to do so.	Simple imprisonment for 3 months, or fine of 500 rupees, or both.	Nomcognizable	Bailable	The Court in which the offence is committed, subject to the provision of Chapter XXVI; or, it not committed in a Court, any Magistrate.
181	Knowingly stating to a public servant, on oath as true that which is false.	Imprisonment for 3 years and fine.	Nomcognizable	Bailable	Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Imprisonment for 6 months, or fine of 1,000 mpees, or both.	Nomcognizable	Bailable	Any Magistrate.
183	Resistance to the taking of property by the lawful authority of a public servant.	Imprisonment for 6 months, or fine of 1,000 mpees, or both.	Nomcognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
184	Obstmcting sale of property offered for sale by authority of a public servant.	Imprisonment for 1 month, or fine of 500 rupees, or both.	Nomcognizable	Bailable	Any Magistrate.
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby.	Imprisonment for 1 month, or fine of 200 rupees, or both.	Nomcognizable	Bailable	Any Magistrate.
186	Obstructing public servant in discharge of his public functions.	Imprisonment for 3 months, or fine of 500 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.

STATE AMENDMENT

Andhra Pradesh:

Offence under section 186 is cognizable.

[Vide A.P.G.O. Ms No. 732, dated 5th December, 1991.]

187	Omission to assist public servant when bound by law to give such assistance.	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.
	Wilfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Simple imprisonment for 6 months, or fine of 500 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed.	Simple imprisonment for one month, or fine of 200 rupees, or both.	Cognizable	Bailable	Any Magistrate.
	If such disobedience causes danger to human life, health or safety, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
	STATE AMENDMENT				
Andhra Pradesh:					
	Offence under section 188 is non-bailable.				
	[Vide A.P.G.O. Ms No. 732, dated 5th December, 1991.]				
189	Threatening a public servant with injury to him or one in whom he is interested, to induce him to do or forbear to do any official act.	Imprisonment for 2 years or fine, or both	Nomcognizable	Bailable	Any Magistrate.
	STATE AMENDMENT				
Andhra Pradesh:					
	Offence under section 189 is cognizable.				
	[Vide A.P.G.O. Ms No. 732, dated 5th December, 1991.]				
190	Threatening any person to in-duce him to refrain from making a legal application for protection from injury.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
		STATE AMENDMENT			
Andhra Pradesh:					
	Offence under section 190 is cognizable.				
	[Vide A.P.G.O. Ms No. 732, dated 5th December, 1991.]				
CHAPTER **XI**—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE					
193	Giving or fabricating false evidence in a judicial proceeding.	Imprisonment for 7 years and fine.	non-bailable	Bailable	Magistrate of the first class.
	Giving or fabricating false evidence in any other case.	Imprisonment for 3 years and fine.	non-bailable	Bailable	Any Magistrate.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	non-bailable	non-bailable	Court of Session.
	If innocent person be thereby convicted and executed.	Death, or as above.	non-bailable	non-bailable	Court of Session.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment for life or with imprisonment for 7 years or upwards.	The same as for the offence.	non-bailable	non-bailable	Court of Session.
[14][195A	Threatening any person to give false evidence.	Imprisonment for 7 years, or fine, or both.	Cognizable	non-bailable	Court by which offence of giving false evidence is triable.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	If innocent person is convicted and sentenced in consequence of false evidence with death, or imprisonment for more than seven years.	The same as for the offence.	Cognizable	non-bailable	Court by which offence of giving false evidence is triable.]
196	Using in a judicial proceeding evidence known to Be false or fabricated.	The same as for giving or fabricating false evidence.	[15][Non-cognizable]	According as offence of giving such evidence is bailable or non- bailable.	Court by which offence of giving or fabricating false evidence is triable.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	The same as for giving or fabricating false evidence.	non-bailable	Bailable	Court by which offence of giving false evidence is triable.
198	Using as a true certificate one known to be false in a material point.	The same as for giving or fabricating false evidence.	non-bailable	Bailable	Court by which offence of giving false evidence is triable.
199	False statement made in any declaration which is by law receivable as evidence.	The same as for giving or fabricating false evidence.	non-bailable	Bailable	Court by which offence of giving false evidence is triable.
200	Using as true any such declaration known to be false.	The same as for giving or fabricating false evidence.	non-bailable	Bailable	Court by which offence of giving false evidence is triable.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Imprisonment for 7 years and fine.	According as the offence in relation to which disappearance of evidence is caused is cognizable or non-bailable.	Bailable	Court of Session.
	If punishable with imprisonment for life or imprisonment for 10 years.	Imprisonment for 3 years and fine.	non-bailable	Bailable	Magistrate of the first class.
	If punishable with less than 10 years' imprisonment.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both.	non-bailable	Bailable	Court by which the offence is triable.
202	Intentional omission to give information of an offence by a person legally bound to inform.	Imprisonment for 6 months, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
203	Giving false information respecting an offence committed.	Imprisonment for 2 years or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
204	Secreting or destroying any document to prevent its production as evidence.	Imprisonment for 2 years or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture or in satisfaction of a fine under sentence, or in execution of a decree.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
208	Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
209	False claim in a Court of Justice.	Imprisonment for 2 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
211	False charge of offence made with intent to injure. If offence charged be punishable with imprisonment for 7 years or upwards. If offence charged be capital or punishable with imprisonment for life.	Imprisonment for 2 years, or fine, or both. Imprisonment for 7 years and fine. Imprisonment for 7 years and fine.	Non-cognizable Non-cognizable Non-cognizable	Bailable Bailable Bailable	Magistrate of the first class. Magistrate of the first class. Court of Session.

STATE AMENDMENT

Chattisgarh:

(a) In the entries relating to section 211, add the following entries, namely:—

"If offence charged be punishable under sections 354, 354A, 354B, 354C, 354D, 354E, 376B, 376C, 376F, 509, 509A or 509B.	*Imprisonment not less than 3 years but which may extend to 5 years and fine.*	*No n-cogn izable*	*Bailable*	*Magistrate of the first class. "*

[Vide Chattisgarh Act 25 of 2015, sec. 13(a) (w.e.f. 21-7-2015).]

212	Harbouring an offender, if the offence be capital.	Imprisonment for 5 years and fine.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	If punishable with imprisonment for life or with imprisonment for 10 years.	Imprisonment for 3 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for 1 year and not for 10 years.	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
213	Taking gift, etc., to screen an offender from punishment if the offence be capital.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for life or with imprisonment for 10 years.	Imprisonment for 3 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for less than 10 years.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both	Cognizable	Bailable	Magistrate of the first class.
214	Offering gift or restoration of property in consideration of screening offender if the offence be capital.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	If punishable with imprisonment for life or with imprisonment for 10 years.	Imprisonment for 3 years and fine.	non-bailable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for less than 10 years.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both.	non-bailable	Bailable	Magistrate of the first class.
215	Taking gift to help to recover movable property of which a person has been deprived by an offence without causing apprehension of offender.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for life or with imprisonment for 10 years.	Imprisonment for 3 years, with or without fine.	Cognizable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for 1 year and not for 10 years.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
216A	Harbouring robbers or dacoits.	Rigorous imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Imprisonment for 2 years, or fine or both.	Non-cognizable	Bailable	Any Magistrate.
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Imprisonment for 3 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict, or decision which he knows to be contrary to law.	Imprisonment for 7 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Imprisonment for 7 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital.	Imprisonment for 7 years, with or without fine.	According as the offence in relation to which such omission has been made is cognizable or non-cognizable.	Bailable	Magistrate of the first class.
	If punishable with imprisonment for life or imprisonment for 10 years.	Imprisonment for 3 years, with or without fine.	Cognizable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for less than 10 years.	Imprisonment for 2 years, with or without fine.	Cognizable	Bailable	Magistrate of the first class.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice if under sentence of death.	Imprisonment for life, or imprisonment for 14 years, with or without fine.	Cognizable	Non-bailable	Court of Session.
	If under sentence of imprisonment for life or imprisonment for 10 years, or upwards	Imprisonment for 7 years, with or without fine.	Cognizable	Non-bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	If under sentence of imprisonment for less than 10 years or lawfully committed to custody.	Imprisonment for 3 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
223	Escape from confinement negligently suffered by a public servant.	Simple imprisonment for 2 years or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
224	Resistance or obstruction by a person to his lawful apprehension.	Imprisonment for 2 years, or fine or both.	Cognizable	Bailable	Any Magistrate.
225	Resistance or obstruction to the lawful apprehension of any person, or rescuing him from lawful custody.	Imprisonment for 2 years, or fine or both.	Cognizable	Bailable	Any Magistrate.
	If charged with an offence punishable with imprisonment for life or, imprisonment for 10 years.	Imprisonment for 3 years and fine.	Cognizable	Non-Bailable	Magistrate of the first class.
	If charged with a capital offence.	Imprisonment for 7 years and fine.	Cognizable	Non-Bailable	Magistrate of the first class.
	If the person is sentenced to imprisonment for life, or imprisonment for 10 years, or upwards.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
225A	If under sentence of death. Omission to apprehend, or sufferance of escape on part of public servant, in cases not otherwise provided for—	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
	(a) in case of intentional omission or sufferance.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
	(b) in case of negligent omission or sufferance.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
225B	Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.
227	Violation of condition of remission of punishment.	Punishment of original sentence, or if part of the punishment has been undergone, the residue.	Cognizable	Non-bailable	The Court by which the original offence was triable.
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	Non-cognizable	Bailable	The Court in which the offence is committed subject to the provisions of Chapter XXVI.

STATE AMENDMENT

Andhra Pradesh:

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	Offence under section 228 is cognizable. *[Vide* A.P.G.O. Ms No. 732, dated 5th December, 1991.]				
[16][228A	Disclosure of identity of the victim of certain offences, etc.	Imprisonment for two years and fine.	Cognizable	Bailable	Any Magistrate.
	Printing or publication of a proceeding without prior permission of court	Imprisonment for two years and fine.	Cognizable	Bailable	Any Magistrate.]
229	Personation of a juror or assessor.	Imprisonment for 2 years, or fine or both.	Non-cognizable	Bailable	Magistrate of the first class.
[17][229A	Failure by person released on bail or bond to appear in Court.	Imprisonment for 1 year, or fine or both.	Cognizable	Non-bailable	Any Magistrate.]
CHAPTER XII—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS					
231	Counterfeiting, or performing any part of the process of counterfeiting coin.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
232	Counterfeiting, or performing any part of the process of counterfeiting Indian coin.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
233	Making, buying or selling instrument for the purpose of counterfeiting coin.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
234	Making, buying or selling instrument for the purpose of counterfeiting Indian coin.	Imprisonment for 7 years and fine	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
	If Indian coin.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
236	Abetting, in India, the counterfeiting, out of India, of coin.	The punishment provided for abetting the counterfeiting of such coin within India.	Cognizable	Non-bailable	Court of Session.
237	Import or export of counterfeit coin, knowing the same to be counterfeit.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
238	Import or export of counterfeit of Indian coin, knowing the same to be counterfeit.	Imprisonment for life, or Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
239	Having any counterfeit coin known to be such when it came into possession, and delivering, etc., the same to any person.	Imprisonment for 5 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
240	Same with respect to Indian coin.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
241	Knowingly delivering to another any counterfeit coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.	Imprisonment for 2 years, or fine, or 10 times the value of the coin counterfeited, or both.	Cognizable	Non-bailable	Any Magistrate
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
243	Possession of Indian coin by a person who knew it to be counterfeit when he became possessed thereof	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
245	Unlawfully taking from a Mint any coining instrument.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
246	Fraudulently diminishing the weight or altering the composition of any coin.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
247	Fraudulently diminishing the weight or altering the composition of Indian coin.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
249	Altering appearance of Indian coin with intent that it shall pass as a coin of a different description.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
250	Delivery to another of coin possessed with the knowledge that it is altered.	Imprisonment for 5 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
251	Delivery of Indian coin possessed with the knowledge that it is altered.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
252	Possession of altered coin by a person who knew it to be altered when he became possessed thereof.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
253	Possession of Indian coin by a person who knew it to be altered when he became possessed thereof.	Imprisonment for 5 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
254	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered.	Imprisonment for 2 years, or fine, or 10 times the value of the coin.	Cognizable	Non-bailable	Any Magistrate.
255	Counterfeiting a Government stamp.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
258	Sale of counterfeit Government stamp.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
259	Having possession of a counterfeit Government stamp.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
260	Using as genuine a Government stamp known to be counterfeit.	Imprisonment for 7 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it, with intent to cause a loss to Government.	Imprisonment for 3 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
262	Using a Government stamp known to have been before used.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
263	Erasure of mark denoting that stamps have been used.	Imprisonment for 3 years or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
263A	Fictitious stamps.	Fine of 200 rupees.	Cognizable	Bailable	Any Magistrate.
	CHAPTER XIII—OFFENCES RELATING TO WEIGHTS AND MEASURES				
264	Fraudulent use of false instrument for weighing.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
265	Fraudulent use of false weight or measure.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
266	Being in possession of false weights or measures for fraudulent use.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
267	Making or selling false weights or measures for fraudulent use.	Imprisonment for 1 year, or fine, or both.	Cognizable	Non-bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	CHAPTER XIV—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS				
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
271	Knowingly disobeying any quarantine rule.	Imprisonment for 6 months, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Imprisonment for 6 months, or fine of 1,000 mpees, or both.	non-bailable	Bailable	Any Magistrate.
273	Selling any food or drink as food and drink, knowing the same to be noxious.	Imprisonment for 6 months, or fine of 1,000 mpees, or both.	non-bailable	Bailable	Any Magistrate.
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Imprisonment for 6 months, or fine of 1,000 mpees, or both.	non-bailable	[18.][non-bailable]	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Imprisonment for 6 months, or fine of 1,000 mpees, or both.	non-bailable	[19.][Bailable]	Any Magistrate.
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.	Imprisonment for 6 months, or fine of 1,000 mpees, or both.	non-bailable	Bailable	Any Magistrate.

STATE A MENDMENTS

Orissa:

For the entries relating to sections 272, 273, 274, 275 and 276, substitute the following entries, namely:—

"272	*Adulterating food or drink intended for sale, so as to make the same noxious.*	*Imprisonment for life, and fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*
273	*Selling any food or drink as food and drink, knowing the same to be noxious.*	*Imprisonment for life, and fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*
274	*Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.*	*Imprisonment for life, and fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
275	*Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.*	*Imprisonment for life, and fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*
276	*Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.* [*Vide* Orissa Act 6 of 2004, sec. *4*	*Imprisonment for life, and fine.*	*Cognizable*	*Non-bailable*	*Court of Session. "*

Uttar Pradesh:

For the entries relating to sections 272, 273, 274, 275 and 276, substitute the following entries, namely:—

'272	*Adulterating food or drink intended for sale, so as to make the same noxious.*	*Imprisonment for life, with or without fine*	*Cognizable*	*Non-bailable*	*Court of Session.*
273	*Selling any food or drink as food and drink, knowing the same to be noxious.*	*Imprisonment for life, with or without fine*	*Cognizable*	*Non-bailable*	*Court of Session.*
274	*Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.*	*Imprisonment for life, with or without fine*	*Cognizable*	*Non-bailable*	*Court of Session.*

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
275	*Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.*	*Imprisonment for life, with or without fine*	*Cognizable*	*Non-bailable*	*Court of Session.*
276	*Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation*	*Imprisonment for life, with or without fine*	*Cognizable*	*Non-bailable*	*Court of Session. "*
	[*Vide* Uttar Pradesh Act 47 of 1975, sec. 5 (w.e.f. 15-9-1975).]				
West Bengal:					
	For the entries relating to sections 272, 273, 274, 275 and 276, substitute, the following entries, namely:—				
'272	*Adulterating food or drink intended for sale, so as to make the same noxious.*	*Imprisonment for life, with or without fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*
275	*Selling any food or drink, as food and drink, knowing the same to be noxious.*	*Imprisonment for life, with or without fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*
274	*Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.*	*Imprisonment for life, with or without fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
275	*Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.*	*Imprisonment for life, with or without fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*
276	*Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.*	*Imprisonment for life, with or without fine.*	*Cognizable*	*Non-bailable*	*Court of Session. "*
	[*Vide* West Bengal Act 34 of 1974, sec. 5 (w.e.f. 16-7-1974).]				
277	Defiling the water of a public spring or reservoir.	Imprisonment for 3 months, or fine of 500 rupees, or both	Cognizable	Bailable	Any Magistrate.
278	Making atmosphere noxious to health.	Fine of 500 rupees	Non-cognizable	Bailable	Any Magistrate.
279	Driving or riding on a public way so rashly or negligently as to endanger human life, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
280	Navigating any vessel so rashly or negligently as to endanger human life, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
281	Exhibition of a false light, mark or buoy.	Imprisonment for 7 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
282	Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
283	Causing danger, obstruction or, injury in any public way or line of navigation.	Fine of 200 rupees.	Cognizable	Bailable	Any Magistrate.
284	Dealing with any poisonous substance so as to endanger human life, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
286	So dealing with any explosive substance.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
287	So dealing with any machinery.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
290	Committing a public nuisance.	Fine of 200 rupees.	Non-cognizable	Bailable	Any Magistrate.
291	Continuance of nuisance after injunction to discontinue.	Simple imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate.
292	Sale, etc., of obscene books, etc.	On first conviction, with imprisonment for 2 years, and with fine of 2,000 rupees and, in the event of second or subsequent conviction, with imprisonment for five years and with fine of 5,000rupees	Cognizable	Bailable	Any Magistrate.
	STATE AMENDMENTS				
Orissa					
	After the entries relating to section 292, insert the following entries, namely:—				
"292A	*Printing, etc. of grossly indecent or scurrilous matter or matter intended for blackmail.*	*Imprisonment of either description for 2 years, or fine, or both.*	*Non-Cognizable*	*Bailable*	*Any Magistrate. "*
	[*Vide* Orissa Act 13 of 1962, sec. 3 (w.e.f. 16-5-1962).]				
Tamil Nadu:					

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
After the entries relating to section 292, insert the following entries, namely:—					
"292A	*Printing, etc. of grossly indecent or scurrilous matter or matter intended for black??iail.*	*Imprisonment of either description for 2 years, or fine, or both.*	*Non-Cognizable*	*Bailable*	*Any Magistrate. "*
	[*Vide* Tamil Nadu Act 30 of 1984, sec. 3(ii) (w.e.f. 2-7-1984).] Ed. Earlier entries relating to section 292A and 293 were substituted by Tamil Nadu Act13 of 1982, sec. 3(ii) (w.r.e.f. 21-9-1981).				
293	Sale, etc., of obscene objects to young persons.	On first conviction with imprisonment for 3 years, and with fine of 2,000 rupees, and in the event of second or subsequent conviction, with imprisonment for 7years, and with fine of 5,000rupees.	Cognizable	Bailable	Any Magistrate.
294	Obscene songs	Imprisonment for 3 months, or fine, or both	Cognizable	Bailable	Any Magistrate.
294A	Keeping a lottery office	Imprisonment for 6 months, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
	Publishing proposals relating to lotteries.	Fine of 1,000 rupees.	Non-cognizable	Bailable	Any Magistrate.

STATE AMENDMENTS

Andhra Pradesh:

Entries relating to section 294A have been repealed. [*Vide* Andhra Pradesh Act 16 of 1968, sec. 27.]

Gujarat:

Entries relating to section 294A have been repealed. [*Vide* Bombay Act 82 of 1958.]

Maharashtra:

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	Entries relating to section 294A have been repealed [*Vide* Bombay Act 82 of 1958.]				
Mysore (Karnataka):					
	In its application to the whole of Mysore except Bellary District, entries relating to section 294A have been repealed. [*Vide* Mysore Act 27 of 1951.]				
Uttar Pradesh:					
	Entries relating to section 294A have been repealed. [*Vide* Uttar Pradesh Act 24 of 1995, sec. 11.]				
CHAPTER **XV—**	OFFENCES RELATING TO RELIGION				
295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	Imprisonment for 2 years fine, or both.	, or Cognizable	non-bailable	Any Magistrate.
295A	Maliciously insulting the religion or the religious beliefs of any class.	Imprisonment for 3 years fine, or both.	, or Cognizable	non-bailable	Magistrate of the first class.
	STATE AMENDMENT				
Andhra Pradesh:					
	Offence under section 295A is cognizable. [*Vide* A.P.G.O. Ms. No. 732, dated 5th December, 1991.]				
296	Causing a disturbance to an assembly engaged in religious worship	Imprisonment for 1 year fine or both.	, or Cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
297	Trespassing in place of worship or sepulchre, disturbing funeral with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Imprisonment for 1 year fine or both.	, or Cognizable	Bailable	Any Magistrate.
298	Uttering any word or making any sound in the hearing or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feelings.	Imprisonment for 1 year, or fine or both.	Non-cognizable	Bailable	Any Magistrate.
STATE AMENDMENT					
Andhra Pradesh:					
	Offence under section 298 is cognizable. [*Vide* A.P.G.O. Ms. No. 732, dated 5th December, 1991.]				
CHAPTER **XVI**—OFFENCES AFFECTING THE HUMAN BODY					
302	Murder.	Death, or imprisonment for life, and fine.	Cognizable	Non-bailable	Court of Session.
303	Murder by a person under sentence of imprisonment for life.	Death.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
	If act is done with knowledge that it is likely to cause death, but without any intention to cause death, etc.	Imprisonment for 10 years or fine, or both.	Cognizable	Non-bailable	Court of Session.
304A	Causing death by rash or negligent act.	Imprisonment for 2 years, or fine or both.	Cognizable	Bailable	Magistrate of the first class.
[20.][304B	Dowry death.	Imprisonment of not less than 7 years but which may extend to imprisonment for life.	Cognizable	Non-bailable	Court of Session.]
305	Abetment of suicide committed by child or insane or delirious person or an idiot, or a person intoxicated.	Death, or imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
306	Abetting the commission of suicide.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
307	Attempt to murder.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	If such act causes hurt to any person.	Imprisonment for life or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
	Attempt by life-convict to murder, if hurt is caused.	Death or imprisonment for 10 years, and fine.	Cognizable	Non-bailable	Court of Session.
308	Attempt to commit culpable homicide.	Imprisonment for 3 years or fine, or both.	Cognizable	Non-bailable	Court of Session.
	If such act causes hurt to any person.	Imprisonment for 7 years, or fine, or both.	Cognizable	Non-bailable	Court of Session.
309	Attempt to commit suicide.	Simple imprisonment for 1 year, or fine, or both.	Cognizable	Bailable	Any Magistrate.
311	Being a thug.	Imprisonment for life and fine.	Cognizable	Non-bailable	Court of Session.
312	Causing miscarriage.	Imprisonment for 3 years or fine or both.	Non-cognizable	Bailable	Magistrate of the first class.
	If the woman be quick with child.	Imprisonment for 7 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
313	Causing miscarriage without woman's consent.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
314	Death caused by an act done with intent to cause miscarriage.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
	If act done without woman's consent.	Imprisonment for life, or as above.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Imprisonment for 10 years, or fine, or both.	Cognizable	Non-bailable	Court of Session.
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Imprisonment for 10 years, or fine.	Cognizable	Non-bailable	Court of Session.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	Imprisonment for 7 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
318	Concealment of birth by secret disposal of dead body.	Imprisonment for 2 years, or fine or both.	Cognizable	Bailable	Magistrate of the first class.

STATE AMENDMENT

Madhya Pradesh:

In the entries relating to sections 317 and 318, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".

[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]

323	Voluntarily causing hurt.	Imprisonment for 1 year, or fine of 1,000 mpees, or both.	Non-cognizable	Bailable	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	Imprisonment for 3 years, or fine, or both.	Cognizable	[21][Non-bailable]	Any Magistrate.
325	Voluntarily causing grievous hurt.	Imprisonment for 7 years and fine.	Cognizable	[22][Bailable]	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
[23][326A	Voluntarily causing grievous hurt by use of acid, etc.	Imprisonment for not less than 10 years but which may extend to imprisonment for life and fine to be paid to the victim.	Cognizable	Non-bailable	Court of Session.]
[24][326B	Voluntarily throwing or attempting to throw acid.	Imprisonment for 5 years but which may extend to 7 years and with fine.	Cognizable	Non-bailable	Court of Session.]

STATE AMENDMENT

Madhya Pradesh:

In the entries relating to section 326, in column 6, for the words "Magistrate of the first class' substitute the words "Court of Session".

[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]

327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
328	Administering stupefying drug with intent to cause hurt, etc.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.
331	Voluntarily causing grievous hurt to extort confession or information or to compel restoration of property, etc.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
332	Voluntarily causing hurt to deter public servant from his duty.	Imprisonment for 3 years or fine, or both.	Cognizable	[25.][non-bailable]	Magistrate of the first class.

STATE AMENDMENT

Maharashtra:

For the entry relating to section 332, substitute the following entry, namely:—

"332	*Voluntary causing hurt to deter public servant from his duty*	*Imprisonment for five years, or fine, or both*	*Cognizable*	*Non-bailable*	*Court of Session'.*

[*Vide* Maharashtra Act XL of 2018, ; sec. 5(i).]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
333	Voluntarily causing grievous hurt to deter public servant from his duty.	Imprisonment for 10 years and fine.	Cognizable	[26.][Non-bailable]	Court of Session.
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Imprisonment for 1 month, or fine of 500 rupees, or both.	non-bailable	Bailable	Any Magistrate.
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Imprisonment for 4 years, or fine of 2,000 rupees, or both.	Cognizable	Bailable	Magistrate of the first class.
336	Doing any act which endangers human life or the personal safety of others.	Imprisonment for 3 months, or fine of 250 rupees, or both	Cognizable	Bailable	Any Magistrate.
337	Causing hurt by an act which endangers human life, etc.	Imprisonment for 6 months, or fine of 500 rupees, or both.	Cognizable	Bailable	Any Magistrate.
338	Causing grievous hurt by an act which endangers human life. etc.	Imprisonment for 2 years, or fine of 1,000 rupees, or both	Cognizable	Bailable	Any Magistrate.
341	Wrongfully restraining any person.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
342	Wrongfully confining any person.	Imprisonment for 1 year, or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
343	Wrongfully confining for 3 or more days.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
344	Wrongfully confining for 10 or more days.	Imprisonment for 3 years and fine.	Cognizable	Bailable	Any Magistrate.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Imprisonment for 2 years in addition to imprisonment under any other section.	Cognizable	Bailable	Magistrate of the first class.
346	Wrongful confinement in secret.	Imprisonment for 2 years in addition to imprisonment under any other section.	Cognizable	Bailable	Magistrate of the first class.
347	Wrongful confinement for the purpose of extorting property, or constraining to an illegal act, etc.	Imprisonment for 3 years and fine.	Cognizable	Bailable	Any Magistrate.
348	Wrongful confinement for the purpose of extorting confession or information, or of compelling restoration of property, etc.	Imprisonment for 3 years and fine.	Cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
352	Assault or use of criminal force otherwise than on grave provocation.	Imprisonment for 3 months, or fine of 500 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.
353	Assault or use of criminal force to deter a public servant from discharge of his duty.	Imprisonment for 2 years, or fine, or both.	Cognizable	[27][Non-bailable]	Any Magistrate.

STATE AMENDMENT

Maharashtra:

For the entry relating to section 353, substitute the following entry, namely:—

"353	*Assault or use of criminal force to deter a public servant from discharge of his duty*	*Imprisonment for five years, or fine, or both*	*Cognizable*	*Non-bailable*	*Court of Session".*

[*Vide* Maharashtra Act XL of 2018, sec. 5(ii).]

[28][354	Assault or use of criminal force to woman with intent to out-rage her modesty.	Imprisonment of 1 year which may extend to 5 years, and with fine.	Cognizable	Non-bailable	Any Magistrate.]

STATE AMENDMENT

Chattisgarh:

In the entries relating to section 354, add the following entries, namely:—

"...	*If committed by relative of the woman.*	*Imprisonment not less than 2 years but which may extend to7 years and fine.*	*Cognizable*	*Non-bailable*	*Magistrate of the first class.* "

[*Vide* Chattisgarh Act 25 of 2015, sec. 13(b) (w.e.f. 21-7-2015).]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
[29][354	A Sexual harassment of the nature of unwelcome physical contact and advances or a demand or request for sexual favours, showing pornography	Imprisonment which may extend to 3 years or with fine or with both.	Cognizable	Bailable	Any Magistrate.
	Sexual harassment of the nature of making sexually coloured remark	Imprisonment which may extend to 1 year or with fine or with both.	Cognizable	Bailable	Any Magistrate.]
[30][354B	Assault or use of criminal force to woman with intent to disrobe.	Imprisonment of not less than 3 years but which may extend to 7 years and with fine.	Cognizable	Non-bailable	Any Magistrate.]
[31][354C	Voyeurism.	Imprisonment of not less than 1 year but which may extend to 3 years and with fine for first conviction.	Cognizable	Bailable	Any Magistrate.
		Imprisonment of not less than 3 years but which may extend to 7 years and with fine for second or subsequent conviction.	Non-bailable	Cognizable	Any Magistrate.]
[32][354D	Stalking.	Imprisonment up to 3 years and with fine for first conviction.	Bailable	Cognizable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
		Imprisonment up to 5 years Cognizable and with fine for second or subsequent conviction	Non-bailable	Cognizable	Any Magistrate.]

STATE AMENDMENTS

Chattisgarh:

After the entries relating to section 354D, insert the following, namely:—

" *354E*	*Liability of person present who fails to prevent the commission of offence under sections 354, 354A, 354B, 354C or 354D.*	*Imprisonment upto 3 years or fine or both.*	*Cognizable*	*Bailable*	*Any Magistrate. "*

[*Vide* Chattisgarh Act 25 of 2015, sec. 13(c) (w.e.f. 21-7-2015).]

Madhya Pradesh:

After the entries relating to section 354, insert the following entries, namely:—

" *354A*	*Asault or use of criminal force to woman with intend to disrobe her.*	*Imprisonment of not less than one year but which may extend to ten years and fine.*	*Cognizable*	*Non-bailable*	*Court of Session.* "

[*Vide* Madhya Pradesh Act 15 of 2004, sec. 5 (w.e.f. 26-11-2004).]

Orissa:

The offence under section 354 is Non-bailable.

[*Vide* Orissa Act 6 of 1995, sec. 3 (w.e.f. 10-3-1995).]

355	Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocation.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.

STATE AMENDMENTS (Sections 354 and 355)

Andhra Pradesh:

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	For the entries relating to sections 354 and 355, substitute the following entries, namely:—				
"354	*Assault or use of criminal force to a woman with intent to outrage her modesty*	*Imprisonment for 7 years and fine.*	*Cognizable*	*Non-bailable*	*Court of Session.*
355	*Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocations.*	*Imprisonment for 2 years, or fine, or both.*	*Non-cognizable*	*Bailable*	*Any Magistrate. "*
	[*Vide* Andhra Pradesh Act 3 of 1992, sec. 2 (w.e.f. 15-2-1992).]				
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Imprisonment for 1 year or fine of 1,000 rupees, or both.	Cognizable	Bailable	Any Magistrate.
358	Assault or use of criminal force on grave and sudden provocation.	Simple imprisonment for one month, or fine of 200 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.
363	Kidnapping.	Imprisonment for 7 years, and fine.	Cognizable	Bailable	Magistrate of the first class.

STATE AMENDMENTS

Madhya Pradesh:

In the entries relating to sections 363, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14- 2-2008).]				
Uttar Pradesh:					
	In the entries relating to section 363 in column 5, for the word "Bailable", substitute the word "Non-bailable".				
	[*Vide* Uttar Pradesh Act 1 of 1984, sec. 12 (w.e.f. 1-5-1984).]				
363A	Kidnapping or obtaining the custody of a minor in order that such minor may be employed or used for purposes of begging.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
	Maiming a minor in order that such minor may be employed or used for purposes of begging.	Imprisonment for life and fine.	Cognizable	Non-bailable	Court of Session.
STATE AMENDMENT					
Madhya Pradesh:					
	In the entries relating to section 363A, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".				
	[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14- 2-2008).]				
364	Kidnapping or abducting in order to murder.	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
[33][364A	Kidnapping for ransom, etc.	Death, or imprisonment for life, and fine.	Cognizable	Non-bailable	Court of Session.]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

STATE AMENDMENT

Madhya Pradesh:

In the entries relating to section 365, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".

[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]

366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement etc.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
366A	Procuration of minor girl.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
366B	Importation of girl from foreign country.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
368	Concealing or keeping in confinement a kidnapped person.	Punishment for kidnapping or abduction.	Cognizable	Non-bailable	Court by which the kidnapping or abduction is triable.
369	Kidnapping or abducting a child with intent to take property from the person of such child.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
[34.][370	Trafficking of person	Imprisonment of not less than 7 years but which may extend to 10 years and with fine.	Cognizable	Non-bailable	Court of Session.
	Trafficking of more than one person.	Imprisonment of not less than 10 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session.
	Trafficking of a minor	Imprisonment of not less than 10 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session.
	Trafficking of more than one minor	Imprisonment of not less than 14 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session.
	Person convicted of offence of trafficking of minor on more than one occasion.	Imprisonment for life which shall mean the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session.
	Public servant or a police officer involved in trafficking of minor.	Imprisonment for life which shall mean the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session.]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
[35][370A	Exploitation of a trafficked child.	Imprisonment of not less than 5 years but which may extend to 7 years and with fine.	Cognizable	Non-bailable	Court of Session.
	Exploitation of a trafficked person.	Imprisonment of not less than 3 years but which may extend to 5 years and with fine.	Cognizable	Non-bailable	Court of Session.]
371	Habitual dealing in slaves.	Imprisonment for life, or Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
372	Selling or letting to hire a minor for purposes of prostitution, etc.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
373	Buying or obtaining possession of a minor for the same purposes.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
374	Unlawful compulsory labour.	Imprisonment for 1 year, or fine or both.	Cognizable	Bailable	Any Magistrate.
[36][376	Rape	Rigorous imprisonment of not less than 10 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	Rape by a police officer or a public servant or member of armed forces or a person being on the management or on the staff of a jail, remand home or other place of custody or women's or children's institution or by a person on the management or on the staff of a hospital, and rape committed by a person in a position of trust or authority towards the person raped or by a near relative of the person raped.	Rigorous imprisonment of not less than 10 years but which may extend to imprisonment for life which shall mean the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session.
	Persons committing offence of rape on a woman under sixteen years of age.	Rigorous imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session.]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
[37][376A	Person committing an offence of rape and inflicting injury which causes death or causes the woman to be in a persistent vegetative state.	Rigorous imprisonment of not less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that persons natural life or with death.	Cognizable	Non-bailable	Court of Session]
[38.][376AB	Person committing an offence of rape on a woman under twelve years of age	Rigorous imprisonment of not less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine or with death.	Cognizable	Non-bailable	Court of Session.]
[39.][376B	Sexual intercourse by husband upon his wife during separation.	Imprisonment for not less than 2 years but which may extend to 7 years and with fine.	Cognizable (but only on the complaint of the victim)	Bailable	Court of Session.]
[40.][376C	Sexual intercourse by a person in authority.	Rigorous imprisonment for not less than 5 years but which may extend to 10 years and with fine.	Cognizable	Non-bailable	Court of Session.]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
[41].[376D	Gang rape	Rigorous imprisonment for not less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine to be paid to the victim.	Cognizable	Non-bailable	Court of Session.]
[42].[376DA	Gang rape on a woman under sixteen years of age.	Imprisonment for life which shall mean imprisonment for the remainder of that persons natural life and with fine.	Cognizable	Non-bailable	Court of Session.
376DB	Gang rape on woman under twelve years of age.	Imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine or with death.	Cognizable	Non-bailable	Court of Session.]
[43].[376E	Repeat offenders.	Imprisonment for life which shall mean imprisonment for the remainder of that person's natural life or with death.	Cognizable	Non-bailable	Court of Session.]

STATE AMENDMENT

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
Chattisgarh:					
	After the entries relating to section 376E, insert the following, namely:—				
" *376F*	*Liability of person incharge of any work place and others to give information about offence.*	*Imprisonment upto 3 years and fine.*	*Cognizable*	*Non-bailable*	*Magistrate of the first class. "*
	[*Vide* Chattisgarh Act 25 of 2015, sec. 13(d) (w.e.f. 21-7-2015).]				
[44][377	Unnatural offences.	Imprisonment for life, or imprisonment for ten years and fine.	Cognizable	Non-bailable	Magistrate of the first class.]
STATE AMENDMENT					
Madhya Pradesh:					
	In the entries relating to section 377, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".				
	[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]				
CHAPTER **XVII**—OFFENCES AGAINST PROPERTY					
379	Theft.	Imprisonment for 3 years, or fine or both	Cognizable	Non-bailable	Any Magistrate.
STATE AMENDMENT					
Haryana:					
	After section 379, insert section 379A and section 379B, namely:—				
379A.	Snatching	Rigorous imprisonment for a term which shall not be less than five years but which may extend to ten years, and fine of Rs. 25,000.	Cognizable	Non-bailable	Court of Session

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
379B.	Snatching with hurt or wrongful restraint or fear of hurt.	Rigorous imprisonment for a term which shall not be less than ten years and which may extend to fourteen years, and fine of Rs. 25,000.	Cognizable	Non-bailable	Court of Session
	[*Vide* Haryana Act 19 of 2015, sec. 2 (w.e.f. 3-9-2015).]				
380	Theft in a building, tent or vessel.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Any Magistrate.
381	Theft by clerk or servant of property in possession of master or employer.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Any Magistrate.
382	Theft, after preparation having been made for causing death, or hurt, or restraint or fear of death, or of hurt or of restraint, in order to the committing of such theft, or to retiring after committing it, or to retaining property taken by it.	Rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
384	Extortion.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
385	Putting or attempting to put in fear of injury, in order to commit extortion.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
386	Extortion by putting a person in fear of death or grievous hurt.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
387	Putting or attempting to put a person in fear of death or grievous hurt in order to commit extortion.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
388	Extortion by threat of accusation of an offence punishable with death, imprisonment for life, or imprisonment for 10 years.	Imprisonment for 10 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If the offence threatened be an unnatural offence.	Imprisonment for life.	Cognizable	Bailable	Magistrate of the first class.
389	Putting a person in fear of accusation of an offence punishable with death, imprisonment for life, or imprisonment for 10 years in order to commit extortion.	Imprisonment for 10 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If the offence be an unnatural offence.	Imprisonment for life.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
392	Robbery.	Rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
	If committed on the highway between sunset and sunrise.	Rigorous imprisonment for 14 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
393	Attempt to commit robbery.	Rigorous imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery.	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

STATE AMENDMENT

Madhya Pradesh:

In the entries relating to sections 392, 393 and 394, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".

[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]

395	Dacoity.	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
396	Murder in Dacoity.	Death, Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
397	Robbery or dacoity, with attempt to cause death or grievous hurt.	Rigorous imprisonment for not less than 7 years.	Cognizable	Non-bailable	Court of Session.
398	Attempt to commit robbery or dacoity when armed with deadly weapons.	Rigorous imprisonment for not less than 7 years.	Cognizable	Non-bailable	Court of Session.
399	Making preparation to commit dacoity.	Rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity.	Imprisonment for life or rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts.	Rigorous imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
402	Being one of five or more persons assembled for the purpose of committing dacoity.	Rigorous imprisonment for 7 years and fine.	Cognizable	Non-bailable	Court of Session.
403	Dishonest misappropriation of movable property, or converting it to one's own use.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Imprisonment for 3 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
	If by clerk or person employed by deceased.	Imprisonment for 7 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
406	Criminal breach of trust.	Imprisonment for 3 years or fine, or both	Cognizable	Non-bailable	Magistrate of the first class.
407	Criminal breach of trust by a carrier, wharfinger, etc.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
408	Criminal breach of trust by a clerk or servant.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
409	Criminal breach of trust by public servant or by banker, merchant or agent, etc.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

STATE AMENDMENT

Madhya Pradesh:

In the entries relating to section 409, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".

[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
411	Dishonestly receiving stolen property knowing it to be stolen.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-bailable	Any Magistrate.
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity.	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
413	Habitually dealing in stolen property.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
414	Assisting in concealment or disposal of stolen property, knowing it to be stolen.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-bailable	Any Magistrate.
417	Cheating.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
419	Cheating by personation.	Imprisonment for 3 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
420	Cheating and thereby dishonestly inducing delivery of property, or the making, alteration or destruction of a valuable security.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
421	Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
423	Fraudulent execution of deed of transfer containing a false statement of consideration.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
424	Fraudulent removal or concealment of property of himself or any other person or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
426	Mischief.	Imprisonment for 3 months, or fine, or both	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
427	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
428	Mischief by killing, poisoning, maiming or rendering useless any animal of the value of 10 rupees or upwards.	Imprisonment for 2 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
429	Mischief by killing poisoning, maiming or rendering useless any elephant, camel, horse, etc., whatever may be its value or any other animal of the value of 50 rupees or upwards.	Imprisonment for 5 years or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
430	Mischief by causing diminution of supply of water for agricultural purposes, etc.	Imprisonment for 5 years or fine, or both.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
431	Mischief by injury to public road, bridge, navigable river, or navigable channel and rendering it impassable or less safe for travelling or conveying property.	Imprisonment for 5 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
432	Mischief by causing inundation or obstruction to public drainage attended with damage.	Imprisonment for 5 years or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
433	Mischief by destroying or moving or rendering less useful a lighthouse or sea-mark, or by exhibiting false lights.	Imprisonment for 7 years, or fine, or both.	Cognizable	Bailable	Magistrate of the first class.
434	Mischief by destroying or moving, etc., a landmark fixed by public authority.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
435	Mischief by fire or explosive substance with intent to cause damage to an amount of 100 rupees or upwards, or, in case of agricultural produce, 10 rupees or upwards.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.

STATE AMENDMENT

Madhya Pradesh:

In the entries relating to section 435, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session".

[*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]

436	Mischief by fire or explosive substance with intent to destroy house, etc.	Imprisonment for life, or Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tonnes burden.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
438	The mischief described in the last section when committed by fire or any explosive substance.	Imprisonment for life, or imprisonment for 10 years, and fine.	Cognizable	Non-bailable	Court of Session.
439	Running vessel ashore with intent to commit theft, etc.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
440	Mischief committed after preparation made for causing death, or hurt, etc.	Imprisonment for 5 years and fine.	Cognizable	Bailable	Magistrate of the first class.
447	Criminal trespass.	Imprisonment for 3 months, or fine of 500 rupees or both.	Cognizable	Bailable	Any Magistrate.
448	House-trespass.	Imprisonment for one year, or fine of 1,000 rupees or both.	Cognizable	Bailable	Any Magistrate.
449	House-trespass in order to the commission of an offence punishable with death.	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
450	House-trespass in order to the commission of an offence punishable with imprisonment for life.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
451	House-trespass in order to the commission of an offence punishable with imprisonment.	Imprisonment for 2 years and fine.	Cognizable	Bailable	Any Magistrate.
	If the offence is theft.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Any Magistrate.
452	House-trespass, having made preparation for causing hurt, assault, etc.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Any Magistrate.
453	Lurking house trespass or house-breaking.	Imprisonment for 2 years and fine.	Cognizable	Non-bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
454	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Any Magistrate.
	If the offence be theft.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
455	Lurking house-trespass or housebreaking after preparation made for causing hurt, assault, etc.	Imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
456	Lurking house-trespass or house-breaking by night.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Any Magistrate.
457	Lurking house-trespass or housebreaking by night in order to the commission of an offence punishable with imprisonment.	Imprisonment for 5 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
	If the offence is theft.	Imprisonment for 14 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
458	Lurking house-trespass or house-breaking by night, after preparation made for causing hurt, etc.	Imprisonment for 14 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
459	Grievous hurt caused whilst committing lurking house-trespass or house-breaking.	Imprisonment for life or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
460	Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night, etc.	Imprisonment for life or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property.	Imprisonment for 2 years, or fine or both.	Cognizable	Non-bailable	Any Magistrate.
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Imprisonment for 3 years, or fine, or both.	Cognizable	Bailable	Any Magistrate.
CHAPTER XVIII—OFFENCES RELATING TO DOCUMENTS AND TO PROPERTY MARKS					
465	Forgery	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
466	Forgery of a record of a Court of Justice or of a Registrar of Births, etc., kept by a public servant.	Imprisonment for 7 years and fine.	Non-cognizable	Non-Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
467	Forgery of a valuable security, will or authority to make or transfer any valuable security, or to receive any money, etc.	Imprisonment for life, or imprisonment for 10 years and fine.	Non-cognizable	Non-Bailable	Magistrate of the first class.
	When the valuable security is a promissory note of the Central Government.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-Bailable	Magistrate of the first class.
468	Forgery for the purpose of cheating.	Imprisonment for 7 years and fine.	Cognizable	Non-Bailable	Magistrate of the first class.
STATE AMENDMENT					
Madhya Pradesh:					
	In the entries relating to sections 466,467 and 468, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session". [*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]				
469	Forgery for the purpose of harming the reputation of any person or knowing that it is likely to be used for that purpose.	Imprisonment for 3 years and fine.	Cognizable	Bailable	Magistrate of the first class.
471	Using as genuine a forged document which is known to be forged.	Punishment for forgery of such document.	Cognizable	Bailable	Magistrate of the first class.
	When the forged document is a promissory note of the Central Government.	Punishment for forgery of such document.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
472	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc. knowing the same to be counterfeit.	Imprisonment for life, or imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
474	Having possession of a document, knowing it to be forged, with intent to use it as genuine; if the document is one of the description mentioned in section 466 of the Indian Penal Code.	Imprisonment for 7 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If the document is one of the description mentioned in section 467 of the Indian Penal Code.	Imprisonment for life, or imprisonment for 7 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
STATE AMENDMENT					
Madhya Pradesh:					
	In the entries relating to sections 471, 472, 473 and 474 in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session". [*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]				
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Imprisonment for life, or imprisonment for 7 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
476	Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Imprisonment for 7 years and fine.	Non-cognizable	Non-baiiabie	Magistrate of the first class.
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting, a Will, etc.	Imprisonment for life, or imprisonment for 7 years and fine.	Non-cognizable	Non-baiiabie	Magistrate of the first class.
477A	Falsification of accounts.	Imprisonment for 7 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.

STATE AMENDMENT

Madhya Pradesh:

In the entries relating to sections 475, 476, 477 and 477A, in column 6, for the words "Magistrate of the first class", substitute the words "Court of Session". [*Vide* The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 (Madhya Pradesh Act 2 of 2008), sec. 4 (w.e.f. 14-2-2008).]

482	Using a false property mark with intent to deceive or injure any person.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
483	Counterfeiting a property mark used by another, with intent to cause damage or injury.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
484	Counterfeiting a property mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of any property.	Imprisonment for 3 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
485	Fraudulently marking or having possession of any die, plate or other instrument for counterfeiting any public or private property mark.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
486	Knowingly selling goods marked with a counterfeit property mark.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
487	Fraudulently marking a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, etc.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
488	Making use of any such false mark.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
489	Removing, destroying or defacing property mark with intent to cause injury.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
489A	Counterfeiting currency-notes or bank-notes.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
489B	Using as genuine forged or counterfeit currency-notes or bank-notes.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
489C	Possession of forged or counterfeit currency-notes or banknotes.	Imprisonment for 7 years, or fine, or both.	Cognizable	Bailable	Court of Session.
489D	Making or possessing machinery, instrument or material for forging or counterfeiting currency-notes or bank-notes.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Court of Session.
489E	Making or using documents resembling currency-notes or bank-notes.	Fine of 100 rupees.	Non-cognizable	Bailable	Any Magistrate.
	On refusal to disclose the name and address of the printer.	Fine of 200 rupees.	Non-cognizable	Bailable	Any Magistrate.

CHAPTER **XIX**—CRIMINAL BREACH OF CONTRACTS OF SERVICE

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so.	Imprisonment for 3 months, or fine of 200 rupees or both.	Non-cognizable	Bailable	Any Magistrate.
CHAPTER **XX**—OFFENCES RELATING TO MARRIAGE					
493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief.	Imprisonment for 10 years and fine.	Non-cognizable	Non-bailable	Magistrate of the first class.
494	Marrying again during the lifetime of a husband or wife.	Imprisonment for 7 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Imprisonment for 10 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
496	A person with fraudulent intention going through the ceremony of being married knowing that he is not thereby lawfully married.	Imprisonment for 7 years and fine.	Non-cognizable	Bailable	Magistrate of the first class.
	STATE AMENDMENTS				

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
Andhra Pradesh:					
	Offences under sections 494, 495 and 496 are cognizable and non-bailable. [*Vide* Andhra Pradesh Act 3 of 1992, sec. 2 (w.e.f. 15-2-1992).]				
497	Adultery.	Imprisonment for 5 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
	STATE AMENDMENTS				
Andhra Pradesh:					
	Offence under section 497 is non-cognizable and bailable. [*Vide* Andhra Pradesh Act 3 of 1993.]				
498	Enticing or taking away or detaining with a criminal intent a married woman.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
[45.][**CHAPTER XXA— OF CRUELTY BY HUSBAND OR RELATIVES OF HUSBAND**					
498A	Punishment for subjecting a married woman to cruelty.	Imprisonment for three years and fine.	Cognizable if information relating to the commission of the offence is given to an officer in charge of a police station by the person aggrieved by the offence or by any person related to her by blood, marriage or adoption or if there in no such relative, by any public servant belonging to such class or category as may be notified by the State Government in this behalf.	Non-bailable	Magistrate of the first class.]

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
CHAPTER XXI—DEFAMATION					
500	Defamation against the President or the Vice-president or the Governor of a State or Administrator of a Union territory or a Minister in respect of his conduct in the discharge of his public functions when instituted upon a complaint made by the Public Prosecutor.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Court of Session.
	Defamation in any other case.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
501	(a) Printing or engraving matter knowing it to be defamatory against the President or the Vice-President or the Governor of a State or Administrator of a Union territory or a Minister in respect of his conduct in the discharge of his public functions when instituted upon a complaint made by the Public Prosecutor.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Court of Session.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	(b) Printing or engraving matter knowing it to be defamatory, in any other case.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
502	(a) Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter against the President or the Vice-President or the Governor of a State or Administrator of a Union territory or a Minister in respect of his conduct in the discharge of his public functions when instituted upon a complaint made by the Public Prosecutor.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Court of Session.
	(b) Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter in any other case.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
CHAPTER XXII—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE					
504	Insult intended to provoke breach of the peace.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
505	False statement, rumour, etc,. circulated with intent to cause mutiny or offence against the public peace.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Non-bailable	Any Magistrate.
	False statement, rumour, etc., with intent to create enmity, hatred or ill-will between different classes.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-bailable	Any Magistrate.
	False statement, rumour, etc, made in place of worship etc., with intent to create enmity, hatred or ill-will.	Imprisonment for 5 years and fine.	Cognizable	Non-bailable	Any Magistrate.

STATE AMENDMENT

Andhra Pradesh:

Offences under section 505 are Cognizable.

[*Vide* A.P.G.O. Ms. No. 732, dated 5th December, 1991.]

506	Criminal intimidation.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
	If threat be to cause death or grievous hurt, etc.	Imprisonment for 7 years or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.

STATE AMENDMENTS

Andhra Pradesh:

Offences under section 506 are cognizable and non-bailable.

[*Vide* A.P.G.O. Ms. No. 732, dated 5th December, 1991.]

Uttar Pradesh:

The offence under section 506 are cognizable and non-bailable.*

[*Vide* Notification. No. 777/VIII 9-4(2)-87, dated 31st July, 1989, published in U.P. Gazette, Extra., Part A, Section (Kha), dated 2nd August, 1989.]

* The offence is bailable and non-cognizable as decided in *Virendra Singh* v. *State of Uttar Pradesh,* 2002 Cr LJ 4265 (All).

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
507	Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes.	Imprisonment for 2 years, in addition to the punishment under above section.	Non-cognizable	Bailable	Magistrate of the first class.
STATE AMENDMENT					
Andhra Pradesh:					
	Offence under section 507 is cognizable.				
	[*Vide* A.P.G.O. Ms. No. 732, dated 5th December, 1991.				
508	Act caused by inducing a per son to believe that he will be rendered an object of Divine displeasure.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate.
509	Uttering any word or making any gesture intended to insult the modesty of a woman, etc.	[46][Simple imprisonment for 3 years and with fine.]	Cognizable	Bailable	Any Magistrate.
STATE AMENDMENT					
Chattisgarh:					
	After the entries relating to section 509, insert the following, namely:—				
"509A	*Sexual harassment by relative.*	*Rigorous imprisonment not less than 1 year but which may extend upto* **5** *years and fine.*	*Cognizable*	*Non-bailable*	*Magistrate of the first class.*
509B	*Sexual harassment by electronic modes.*	*Rigorous imprisonment not less than 6 months but which may extend upto 2 years and fine.*	*Cognizable*	*Non-bailable*	*Magistrate of the first class.* "

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4	5	6
	[*Vide* Chattisgarh Act 25 of 2015, sec. 13(e) (w.e.f. 21-7-2015).]				
510	Appearing in a public place, etc., in a state of intoxication, and causing annoyance to any person.	Simple imprisonment for 24 hours, or fine of 10 rupees, or both.	Non-cognizable	Bailable	Any Magistrate.
CHAPTER **XXIII**—ATTEMPTS TO COMMIT OFFENCES					
511	Attempting to commit offences punishable with imprisonment for life or imprisonment, and in such attempt doing any act towards the commission of the offence.	Imprisonment for life or imprisonment not exceeding half of the longest term provided for the offence, or fine, or both.	According as the offence is cognizable or non-cognizable.	According as the offence attempted by the fender is bailable or not.	The court by which the of offence attempted is triable.

II - CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4
If punishable with death, imprisonment for life, or imprisonment for more than 7 years.	Cognizable	Non-bailable	Court of Session.
If punishable with imprisonment for 3 years and upwards but not more than 7 years.	Cognizable	Non-bailable	Magistrate of the first class.
If punishable with imprisonment for less than 3 years or with fine only.	Non-cognizable	Bailable	Any Magistrate.

Cr. P.C. (Amendment) Act, 2005—Clause 42.—Entries relating to sections 153-AA, 174-A and 229-A to be inserted in the Indian Penal Code, as indicated in clause 54 have to be incorporated in the First Schedule to the Code. The amendments are consequential.

The offence under section 324 of the Indian Penal Code, *i.e.*, voluntarily causing hurt by dangerous weapons or means is at present bailable. Since the offender is immediately

released on bail, the chances of recovering the weapon of offence are remote; therefore, the First Schedule appended to the Code, is being amended to classify the offence as non-bailable.

The offences under sections 274 (adulteration of drugs), 332 (voluntarily causing hurt to deter public servant from his duty) and 353 (assault or criminal force to deter public servant from discharging his duty) of the Indian Penal Code are at present bailable. In order to deal with these offences effectively, the First Schedule to the Code is being amended to classify offences under sections 274, 332 and 353 of the Indian Penal Code as non-bailable. *(Notes on Clauses).*

1. Ins. by Act 25 of 2005, section 42(a) (effective date yet to be notified).
2. Subs. by Act 25 of 2005, section 42(b), for "Ditto" (effective date yet to be notified).
3. Sections 161 to 165A of the Indian Penal Code (45 of 1860) repealed by the Prevention of Corruption Act, 1988 (49 of 1988), section 31 (w.e.f. 9-9-1988).
4. Sections 161 to 165A of the Indian Penal Code (45 of 1860) repealed by the Prevention of Corruption Act, 1988 (49 of 1988), section 31 (w.e.f 9-9-1988).
5. Sections 161 to 165A of the Indian Penal Code (45 of 1860) repealed by the Prevention of Corruption Act, 1988 (49 of 1988), section 31 (w.e.f. 9-9-1988).
6. Sections 161 to 165A of the Indian Penal Code (45 of 1860) repealed by the Prevention of Corruption Act, 1988 (49 of 1988), section 31 (w.e.f. 9-9-1988).
7. Sections 161 to 165A of the Indian Penal Code (45 of 1860) repealed by the Prevention of Corruption Act, 1988 (49 of 1988), section 31 (w.e.f. 9-9-1988).
8. Sections 161 to 165A of the Indian Penal Code (45 of 1860) repealed by the Prevention of Corruption Act, 1988 (49 of 1988), section 31 (w.e.f. 9-9-1988).
9. Ins. by Act 13 of 2013, section 24(a) (w.r.e.f. 3-2-2013).
10. Ins. by Act 13 of 2013, section 24(a) (w.r.e.f. 3-2-2013).
11. Ins. by Act 25 of 2005, section 42(c) (w.e.f. 23'6-2006).
12. Subs, by Act 25 of 2005, section 42(d)(i), for "Ditto" (w.e.f. 23'6-2006).
13. Subs, by Act 25 of 2005, ssection 42(d)(ii), for "Ditto" (w.e.f. 23'6-2006).
14. Ins. by Act 2 of 2006, section 7(a) (w.e.f. 16-4-2006).
15. Subs, by Act 2 of 2006, section 7(b), for "Ditto" (w.e.f. 16-4-2006).
16. Ins. by Act 43 of 1983, section 5(a) (w.e.f. 25-12-1983).
17. Ins. by Act 25 of 2005, section 42(e) (w.e.f. 23-6-2006).
18. Subs, by Act 25 of 2005, section 42(f)(i), for "Ditto" (w.e.f. 23'6'2006).
19. Subs, by Act 25 of 2005, section 42(f)(ii), for "Ditto" (w.e.f. 23'6'2006).
20. Ins. by Act 43 of 1986, section 11 (w.e.f. 19' 11-1986).
21. Subs, by Act 25 of 2005, section 42(f)(iii), for "Bailable" (effective date yet to be notified).
22. Subs, by Act 25 of 2005, section 42(f)(iv), for "Ditto" (effective date yet to be notified).
23. Ins. by Act 13 of 2013, section 24(b) (w.r.e.f. 3-2-2013).
24. Ins. by Act 13 of 2013, section 24(b) (w.r.e.f. 3-2-2013).
25. Subs, by Act 25 of 2005, section 42(f)(v)> for "Bailable" (w.e.f. 23'6-2006).
26. Subs, by Act 25 of 2005, section 42(f)(vi) (w.e.f. 23'6'2006).
27. Subs, by Act 25 of 2005, section 42(f)(vii), for "Ditto" (w.e.f. 23'6'2006).
28. Subs, by Act 13 of 2013, section 24(c) (w.r.e.f. 3-2-2013).
29. Subs, by Act 13 of 2013, section 24(c) (w.r.e.f. 3-2-2013).
30. Subs, by Act 13 of 2013, section 24(c) (w.r.e.f. 3-2-2013).

31. Subs, by Act 13 of 2013, section 24(c) (w.r.e.f. 3-2-2013).

32. Subs, by Act 13 of 2013, section 24(c) (w.r.e.f. 3-2-2013).

33. Ins. by Act 42 of 1993, section 4 (w.e.f. 22-5-1993).

34. Subs, by Act 13 of 2013, section 24(d), for section 370 (w.r.e.f. 3-2-2013).

35. Subs, by Act 13 of 2013, section 24(d), for section 370 (w.r.e.f. 3-2-2013).

36. Subs, by Act 22 of 2018, section 24(a), for entries relating to section 376 (w.r.e.f. 21-4-2018). Earlier it was substituted by Act 13 of 2013, sec. 24(e) (w.r.e.f.3-2-2013).

38. Ins. by Act 22 of 2018, section 24(b) (w.r.e.f. 21-4-2018).

39. Subs, by Act 13 of 2013, section 24(e), for section 376B (w.r.e.f. 3-2-2013).

40. Subs, by Act 13 of 2013, section 24(e), for sec. 376C (w.r.e.f. 3-2-2013).

41. Subs, by Act 13 of 2013, section 24(e), for section 376D (w.r.e.f. 3-2-2013).

42. Ins. by Act 22 of 2018, section 24(c) (w.r.e.f. 21-4-2018).

43. Subs, by Act 13 of 2013, section 24(e) (w.r.e.f. 3-2-2013).

45. Ins. by Act 46 of 1983, section 6 (w.e.f. 25' 12' 1983).

46. Subs, by Act 13 of 2013, section 24(f), for "Simple imprisonment for one year, or fine, or both" (w.r.e.f. 3-2-2013).

The Code of Criminal Procedure, 1973

THE SECOND SCHEDULE

(*See* section 476)

FORM NO. 1 SUMMONS TO AN ACCUSED PERSON

(*See* section 61)

To..... (*name of accused*) of..... (*address*)

Whereas your attendance is necessary to answer to a charge of..... (*state shortly the offence charged*), you are hereby required to appear in person (*or b*y pleader, *as the case may be*) before the (*Magistrate*) of..... on the..... day of..... Herein fail not.

Dated, this.....day of....., 20.....

(*Seal of Court*) (Signature)

FORM NO. 2 WARRANT OF ARREST

(*See* section 70)

To.....(*name and designation of the person or persons who is or are to execute the warrant*).

Whereas (*name of accused*) of (*address*) stands charged with the offence of..... (*state the offence*), you are hereby directed to arrest the said....., and to produce him before me. Herein fail not.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (Signature)

(*See* section 71)

This warrant may be endorsed as follows:—

If the said.....shall give bail himself in the sum of rupees.....with one surety in the sum of rupees.....(*or* two sureties each in the sum of rupees.....) to attend before me on the.....day of.....and to continue so to attend until otherwise directed by me, he may be released.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 3 BOND AND BAIL-BOND AFTER ARREST UNDER A WARRANT

(*See* section 81)

I,..... (*name*), of....., being brought before the District Magistrate of.....(*or as the case may be*) under a warrant issued to compel my appearance to answer to the charge of....., do hereby bind myself to attend in the Court of.....on the.....day of.....next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court, and in case of my making default herein, I bind myself to forfeit, to Government, the sum of rupees.

Dated, this.....day of ....., 20.....

(*Signature*)

I do hereby declare myself surety for the above-named..... of....., that he shall attend before..... in the Court of..... on the..... day of..... next, to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit, to Government, the sum of rupees.

Dated, this..... day of....., 20.....

(*Signature*)

FORM NO. 4 PROCLAMATION REQUIRING THE APPEARANCE OF A PERSON ACCUSED

(*See* section 82)

WHEREAS complaint has been made before me that..... (*name, description and address*) has committed (*or i*s suspected to have committed) the offence of....., punishable under section..... of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said..... (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said..... (*name*) has absconded (*or* is concealing himself to avoid the service of the said warrant);

Proclamation is hereby made that the said.....of.....is required to appear at..... (*place*) before this Court (*or* before me) to answer the said complaint on the..... day of.....20.....,

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 5 PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS

(See sections 82, 87 and 90)

WHEREAS complaint has been made before me that..... (*name, description and address*) has committed (*or* is suspected to have committed) the offence of..... (*mention the offence concisely*) and a warrant has been issued to compel the attendance of..... (*name, description and address of the witness*) before this Court to be examined touching the matter of the said complaint; and whereas it has been returned to the said warrant that the said..... (*name of witness*) cannot be served, and it has been shown to my satisfaction that he has absconded (*or i*s concealing himself to avoid the service of the said warrant);

Proclamation is hereby made that the said.....(*name*) is required to appear at..... (*place*) before the Court of..... on the..... day of ..... next at..... O'clock, to be examined touching..... the offence complained of.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 6 ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS

(*See* section 83)

To the officer in charge of the police station at.....

WHEREAS a warrant has been duly issued to compel the attendance of ..... (*name, description and address*) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served; and whereas it has been shown to my satisfaction that he has absconded (*or* is concealing himself to aviod the service of the said warrant); and thereupon a Proclamation has been or is being duly issued and published requiring the said..... to appear and give evidence at the time and place mentioned therein;

This is to authorise and require you to attach by seizure the movable property belonging to the said..... to the value of rupees.....which you may find within the District of..... and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 7 ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED

(*See* section 83)

To.....(*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS complaint has been made before me that.....(*name, description and address*) has committed (*or* is suspected to have committed) the offence of..... punishable under section..... of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said ..... (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said .....(*name*) has absconded (*or i*s concealing himself to avoid the service of the said warrant) and thereupon a Proclamation has been or is being duly issued and published requiring the said.....to appear to answer the said charge within.....days; and whereas the said..... is possessed of the following property, other than land paying revenue to Government, in the village (*or*

town), of..... in the District of....., *viz*.....,....., and an order has been made for the attachment thereof;

You are hereby required to attach the said property in the manner specified in clause (a), or clause (c), or both*, of sub-section (2) of section 83, and to hold the same under attachment pending further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

* Strike out the one which is not applicable, depending on the nature of the property to be attached.

FORM NO. 8 ORDER AUTHORISING AN ATTACHMENT BY THE DISTRICT MAGISTRATE OR COLLECTOR

(*See* section 83)

To the District Magistrate/Collector of the District of .....

WHEREAS complaint has been made before me that.....(*name, description and address*) has committed (*or* is suspected to have committed) the offence of....., punishable under section.....of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said ..... (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said .....(*name*) has absconded (*or* is concealing himself to avoid the service of the said warrant) and thereupon a Proclamation has been or is being duly issued and published requiring the said .....(*name*) to appear to answer the said charge within .....days; and whereas the said.....is possessed of certain land paying revenue to Government in the village (*or* town) of.....in the District of.....,

You are hereby authorised and requested to cause the said land to be attached, in the manner specified in clause (a), or clause (c), or both*, of sub-section (4) of section 83, and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of this order.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

* Strike out the one which is not desired.

FORM NO. 9 WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS

(*See* section 87)

To .....(*name and designation of the police officer or other person or persons who is or are to execute the warrant*).

WHEREAS complaint has been made before me that .....(*name and description of accused*) of ..... (*address*) has (*or* is suspected to have)

committed the offence of .....(*mention the offence concisely*), and it appears likely that .....(*name and description of witness*) can give evidence concerning the said complaint and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so;

This is to authorise and require you to arrest the said .....(*name of witness*) and on the.....day of.....to bring him before this Court, to be examined touching the offence complained of.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 10 WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE

(*See* section 93)

To..... (*name and designation of the police officer or other person or persons who is or are to execute the warrant*).

WHEREAS information has been laid (*or* complaint has been made) before me of the commission (or suspected commission) of the offence of ..... (*mention the offence concisely*), and it has been made to appear to me that the production of ..... (*specify the thing clearly*) is essential to the inquiry now being made (or about to be made) into the said offence (*or* suspected offence);

This is to authorise and require you to search for the said.....(*the thing specified*) in the .....(*describe the house or place or part thereof to which the search is to be confined*), and, if found, to produce the same forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 11 WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

(See section 94)

To .....(*name and designation of a police officer above the rank of a constable*).

WHEREAS information has been laid before me, and on due inquiry thereupon had, I have been led to believe that the .....(*describe the house or other place*) is used as a place for the deposit (*or* sale) of stolen property (*or if for either of the other purposes expressed in the section, state the purpose in the words of the section*);

This is to authorise and require you to enter the said house (*or other place*) with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (*or other place, or if the search is to be confined to a part, specify the part clearly*), and to seize and take possession of any

property (*or* documents, or stamps, *or* seals, *or* coins, *or* obscene objects, *as the case may be*) (*add, when the case requires it*) and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, *or* counterfeit stamps, *or* false seals *or* counterfeit coins *or* counterfeit currency notes (*as the case may be*), and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 12 BOND TO KEEP THE PEACE

(See sections 106 and 107)

WHEREAS I, ...(*name*) inhabitant of .....(*place*), have been called upon to enter into a bond to keep the peace for the term of.....or until the completion of the inquiry in the matter of..... now pending in the Court of....., I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term or until the completion of the said inquiry and, in case of my making default therein, I hereby bind myself to forfeit to Government the sum of rupees.....

Dated, this..... day of....., 20.....

(*Signature*)

FORM NO. 13 BOND FOR GOOD BEHAVIOUR

(*See* sections 108, 109 and 110)

WHEREAS I, ... (*name*), inhabitant of (*place*)....., have been called upon to enter into a bond to be of good behaviour to Government and all the citizens of India for the term of..... (*state the period*) or until the completion of the inquiry in the matter of.....now pending in the Court of....., I hereby bind myself to be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of my making default therein, I hereby bind myself to forfeit to Government the sum of rupees.....

Dated, this..... day of....., 20.....

(*Signature*)

(*Where a bond with sureties is to be executed, add...*)

We do hereby declare ourselves sureties for the above-named..... that he will be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Government the sum of rupees.....

Dated, this.....day of....., 20.....

(*Signature*)

FORM NO. 14 SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE

(*See* section 113)

To .....of.....

WHEREAS it has been made to appear to me by credible information that ..... (*state the substance of the information*), and that you are likely to commit a breach of the peace (*or* by which act a breach of the peace will probably be occasioned), you are hereby required to attend in person (*or* by a duly authorised agent) at the office of the Magistrate of.....on the.....day of 20.....at ten o'clock in the forenoon, to show cause why you should not be required to enter into a bond for rupees.....[*when sureties are required, add,* and also to give security by the bond of one (or *two, as the case may be*) surety (*or sureties*) in the sum of rupees..... (*each if more than one*)] that you will keep the peace for the term of.....

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 15 WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE

(*See* section 122)

To the Officerin charge ofthe Jail at.....

WHEREAS.....(*name and address*) appeared before me in person (or by his authorised agent) on the.....day of.....in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees.....with one surety (*or* a bond with two sureties each in rupees...) that he, the said ..... (*name*), would keep the peace for the period of.....months; and whereas an order was then made requiring the said .....(name) to enter into and find such security (*state the security ordered when if differs from that mentioned in the summons*), and he has failed to comply with the said order;

This is to authorise and require you to receive the said ..... (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of .....(*term of imprisonment*) unless he shall in the meantime be lawfully ordered to be released, and to return this warrant with an endorsement certifying the manner of its execution.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 16 WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR

(*See* section 122)

To the Officer in charge of the Jail at .....

WHEREAS it has been made to appear to me that ..... (*name and description*) has been concealing his presence within the district of..... and that there is reason to believe that he is doing so with a view to committing a cognizable offence.

or

WHEREAS evidence of the general character of .....(name and description) has been adduced before me and recorded, from which it appears that he is an habitual robber (*or h*ouse-breaker, etc., *as the case may* be);

And whereas an order has been recorded stating the same and requiring the said ..... (*name*) to furnish security for his good behaviour for the term of ..... (*state the period*) by entering into a bond with one surety (*or* two or more sureties, *as the case may be*), himself for rupees....., and the said surety (or each of the said sureties) for rupees.....and the said..... (*name*) has failed to comply with the said order and for such default has been adjudged imprisonment for..... (*state the term*) unless the said security be sooner furnished;

This is to authorise and require you to receive the said.....(*name*) into your custody, together with this warrant and him safely to keep in the Jail, *or* if he is already in prison, be detained therein, for the said period of.....(*term of imprisonment*) unless he shall in the meantime be lawfully ordered to be released, and to return this warrant with an endorsement certifying the manner of its execution.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 17 WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(*See* sections 122 and 123)

To the Officer in charge of the Jail at..... (*or other officer in whose custody the person is*).

WHEREAS.....(*name and description of prisoner*) was committed to your custody under warrant of the Court, dated the.....day of..... 20.....; and has since duly given security under section..... of the Code of Criminal Procedure, 1973.

or

WHEREAS .....(*name and description of prisoner*) was committed to your custody under warrant of the Court, dated the..... day of..... 20..... and there have appeared to me sufficient grounds for the opinion that he can be released without hazard to the community;

This is to authorise and require you forthwith to discharge the said ..... (*name*) from your custody unless he is liable to be detained for some other cause.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 18 WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE

(*See* section 125)

To the Officer in charge of the jail at .....

WHEREAS .....(*name, description and address*) has been proved before me to be possessed of sufficient means to maintain his wife.....(*name*) [or his child.....(*name*) *or* his father or mother.....(*name*), who is by reason of.....(*state the reasons*) unable to maintain herself (*or* himself)] and to have neglected (*or* refused) to do so, and an order has been duly made requiring the said..... (*name*) to allow to his said wife (*or* child *or* father *or* mother) for maintenance the monthly sum of rupees.....and whereas it has been further proved that the said.....(*name*) in wilful disregard of the said order has failed to pay rupees....., being the amount of the allowance for the month (*or* months) of.....

And thereupon an order was made adjudging him to undergo imprisonment in the said Jail for the period of.....;

This is to authorise and require you to receive the said.....(*name*) into your custody in the said Jail, together with this warrant, and there carry said order into execution according to law, returning this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 19 WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY ATTACHMENT AND SALE

(*See* section 125)

To..... (*name and designation of the police officer or other person to execute the warrant*).

WHEREAS an order has been duly made requiring..... (*name*) *to* allow to his said wife (or child *or* father *or* mother) for maintenance the monthly sum of rupees....., and whereas the said..... (*name*) in wilful disregard of the said order has failed to pay rupees....., being the amount of the allowance for the month (*or* months) of..... ;

This is to authorise and require you to attach any movable property belonging to the said .....(*name*) which may be found within the district of..... and if within ..... (*state the number of days or hours allowed*) next after such attachment the said sum shall not be paid (or forthwith), to sell the movable property attached, or so much thereof as shall be sufficient to satisfy the said sum, returning

this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 20 ORDER FOR THE REMOVAL OF NUISANCES

(*See* section 133)

To,.....(*name, description and address*).

WHEREAS it has been made to appear to me that you have caused an obstruction (or nuisance) to persons using the public roadway (*or other public place*) which, etc.,..... (*describe the road or public place*), by, etc....., (*state what it is that causes the obstruction or nuisance*), and that such obstruction (*or* nuisance) still exists;

or

WHEREAS it has been made to appear to me that you are carrying on, as owner, or manager, the trade or occupation of .....(*state the particular trade or occupation and the place where it is carried on*), and that the same is injurious to the public health (*or* comfort) by reason ..... (*state briefly*) *in what manner the injurious effects are caused*), and should be suppressed or removed to a different place.

or

WHEREAS it has been made to appear to me that you are the owner (*or* are in possession of or have the control over) a certain tank (*or* well *or* excavation) adjacent to the public way .....(*describe the thoroughfare*), and that the safety of the public is endangered by reason of the said tank (*or* well *or* excavation) being without a fence (*or* insecurely fenced);

or

WHEREAS, etc., etc., (*as the case may be*)*;*

I do hereby direct and require you within .....(*state the time allowed*) ..... (*state what is required to be done to abate the nuisance*) or to appear at.....in the Court of.....on the.....day of.....next, and to show cause why this order should not be enforced;

or

I do hereby direct and require you within .....(*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, *etc*;

or

I do hereby direct and require you within ..... (*state the time allowed*) to put up a sufficient fence ..... (*state the kind of fence and the part to be fenced*)*;* or to appear, *etc;*

or

I do hereby direct and require you, etc., etc., (as *the case may be*).

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 21 MAGISTRATE'S NOTICE AND PEREMPTORY ORDER

(*See* section 141)

To ..... (*name, description and address*).

I HEREBY give you notice that it has been found that the order issued on the..... day of.....requiring you .....(*state substantially the requisition in the order*) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within .....(*state the time allowed*), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 22 INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY

(*See* section 142)

To ..... (*name, description and address*).

WHEREAS the inquiry into the conditional order issued by me on the..... day of.....20....., is pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with such imminent danger or injury of a serious kind to the public as to render necessary immediate measures to prevent such danger or injury, I do hereby, under the provisions of section 142 of the Code of Criminal Procedure, 1973, direct and enjoin you forthwith to ..... (*state plainly what is required to be done as a temporary safeguard*), pending the result of the inquiry.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 23 MAGISTRATE'S ORDER PROHIBITING THE REPETITION, ETC., OF A NUISANCE

(*See* section 143)

To ..... (*name, description and address*)

WHEREAS it has been made to appear to me that, etc.,..... (*state the proper recital, guided by* Form No. 20 *or* Form No. 24, *as the case may be*)*;*

I do hereby strictly order and enjoin you not to repeat or continue, the said nuisance.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 24 MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT, ETC.

(*See* section 144)

To.....(*name, description and address*)

WHEREAS it has been made to appear to me that you are in possession (*or* have the management) of.....(*describe clearly the property*), and that, in digging a drain on the said land, you are about to throw or place a portion of the earth and stones dug-up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road.

or

WHEREAS it has been made to appear to me that you and a number of other persons .....(*mention the class of persons*) are about to meet and proceed in a procession along the public street, etc., (*as the case may be*) and that such procession is likely to lead to a riot or an affray;

or

WHEREAS, etc., etc., (*as the case may be*)*;*

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road;

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (*or as the case recited may require*).

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 25 MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN POSSESSION OF LAND, ETC., IN DISPUTE

(*See* section 145)

It appears to me, on the grounds duly recorded, that a dispute, likely to induce a breach of the peace, existed between.....(*describe the parties by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain.....(*state concisely the subject of dispute*), situate within my local jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said.....(*the*

subject of dispute), and being satisfied by due inquiry had thereupon, without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by the said..... (*name or names or description*) is true, I so decide and declare that he is (*or they are*) in possession of the said..... (the *subject of dispute*) and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his (*or* their) possession in the meantime.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 26 WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO THE POSSESSION OF LAND, ETC.

(See section 146)

To the officer in charge of the police station at.....

(*or*, To the Collector of.....)

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between..... (*describe the parties concerned by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain ..... (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said ..... (the *subject of dispute*), and whereas, upon due inquiry into the said claims, I have decided that neither of the said parties was in possession of the said..... (the *subject of dispute*) (*or* I am unable to satisfy myself as to which of the said parties was in possession as aforesaid);

This is to authorise and require you to attach the said ..... (the *subject of dispute*) by taking and keeping possession thereof, and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession, shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 27 MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON LAND OR WATER

(*See* section 147)

A DISPUTE having arisen concerning the right of use of.....(*state concisely the subject of dispute*) situate within my local jurisdiction, the possession of which land (*or* water) is claimed exclusively by..... (*describe the person or persons*), and it appears to me, on due inquiry into the same, that the said land (or water) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons, describe him or them*) and (*if the use can be enjoyed throughout the year*) that the said use has been enjoyed within three months of the institution of the said inquiry

(*or if the use is enjoyable only at a particular season say,* "during the last of the seasons at which the same is capable of being enjoyed");

I do order that the said..... (the *claimant or claimant of possession*) or any one in their interest, shall not take (or retain) possession of the said land (*or w*ater) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or t*hey) shall obtain the decree or order of a competent Court adjudging him (*or t*hem) to be entitled to exclusive possession.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 28 BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A POLICE OFFICER

(*See* section 169)

I, ...(*name*), of....., being charged with the offence of..... and after inquiry required to appear before the Magistrate of.....

or

and after inquiry called upon to enter into my own recognizance to appear when required, do hereby bind myself to appear at....., in the Court of....., on the..... day of..... next (*or o*n such day as I may hereafter be required to attend) to answer further to the said charge, and in case of my making default therein, I bind myself to forfeit to Government, the sum of rupees.....

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

I hereby declare myself (*or* we jointly and severally declare ourselves and each of us) surety (*or sureties*) for the above said ..... (*name*) that he shall attend at.....in the Court of....., on the..... day of.....next (or on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and, in case of his making default therein, I hereby bind myself (*or* we hereby bind ourselves) to forfeit to Government, the sum of rupees.....

Dated, this..... day of....., 20.....

(*Signature*)

FORM NO. 29 BOND TO PROSECUTE OR GIVE EVIDENCE

(*See* section 170)

I, ... (*name*), of ....., (*place*) do hereby bind myself to attend at..... in the Court of..... at.....o'clock on the..... day of..... next and then and there to prosecute (*or* to prosecute and give evidence) (*or to give evidence*), in the matter of a charge of..... against one A.B. and, in

case of making default herein. I bind myself to forfeit to Government the sum of rupees.....

Dated, this..... day of....., 20.....

(*Signature*)

FORM NO. 30 SPECIAL SUMMONS TO A PERSON ACCUSED OF A PETTY OFFENCE

(*See* section 206)

To..... (Name of the accused)

of .....(address)

WHEREAS your attendance is necessary to answer a charge of a petty offence..... (*state shortly the offence charged*), you are hereby required to appear in person (*or by pleader*) before..... (Magistrate) of..... on the..... day of..... 20....., or if you desire to plead guilty to the charge without appearing before the Magistrate, to transmit before the aforesaid date the plea of guilty in writing and the sum of..... rupees as fine, or if you desire to appear by pleader and to plead guilty through such pleader, to authorise such pleader in writing to make such a plea of guilty on your behalf and to pay the fine through such pleader. Herein fail not.

Dated, this..... day of....., 20.....

(*Seal of the Court*) (*Signature*)

(*Note.*—The amount of fine specified in this summons shall not exceed one hundred rupees.)

FORM NO. 31 NOTICE OF COMMITMENT BY MAGISTRATE TO PUBLIC PROSECUTOR

(*See* section 209)

The Magistrate of..... hereby gives notice that he has committed one .....for trial at the next Sessions; and the Magistrate hereby instructs the Public Prosecutor to conduct the prosecution of the said case.

The charge against the accused is that,..... etc. (*state the offence as in the charge*).

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 32 CHARGES

(*See* sections 211, 212 and 213)

I. CHARGES WITH ONE-HEAD

(1)(a) I,..... (*name and office of Magistrate,* etc.), hereby charge you ..... (*name of accused person*) as follows:—

(b) **On section 121**.—That you, on or about the..... day of....., at....., waged war against the Government of India and thereby committed an offence punishable under section 121 of the Indian Penal Code, and within the cognizance of this Court.

(c) And I hereby direct that you be tried by this Court on the said charge.

(*Signature and Seal of the Magistrate*)

[*To be substituted for* (b)]—

(2) **On section 124.**—That you, on or about the..... day of....., at....., with the intention of inducing the President of India *[or, as the case may be,* the Governor of.....(*name of State*) to refrain from exercising a lawful power as such President (or, *as the case may be,* the Governor), assaulted President (or, *as the case may be,* Governor), and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of this Court.

(3) **On section 161.**—That you, being a public servant in the.....Department, directly accepted from..... (*state the name*) for another party..... (*state the name*) gratification other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within the cognizance of this Court.

(4) **On section 166.**—That you, on or about the..... day of....., at.....did (*or* omitted to do, *as the case may be*), such conduct being contrary to the provisions of.....Act....., section....., and known by you to be prejudicial to....., and thereby committed an offence punishable under section 166 of the Indian Penal Code, and within the cognizance of this Court.

(5) **On section 193.**—That you, on or about the.....day of....., at....., in the course of the trial of.....before....., stated in evidence that "....." which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of this Court.

(6) **On section 304.**—That you, on or about the..... day of....., at....., committed culpable homicide not amounting to murder, causing the death of....., and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of this Court.

(7) **On section 306.—**That you, on or about the..... day of....., at....., abetted the commission of suicide by A.B., a person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of this Court.

(8) **On section 325.—**That you, on or about the.....day of ....., at....., voluntarily caused grievous hurt to....., and thereby committed an offence punishable under section 325 of the Indian Penal Code, and within the cognizance of this Court.

(9) **On section 392.**—That you, on or about the.....day of....., at....., robbed (*state the name*), and thereby committed an offence

punishable under section 392 of the Indian Penal Code, and within the cognizance of this Court.

(10) **On section 395.**—That you, on or about the.....day of....., at....., committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of this Court.

II. CHARGES WITH TWO OR MORE HEADS

(1)(a) I,..... (*name and office of Magistrate,* etc.) hereby charge you ..... (name of accused person) as follows:—

(b) **On section 241** *First*—That you, on or about the..... day of..... at ..... knowing a coin to be counterfeit, delivered the same to another person, by name, A.B. as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session.

Secondly—Thatyou, on or about the.....day of.....at....., knowing a coin to be counterfeit attempted to induce another person, by name, A.B. to receive it as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session.

(c) And I hereby direct that you be tried by the said Court on the said charge.

(*Signature and seal of the Magistrate*)

[*To be substituted for* (*b*)]:—

(2) **On sections 302 and 304** *First.*—That you, on or about the.....day of..... at....., committed murder by causing the death of.....and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session.

Secondly—That you, on or about the.....day of.....at....., by causing the death of.....committed culpable homicide not amounting to murder, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session.

(3) **On sections 379 and 382** *First*—That you, on or about the ..... day of....., at....., committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session.

Secondly—That you, on or about the..... day of..... at....., committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session.

Thirdly—That you, on or about the.....day of.....at....., committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session.

Fourthly—That you, on or about the.....day of....., at....., committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session.

(4) **Alternative charge on section 193.**—Thatyou, on or about the.....day of....., at....., in the course ofthe inquiry into.....,before....., stated in evidence that "....." and that you, on or aboutthe.....day of.....at....., in the course of the trial of.....,before....., stated in the evidence that "....."one of which statementsyou either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session.

(*In cases tried by Magistrates substitute* "within my cognizance", for "within the cognizance of the Court of Session").

III. CHARGES FOR THEFT AFTER PREVIOUS CONVICTION

I.....(*name and office of Magistrate,*etc.), hereby charge you..... (name of accused person) as follows:—

That you, on or about the.....day of....., at....., committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session (or Magistrate, *as the case may be*).

And you, the said (name of accused), stand further charged that you, before the committing of the said offence, that is to say, on the day of, had been convicted by the (*state Court by which conviction was had*) at of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night (*describe the offence in the words used in the section under which the accused was convicted*), which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under section 75 of the Indian Penal Code.

And I hereby direct that you be tried, etc.

FORM NO. 33 SUMMONS TO WITNESS

(*See* sections 61 and 244)

To .....of.....

WHEREAS complaint has been made before me that .....(*name of the accused*) of .....(address) has (or is suspected to have) committed the offence of.....(*state the offence concisely with time and place*), and it appears to me that you are likely to give material evidence or to produce any document or other thing for the prosecution;

You are hereby summoned to appear before this Court on the.....day of..... next at ten o'clock in the forenoon, to produce such document or thing or to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court; and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Dated, this.....day of ....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 34 WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A [1][COURT]

[2][*See* sections 235, 248 and 255)]

To the Officer in charge of the Jail at.....

WHEREAS on the.....day of....., ...(*name of prisoner*), the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No..... of the Calendar for 20....., was convicted before me.....(*name and official designation*) of the offence of .....(*mention the offence or offences concisely*) under section..... (*or sections*) of the Indian Penal Code (or of.....Act.....), and was sentenced to .....(*state the punishment fully and distinctly*);

This is to authorise and require you to receive the said.....(*prisoner's name*) into your custody in the said Jail, together with this warrant, and thereby carry the aforesaid sentence into execution according to law.

Dated, this.....day of.....,20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 35 WARRANT OF IMPRISONMENT ON FAILURE TO PAY COMPENSATION

(*See* section 250)

To the Officerin charge oftheJail at.....

WHEREAS.....(*name and description*) hasbrought against.....(*name and description of the accused person*)the complaintthat.....(*mention it concisely*) and the same has been dismissed on the ground thatthere was no reasonable ground for making the accusation against the said.....(*name*) and the order of dismissal awards payment by the said .....(*name of complainant*) of the sum of rupees.....as compensation; and whereas the said sum hasnot been paid and an order has been made for his simple imprisonment in Jail for the period of.....days, unless the aforesaid sum be sooner paid.

This is to authorise and require you to receive the said ..... (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of..... (*term of imprisonment*), subject to the provisons of section 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 36 ORDER REQUIRING PRODUCTION IN COURT OF PERSON IN PRISON FOR ANSWERING TO CHARGE OF OFFENCE

(*See* section 267)

To the Officer in charge of the Jail at.....

WHEREAS the attendance of..... (*name of prisoner*) at present confined/ detained in the above-mentioned prison, is required in this Court to answer to a charge of.....(*state shortly the offence charged*) or for the purpose of a proceeding (*state shortly the particulars of the proceeding*);

You are hereby required to produce the said..... under safe and sure conduct before this Court.....on the.....day of....., 20....., by.....A.M. there to answer to the said charge, or for the purpose of the said proceeding, and after this Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the said prison.

And you are further required to inform the said.....of the contents of this order and deliver to him the attached copy thereof.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

Countersigned.

(*Seal*) (*Signature*)

FORM NO. 37 ORDER REQUIRING PRODUCTION IN COURT OF PERSON IN PRISON FOR GIVING EVIDENCE

(*See* section 267)

To the Officer in charge of the Jail at.....

WHEREAS complaint has been made before this Court that..... (*name of the accused*) of..... has committed the offence of..... (*state offence concisely with time and place*) and it appears that.....(*name of prisoner*) at present confined/detained in the above-mentioned prison, is likely to give material evidence for the prosecution/defence;

You are hereby required to produce the said..... under safe and sure conduct before this Court at..... on the..... day of....., 20.....by..... A.M. there to give evidence in the matter now pending before this Court, and after this Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the said prison.

And you are further required to inform the said..... of the contents of this order and deliver to him the attached copy thereof.

Dated, this.....day of.....20.....

(*Seal of the Court*) (*Signature*)

Countersigned.

(*Seal*) (*Signature*)

FORM NO. 38 WARRANT OF COMMITMENT IN CERTAIN CASES OF CONTEMPT WHEN A FINE IS IMPOSED

(*See* section 345)

To the Officer in charge of the Jail *at*.....

WHEREAS at a Court held before me on this day.....(*name and description of the offender*) in the presence (*or view*) of the Court committed wilful contempt;

And whereas for such contempt the said.....(*name of the offender*) has been adjudged by the Court to pay a fine of rupees....., or in default to suffer simple imprisonment for the period of.....(*state the number of months or days*);

This is to authorise and require you to receive the said.....(*name of offender*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of..... (*term of imprisonment*), unless the said fine be sooner paid; and, on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 39 MAGISTRATE'S OR JUDGE'S WARRANT OF COMMITMENT OF WITNESS REFUSING TO ANSWER OR TO PRODUCE DOCUMENT

(*See* section 349)

To .....(*name and designation of officer of Court*).

WHEREAS .....(*name and description*), being summoned (*or b*rought before this Court) as a witness and this day required to give evidence on an inquiry into 1000 Forms [Sch. II an alleged offence, refused to answer a certain question (*or* certain questions) put to him touching the said alleged offence, and duly recorded, or having been called upon to produce any document has refused to produce such document, without alleging any just excuse for such refusal, and for his refusal has been ordered to be detained in custody for..... (*term of detention adjudged*);

This is to authorise and require you to take the said..... (*name*) into custody, and him safely to keep in your custody for the period of..... days, unless in the meantime he shall consent to be examined and to answer the questions asked of him, or to produce the document called for from him, and on the last of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 40 WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH

(*See* section 366)

To the Officer in charge of the Jail at.....

WHEREAS at the Session held before me on the.....day of....., 20....., (*name of prisoner*) the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No..... of the Calendar for 20.....at the said Session, was duly convicted of the offence of culpable homicide amounting to murder under section..... of the Indian Penal Code, and sentenced to death, subject to the confirmation of the said sentence by the..... Court of.....;

This is to authorise and require you to receive the said.....(*prisoner's name*) into your custody in the said Jail, together with this warrant, and him there safely to keep until you shall receive the further warrant or order of this Court, carrying into effect the order of the said.....Court.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 41 WARRANT AFTER A COMMUTATION OF A SENTENCE

[3].[(*See* sections 386, 413 and 416)]

To the Officerin charge of the Jail at.....

WHEREAS at a Session held on the.....day of....., 20...., ...(*name of prisoner*) the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No....., of the Calendar for 20....., at said Session, was convicted of the offence of.....punishable under section.....of the Indian Penal Code, and sentenced to.....and was thereupon committed to your custody; and whereas by the order of the..... Court of.....(a duplicate of which is hereunto annexed) the punishment adjudged by the said sentence has been commuted to the punishment of imprisonment for life;

This is to authorise and require you safely to keep the said..... (*prisoner's name*) in your custody in the said jail, as by law is required, until he shall be delivered over by you to the proper authority and custody for the purpose of his undergoing the punishment of imprisonment for life under the said order,

or

If the mitigated sentence is one of imprisonment, say, after the words "custody in the said jail", "and there to carry into execution the punishment of imprisonment under the said order according to law".

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 42 WARRANT OF EXECUTION OF A SENTENCE OF DEATH

[4].[(*See* sections 413 and 414)]

To the Officer in charge of the Jail at.....

WHEREAS .....(*name of prisoner*), the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No..... of the Calendar for 20..... at the Session held before me on the..... day of..... 20..... has been by a warrant of the Court, dated the day..... of..... committed to your custody under sentence of death; .....and whereas the order of the High Court at.....confirming the said sentence has been received by this Court;

This is to authorise and require you to carry the said sentence into execution by causing the said.....to be hanged by the neck until he be dead, at ..... (*time and place of execution*) and to return this warrant to the Court with an endorsement certifying that the sentence has been executed.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 43 WARRANT TO LEVY A FINE BY ATTACHMENT AND SALE

(*See* section 421)

To..... (*name and designation of the police officer or other person or persons who is or are to execute the warrant*).

WHEREAS.....(*name and description of the offender*) was on the.....day of....., 20....., convicted before me of the offence of .....(*mention the offence concisely*), and sentenced to pay a fine of rupees....., and whereas the said..... (*name*), although required to pay the said fine, has not paid the same or any part thereof;

This is to authorise and require you to attach any movable property belonging to the said..... (*name*) which may be found within the district of.....; and, if within .....(*state the number of days or hours allowed*) next after such attachment the said sum shall not be paid *or* (forthwith), to sell the movable property attached, or so much thereof as shall be sufficient to satisfy the said fine, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

FORM NO. 44 WARRANT FOR RECOVERY OF FINE

(*See* section 421)

To the Collector of the district of.....

WHEREAS..... (*name, address and description of the offender*) was on the ..... day of....., 20..... convicted before me of the offence of..... (mention the offence concisely), and sentenced to pay a fine of rupees..... ; and

WHEREAS the said.....(*name*), although required to pay the said fine, has not paid the same or any part thereof;

You are hereby authorised and requested to realise the amount of the said fine as arrears of land revenue from the movable or immovable property, or both, of the said..... (*name*) and to certify without delay what you may have done in pursuance of this order.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

[5][FORM NO. 44A BOND FOR APPEARANCE OF OFFENDER RELEASED PENDING REALISATION OF FINE

[*See* section 424(1)(b)]

WHEREAS I,..... (*name*), inhabitant of..... (*place*), have been sentenced to pay a fine of rupees..... and in default of payment thereof to undergo imprisonment for..... ; and whereas the Court has been pleased to order my release on condition of my executing a bond for my appearance on the following date (*or d*ates), namely:—

I hereby bind myself to appear before the Court of.....at..... o'clock on the following date (*or d*ates) namely:—

and, in case of making default therein, I bind myself to forfeit to Government the sum of rupees.....

Dated, this.....day of....., 20.....

(*Signature*)

WHERE A BOND WITH SURETIES IS TO BE EXECUTED, ADD—

We do hereby declare ourselves sureties for the above-named that he will appear before the Court of..... on the following date (or dates) namely:—

and, in case of his making default therein, we bind ourselves jointly and severally to forefeit to Government the sum of rupees.....

(*Signature*)]

FORM NO. 45 BOND AND BAIL-BOND FOR ATTENDANCE BEFORE OFFICER IN CHARGE OF POLICE STATION OR COURT

[*See* sections 436, [6][436A,] 437, [7][437A,] 438(3) and 441]

I, ... (*name*), of..... (*place*), having been arrested or detained without warrant by the officer in charge of..... police station (*or h*aving been brought before the Court of.....) charged with the offence of....., and required to give security for my attendance before such Officer or Court on condition that I shall attend such officer or Court on every day on which any

investigation or trial is held with regard to such charge, and in case of my making default herein, I bind myself to forfeit to Government the sum of rupees.....

Dated, this.....day of....., 20.....

(*Signature*)

I hereby declare myself (*or* we jointly and severally declare ourselves and each of us) surety (or sureties) for the above said..... (*name*) that he shall attend the officer in charge of..... police station or the Court of..... on every day on which any investigation into the charge is made or any trial on such charge is held, that he shall be, and appear, before such Officer or Court for the purpose of such investigation or to answer the charge against him (as the case may be), and, in case of his making default herein, I hereby bind myself (*or* we hereby bind ourselves) to forfeit to Government the sum of rupees.....

Dated, this.....day of....., 20.....

(*Signature*)

FORM NO. 46 WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(*See* section 442)

To the Officer in charge of the Jail at.....

(*or other officer in whose custody the person is*)

WHEREAS ..... (*name and description of prisoner*) was committed to your custody under warrant of this Court, dated, the..... day of....., and has since with his surety (*or* sureties) duly executed a bond under section 441 of the Code of Criminal Procedure.

This is to authorise and require you forthwith to discharge the said..... (*name*) from your custody, unless he is liable to be detained for some other matter.

Dated, this .....day of ....., 20.....

(*Seal of the Court*) (*Signature*)

[8].[FORM NO. 47 WARRANT OF ATTACHMENT TO ENFORCE A BOND

(*See* section 446)

To the Police officer in charge of the police station at.....

WHEREAS.....(*Name, description and address of person*) has failed to appear on.....(*mention the occasion*) pursuant to his recognizance, and has by default forfeited to Government the sum of rupees.....(the *penalty in the bond*); and whereas the said ..... (*name of person*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him.

This is to authorise and require you to attach any movable property of the said..... (*name*) that you may find within the district of....., by seizure and detention, and, if the said amount be not paid within.....days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid, and to make return of what you have done under this warrant immediately upon its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

[9][FORM NO. 48 NOTICE TO SURETY IN BREACH OF A BOND

(*See* section 446)

To....., of.....

WHEREAS on the .....day of....., 20....., you became surety for ..... (*name*) of .....(*place*) that he should appear before this Court on the..... day of..... and bound yourself in default thereof to forfeit the sum of rupees..... to Government; and whereas the said.....(*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees..... ;

You are hereby required to pay the said penalty or show cause, within.....days from this date, why payment of the said sum should not be enforced against you.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

[10][FORM NO. 49 NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(*See* section 446)

To....., of.....

WHEREAS on the.....day of....., 20....., you became surety by a bond for..... (*name*) of.....(*place*) that he would be of good behaviour for the period of.....and bound yourself in default thereof to forfeit the sum of rupees..... to Government; and whereas the said..... (*name*) has been convicted of the offence of.....(*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited;

You are hereby required to pay the said penalty of rupees.....or to show cause within.....days why it should not be paid.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

11.[FORM NO. 50 WARRANT OF ATTACHMENT AGAINST A SURETY

(*See* section 446)

To....., of.....,

WHEREAS ..... (*name, description and address*) has bound himself as surety for the appearance of..... (*mention the condition of the bond*) and the said.....(*name*) has made default, and thereby forfeited to Government the sum of rupees..... (the penalty in the bond);

This is to authorise and require you to attach any movable property of the said..... (*name*) which you may find within the district of....., by seizure and detention; and, if the said amount be not paid within.....days, to sell the property so attached, or so much of it as may be sufficient to realise the amount aforesaid, and make return of what you have done under this warrant immediately upon its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)]

12.[FORM NO. 51 WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL

(*See* section 446)

To the Superintendent (or Keeper) of the Civil Jail at.....

WHEREAS..... (*name and description of surety*) has bound himself as a surety for the appearance of..... (*state the condition of the bond*) and the said..... (*name*) has therein made default whereby the penalty mentioned in the said bond has been forfeited to Government; and whereas the said..... (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of his movable property, and an order has been made for his imprisonment in the Civil Jail for..... (*specify the period*);

This is to authorise and require you, the said Superintendent (or Keeper) to receive the said..... (*name*) into your custody with this warrant and to keep him safely in the said jail for the said .....(*term of imprisonment*), and to return the warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)]

13.[FORM NO. 52 NOTICE TO THE PRINCIPAL OF FORFEITURE OF BOND TO KEEP THE PEACE

(*See* section 446)

To..... (*name, description and address*)

WHEREAS on the..... day of....., 20....., you entered into a bond not to commit, etc. (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded;

You are hereby called upon to pay the said penalty of rupees..... or to show cause before me within..... days why payment of the same should not be enforced against you.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)]

[14][FORM NO. 53 WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH OF A BOND TO KEEP THE PEACE

(*See* section 446)

To.....(*name and designation of police officer*) at the police station of.....

WHEREAS..... (*name and description*) did, on the..... day of....., 20....., enter into a bond for the sum of rupees.....binding himself not to commit a breach of the peace, etc. (as *in the bond*), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said.....(*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

This is to authorise and require you to attach by seizure movable property belonging to the said.....(*name*) to the value of rupees....., which you may find within the district of....., and, if the said sum be not paid within....., to sell the property so attached, or so much of it as may be sufficient to realise the same; and to make return of what you have done under this warrant immediately upon its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)]

[15][FORM NO. 54 WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE

(*See* section 446)

To the Superintendent (*or K*eeper) of the Civil Jail at.....

WHEREAS proof has been given before me and duly recorded that..... (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Government the sum of rupees.....; and whereas the said.....(*name*) has failed to pay the said sum or to show cause why the said sum should not be paid, although duly called upon to do so, and payment thereof cannot be enforced by attachment of his movable property, and an order has been made for the imprisonment of the said.....(*name*) in the Civil Jail for the period of..... (*term of imprisonment*)*;*

This is to authorise and require you, the said Superintendent (*or K*eeper) of the said Civil Jail, to receive the said.....(*name*) into your custody, together with this warrant, and to keep him safely in the said jail for the said period of.....(*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)]

16.[FORM NO. 55 WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(*See* section 446)

To the Police Officerin charge of the police station at.....

WHEREAS..... (*name, description and address*) did, on the..... day of..... 20..... give security by bond in the sum of rupees..... for the good behaviour of..... (*name etc., of the principal*), and proof has been given before me and duly recorded of the commission by the said..... (*name*) of the offence of..... whereby the said bond has been forfeited; and whereas notice has been given to the said.....(*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

This is to authorise and require you to attach by seizure movable property belonging to the said..... (*name*) to the value of rupees..... which you may find within the district of....., and, if the said sum be not paid within....., to sell the property so attached, or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)]

17.[FORM NO. 56 WARRANT OF IMPRISONMENT ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(*See* section 446)

To the Superintendent (*or k*eeper) of the Civil Jail at.....

WHEREAS..... (*name description and address*) did, on the..... day of..... 20....., give security by bond in the sum of rupees..... for the good behaviour of..... (*name, etc., of the principal*) and proof of the breach of the said bond has been given before me and duly recorded, whereby the said.....(*name*) has forfeited to Government the sum of rupees....., and whereas he has failed to pay the said sum or to show cause why the said sum should not be paid, although duly called upon to do so, and payment thereof cannot be enforced by attachment of his movable property, and an order has been made for the imprisonment of the said.....(*name*) in the Civil Jail for the period of.....(*term of imprisonment*);

This is to authorise and require you, the Superintendent (or keeper), to receive the said.....(*name*) into your custody, together with this warrant, and to keep him safely in the said Jail for the period of.....(*term of imprisonment*), returning this warrant with an endorsement certifying the manner of its execution.

Dated, this.....day of....., 20.....

(*Seal of the Court*) (*Signature*)

1. Subs. by Act 45 of 1978, section 35(i)(a), for "Magistrate" (w.e.f. 18-12-1978).
2. Subs. by Act 45 of 1978, section 35(i)(b), for "(See sections 248 and 255)" (w.e.f. 18-12-1978).
3. Subs. by Act 45 of 1978, section 35(ii), for "(See section 386)" (w.e.f. 18-12-1978).
4. Subs. by Act 45 of 1978, section 35(iii), for "(See section 414)" (w.e.f. 18-12-1978).
5. Ins. by Act 45 of 1978, section 35(iv) (w.e.f. 18-12-1978).
6. Ins. by Act 25 of 2005, section 43 (w.e.f. 23-6-2006).
7. Ins. by Act 5 of 2009, section 32 (w.e.f. 31-12-2009).
8. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
9. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
10. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
11. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
12. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
13. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
14. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
15. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
16. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).
17. Ins. by Act 45 of 1978, section 35(v) (w.e.f. 18-12-1978).

The Code of Criminal Procedure, 1973

SUMMARY

Before the establishment of Courts of criminal and civil justice by the East India Company, the Mohammedan power had its own criminal law. In the beginning, the Courts were guided, in criminal matters, by the Mohammedan criminal law. In 1773, the British Parliament enacted the Regulating Act,[1.] which provided for the form of government in India. A Supreme Court was established in Calcutta, and later on, such a Court was established in Madras in 1800, and in Bombay in 1823. In 1781, another statute was passed recognising provincial Courts independent of the Supreme Court, and investing the Governor-General-in-Council with appellate jurisdiction and with power to frame regulations for these Courts. Regulations applicable to Bengal were passed by the Governor-General-in-Council, and those applicable to the Madras Presidency by the Governor in Council of Fort St. George, and to the Bombay Presidency by the Governor-in-Council of Bombay. Legislation by Regulations continued up to 1834. The Supreme Courts mostly applied English law and procedure in matters civil and criminal. The mofussil Courts were guided by the Regulations of Government, and when there was no Regulation, they proceeded according to justice, equity and good conscience.

In 1833, the Governor-General-in-Council was empowered by 3 and4 Will. IV, c. 85, to legislate for the whole of British India, *i.e.*, for all persons whether British or native or foreigners; for all Courts established by Charter or otherwise and for all places within the territories of British India. The Regulations made under the previous statutes were replaced by Acts. This statute provided for the appointment of the "Indian Law Commission" mainly with a view to codify Indian laws and procedure. The most prominent member of the Indian Law Commission was its president, Lord Macaulay. The Commission dealt with substantive criminal law and with procedure of Courts. It made a series of reports which were transmitted to the Court of Directors. The Indian Penal Code (IPC), which is a monument to the genius of Lord Macaulay, was prepared in 1837, though it came into operation on 1-1-1862.

In 1847, the Indian Law Commissioners were instructed to prepare a scheme of pleading and procedure with forms of indictment adapted to the provisions of the Penal Code. It was prepared in 1848.

Owing to the great delay in examining the measures recommended by the Indian Law Commissioners, a Royal Commission was appointed in England in 1853[2.] to examine and consider the recommendations and the draft enactments of the Indian Law Commissioners, and a second Commission was appointed in 1854. The draft of the Criminal Procedure Code was examined and revised by the Commissioners appointed in 1854. They prepared a draft Code which was presented to Parliament in 1856, and introduced into the Legislative Council of the Governor-General by Sir Barnes Peacock in 1857. It appeared on the Statute Book as Act XXV of 1861 and came into force on 1-1-1862. Originally, it applied to the territories subject to general regulations and was gradually extended to other territories of British India, barring the presidency-towns. It was considerably amended by Act VIII of 1869. Both these Acts were repealed by the Criminal Procedure Code of 1872 (Act X of 1872). This Code, like its predecessor, did not apply to the High Courts and the Chief Courts of the Punjab and the Presidency Magistrates' Courts in Calcutta, Madras and Bombay. The several Acts governing the procedure of High Courts were repealed and replaced by the High Courts' Criminal Procedure Act (X of 1875) which regulated the procedure of the High Courts in the exercise of their original criminal jurisdiction. The Presidency Magistrates Act (IV of 1877) was enacted to regulate the procedure of the Courts of Magistrates in the

presidency-towns. Several provisions of these three Acts—X of 1872, X of 1875 and IV of 1877—were similar though not couched in the same language. It was, therefore, thought desirable to consolidate the three Acts into one single Code of Criminal Procedure for the whole of British India. This was done by Act X of 1882 which also repealed those three enactments. The Criminal Procedure Code of 1882 remained in force for sixteen years. It was repealed and consolidated by Act V of 1898. The Criminal Procedure Code of 1898 had undergone radical changes by Act XXIII of 1923 and Act XXVI of 1955, and it was suggested to replace it by a new Code.

The Law Commission presented its report on the Reform of Judicial Administration (14th Report) on 26-9-1958. The report dealt with both civil and criminal administration of justice; however, it was not specifically concerned with general revision of the Code of 1898. That task was undertaken by the Law Commission under the Chairmanship of Shri J.L. Kapur which before its reconstitution submitted a comprehensive Report on ss. 1 to 176 of the Code. The final detailed Report under a reconstituted Commission, *viz.,* the Forty-first Report, was made in September 1969. The Government examined the recommendations made by the Commission in the light of these basic considerations, namely, "(i) an accused person should get a fair trial in accordance with the accepted principles of natural justice; (ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to the society; and (iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community." Thereafter, a draft Bill, Bill No. XLI of 1970, was introduced in the Rajya Sabha on 10-12-1970. The Bill was referred to a Joint Select Committee of both the Houses of Parliament and finally emerged in its present form and passed by both the Houses. It received the assent of the President on 25-1-1974 and came into effect from 1-4-1974. The substantive criminal law is contained in the Penal Code, which defines offences and provides for punishments. The Code of Criminal Procedure has been framed to supplement the Penal Code by rules of procedure for preventing offences and bringing offenders to justice. "The great object of penal law being the prevention of offences by the example of punishment, the intent of all Codes of Procedure is to ensure this end; therefore, every system must be imperfect, which permits the form to defeat the substance of the law and suffers a criminal ever to escape punishment from any defect of form in his prosecution."[3.] The Criminal Procedure Code specifies the jurisdiction of several Courts in which offenders may be prosecuted and explains the procedure which should be followed at various stages of an inquiry, trial or any other proceeding. But the Criminal Procedure Code is not pure adjective law (*i.e.* law of procedure). There are several chapters dealing with matters which partake of the nature of substantive law—Chapters IV, VIII, IX, XI and XXXIV.

The Criminal Procedure Code, 1973 is divided into thirty-seven chapters, each one dealing with a particular topic.

Chapter I.—Preliminary

The Criminal Procedure Code extends to the whole of India except the, State of Nagaland and tribal areas (except for Chapters VII, X and XI), but it does not affect—

(1) any special or local law;

(2) any special jurisdiction or procedure prescribed by any law (ss. 1 and 5). The definitions and explanations of certain words given in the Code and construction of references made in the Code are adhered to throughout the Code. (ss. 2 and 3).

Offences under the Penal Code are investigated, inquired into and tried according to the provisions of the Criminal Procedure Code; offences under any other law are dealt with similarly, but subject to any enactment regulating the manner or place of investigating,

inquiring into or trying such offences (s. 4).[4.] Section 4, therefore, is the connecting nexus between the Code of Criminal Procedure which lays down the procedural law with other penal statute books which lay down the substantive law of punishments.

Chapter II.—Constitution of Criminal Courts and Offices

Classes of Criminal Courts.—There are six different classes of Courts:

(1) High Courts and the Courts constituted under any law other than Cr.P.C.;

(2) Courts of Session;

(3) Judicial Magistrates of the first class;

(4) Judicial Magistrates of the second class;

(5) Metropolitan Magistrates; and

(6) Executive Magistrates (s. 6).

Territorial Divisions.—Every State is a sessions division or consists of sessions divisions. Every sessions division is a district or consists of districts. Every metropolitan area is a sessions division and is a district. The State Government may, after consultation with the High Court, alter the limits or the number of such divisions and districts and also divide any district into sub-divisions or alter the limits of any sub-divisions. The sessions divisions, districts and sub-divisions existing in a State on 1-4-1974 are deemed to have been formed under this Code (s. 7).

Metropolitan areas.—At the commencement of the Code, the presidency-towns of Bombay, Calcutta and Madras, and the city of Ahmedabad are deemed to be declared as metropolitan areas. Further, the State Government can declare a town or city with a population exceeding one million to be a metropolitan area (s. 8).

I. Court of Session.—Every sessions division has a Court of Sessions presided over by a Sessions Judge.

Additional Sessions Judges and Assistant Sessions Judges are also appointed to exercise jurisdiction in such Court. A Sessions Judge of one sessions division may be appointed to be also an Additional Sessions Judge of another division. The High Court may make arrangements for application which may be made to or which is pending before the Sessions Judge when his office is vacant (s. 9).

Subordination of Assistant Sessions Judges.—All Assistant Sessions Judges are subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and who make rules for distribution of work among them. If the Sessions Judge is unavoidably absent or incapable of acting, he may make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge, or if there is none such, by the Chief Judicial Magistrate (s. 10).

Special Courts.—The decision of the Supreme Court in *Dy. Chief Controller of Imports and Exports v. Kishan Lal Agarwal,*[5.] highlights principles applicable to jurisdiction of special Courts.

II. Judicial Magistrates.—In every district, there are Courts of Judicial Magistrates of the first and second class whose presiding officers are appointed by the High Court. The High Court can also confer first or second class magisterial powers on Judicial officers functioning as Judge in Civil Court (s. 11). The State Government can also

establish Special Courts of Judicial Magistrates having jurisdiction throughout any local area and confer on such Courts exclusive jurisdiction extending to areas beyond a district to try any particular case or category of cases. In every district, the High Court appoints one Judicial Magistrate of the first class as Chief Judicial Magistrate and may appoint another or others as Additional Chief Judicial Magistrates; for each subdivision, the High Court designates one Judicial Magistrate of the first class to be the Sub-divisional Judicial Magistrate. The Sub -divisional Judicial Magistrate exercises general control and supervision over other Judicial Magistrates in his sub-division subject to the general control of the Chief Judicial Magistrate over the whole district (s. 12). The Chief Judicial Magistrate defines the local limits of the areas within which Judicial Magistrates and Special Judicial Magistrate may exercise powers; otherwise, the jurisdiction and powers extend throughout the district (s. 14). A Court of a Special Judicial Magistrate may hold it's sitting at any place within the local area for which it is established.

Special Judicial Magistrates.—The High Court may, if requested by the Central or State Government, confer powers of the second class Magistrate on any duly qualified person for dealing with particular cases or classes of cases in any area outside the metropolitan towns. Such Magistrates are called Special Judicial Magistrates and are appointed for prescribed terms not exceeding one year at a time (s. 13).

Subordination of Judicial Magistrates.—The Chief Judicial Magistrate is subordinate to the Sessions Judge, and other Judicial Magistrates are subordinate to him subject to the general control of the Sessions Judge. Rules for distribution of work among Judicial Magistrates are made by the Chief Judicial Magistrate (s. 15).

III. Metropolitan Magistrates.—The State Government may establish a sufficient number of Metropolitan Magistrates' Courts in each metropolitan area, the presiding officers of which are appointed by the High Court (s. 16). One of the Metropolitan Magistrates is appointed as the Chief Metropolitan Magistrate by the High Court. It may appoint any Metropolitan Magistrate as an Additional Chief Metropolitan Magistrate (s. 17). Duly qualified persons who have held posts under Government may be appointed as Special Metropolitan Magistrates with second class Judicial Magistrate's powers by the High Court, on request from the Central or State Government, for a term not exceeding one year at a time for particular cases or classes of cases (s. 18). The High Court or the State Government may authorise a Special Judicial Magistrate to exercise powers of a Judicial Magistrate in any area outside his local jurisdiction.

Subordination of Metropolitan Magistrates.—The Chief Metropolitan Magistrate and the Additional Chief Metropolitan Magistrate are subordinate to the Sessions Judge, and other Metropolitan Magistrates are subordinate to the Chief Metropolitan Magistrate subject to the general control of the Sessions Judge. The extent of subordination of the Additional Chief Metropolitan Magistrate to the Chief Metropolitan Magistrate is defined by the High Court. The Chief Metropolitan Magistrate distributes business amongst the Metropolitan Magistrates and Additional Chief Metropolitan Magistrates by making rules (s. 19).

IV. Executive Magistrates.—The State Government appoints in each district and in every metropolitan area a sufficient number of Executive Magistrates one of whom is appointed as the District Magistrate. An Additional District Magistrate with all or any of the powers of the District Magistrate may also be appointed. An Executive Magistrate may be put in charge of a sub-division or relieved of his charge by the State Government: he is called the Sub-divisional Magistrate. The State Government may delegate its powers to the District Magistrate for the purposes of placing the Executive Magistrates in charge of a sub-division. The State Government may confer on a Commissioner of Police in metropolitan area any power of the Executive Magistrate (s. 20). The State Government can also appoint for a term Special Executive Magistrates

with powers of Executive Magistrate for particular areas or for discharging particular functions (s. 21). The jurisdiction of Executive Magistrates extends throughout the district, unless the District Magistrate defines the local limits of such jurisdiction (s. 22).

Subordination of Executive Magistrates.—All Executive Magistrates are subordinate to the District Magistrate, and all Executive Magistrates in a sub-division are subordinate to the Sub-divisional Magistrate subject to the general control of the District Magistrate. The District Magistrate makes rules for distribution of business (s. 23).

V. Public Prosecutor and Assistant Public Prosecutors.—For each High Court, an advocate of not less than seven years standing shall be appointed as Public Prosecutor either by the State Government or by the Central Government. A Special Public Prosecutor may also be appointed by the Government for any particular case or class of cases; such person should be in practice for not less than ten years. Victim can appoint his/her own lawyer to assist the prosecution upon permission by the court. A Public Prosecutor and one or more Additional Public Prosecutors with not less than seven years' practice for each district may be appointed by the State Government from a panel of names prepared by the District Magistrate in consultation with the Sessions Judge.[6.]

For conducting prosecutions in Courts of Magistrates, the State Government may appoint Assistant Public Prosecutors. Where no Assistant Public Prosecutor is available for any case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor provided that a police officer who is either below the rank of an Inspector or who has taken part in the investigation of the case shall not be appointed as Assistant Public Prosecutor (ss. 24 and 25).

A Public Prosecutor or Additional Public Prosecutor is not in service of the Union or the State within the meaning of Art. 233(2).[7.]

The appointment as the Public Prosecutor for the trial does not make him eligible to prosecute in the appellate proceedings as well on behalf of the prosecuting agency.[8.]

Directorate of Prosecution.—The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors as it thinks fit. The Director of Prosecution shall function under the administrative control of the Head of the Home Department in the State (s. 25A).

Withdrawal from prosecution and assignment of sensitive cases.—Principles have been stated in *State of Gujarat v. K.V. Joseph*.[9.]

Chapter III.—Power of Courts

Offences triable by each Court.—A. Offences under the Penal Code.—These may be tried by (1) the High Court, (2) Court of Session or (3) any other Court having jurisdiction to try them—See First Schedule. The offences u/ss. 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the IPC shall be tried, as far as practicable, by a Court presided over by a woman (s. 26).

B. Offences under other laws.—These are tried by the Courts mentioned in those laws; and where no such Court is mentioned, by the High Court or by any Court constituted under this Code which has jurisdiction to try such offences—See First Schedule (s. 26).

Juvenile offenders.—A person under the age of sixteen years who has committed an offence not punishable with death or imprisonment for life may be tried by a Court of Chief Judicial Magistrate, or by any Court specially empowered under the Children Act [Now the Juvenile Justice (Care and Protection of Children Act, 2000 (56 of 2000)] or any other law providing for the treatment, training and rehabilitation of such offender (s. 27).[10.]

Sentences which may be passed by Courts of various classes.—A High Court may pass any sentence authorised by law.

A Sessions Judge or an Additional Sessions Judge may pass any sentence authorized by law, but a sentence of death passed by him is subject to confirmation by the High Court.

An Assistant Sessions Judge may pass any sentence authorised by law, except a sentence of—

(1) death;

(2) imprisonment for life;

(3) imprisonment for a term exceeding ten years (s. 28).

Magistrates may pass the following sentences combining any of the sentences which they are authorised by law to pass:—

Chief Judicial Magistrates and Chief Metropolitan Magistrate.	**Any sentence authorised by law except sentence of (i) death, (ii) life imprisonment or (iii) imprisonment exceeding seven years;**
First Class Magistrates and Metropolitan Magistrates.	(a) Imprisonment not exceeding three years; or (b) fine not exceeding Rs. 10,000; or (c) both.
Second Class Magistrates.	(a) Imprisonment not exceeding one year; or (b) fine not exceeding Rs. 5,000; or (c) both (s. 29).

Sentence of imprisonment in default of payment of fine.—A Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law. Such imprisonment may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate u/s. 29. But—

(1) The term of imprisonment in default of payment of fine must not be in excess of the Magistrate's powers under the Code.

(2) Where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of fine. If a statute enjoins the Courts to impose the minimum punishment, the Courts are bound to do so unless there is a saving clause. They cannot award a punishment less than such prescribed minimum (s. 30).

Conviction of several offences at one trial.—In such a case, the Court may, subject to the provisions of s. 71 of the Penal Code, sentence the offender to the several punishments prescribed therefore which it is competent to inflict. If the punishments consist of imprisonment, it may direct the order in which they are to run unless they are directed to run concurrently. Where the sentences are consecutive, it is not necessary to send the offender before a higher Court because the aggregate punishment is in excess of that which the Court is competent to inflict on conviction of a single offence. But—

(1) the offender shall not be sentenced to imprisonment for more than fourteen years;

(2) the aggregate punishment shall not exceed twice the amount of punishment which a Magistrate is competent to inflict for a single offence. For the purpose of appeal, the aggregate of consecutive sentences is deemed to be a single sentence (s. 31).

Conferment, continuance and cancellation of powers.—Powers may be conferred on Magistrates by naming them, or in virtue of their offices, or by their official titles. The order takes effect from the date on which it is communicated to the Magistrate (s. 32). The person invested with such powers continues to exercise them even when he is transferred to another place (s. 33).

The High Court or the State Government may withdraw powers conferred on any person by it or by any subordinate officer. The Chief Judicial Magistrate or the District Magistrate may likewise withdraw any powers conferred by him (s. 34).

Exercise of powers by successors.—The powers and duties of a Judge or Magistrate may be exercised by his successor. If there is any doubt as to who the successor is, the Chief Judicial Magistrate or the District Magistrate decides it in the case of Magistrates and the Sessions Judge in the case of Additional or Assistant Sessions Judge (s. 35).

Hierarchy of Courts.—Hierarchy of Courts with varying powers has been provided with a view to ensure proper proof of guilt and punishment according to the gravity of the offence.[11.]

Chapter IV.—Powers of Superior Officers of Police

A. Powers of superior police officers.—Officers superior in rank to an officer-in-charge of police station exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station (s. 36).

B. Aid to the Magistrate and Police.—Every person is bound to assist a Magistrate or police officer demanding his aid—

(1) in the taking or preventing the escape of any person whom the Magistrate or police officer is authorised to arrest;

(2) in the prevention or suppression of a breach of the peace;

(3) in the prevention of any injury attempted to be committed to any (a) railway, (b) canal, (c) telegraph or (d) public property (s. 37).

Aid to a person executing a warrant.—When a person other than a police officer is executing a warrant, any person may aid in its execution (s. 38).

Information of certain offences: (I) By public.—Every person aware of the commission or intention to commit the following offences, under the Penal Code, is bound, in the absence of any reasonable excuse, to give information to the nearest Magistrate or police officer:—

(1) Certain offences against the State (ss. 121-126 and s. 130).

(2) Unlawful assembly and rioting (ss. 143, 144, 145, 147 and 148).

(3) Offences relating to illegal gratification (ss. 161 to 165A).

(4) Offences relating to adulteration of food and drugs (ss. 272 to 278).

(5) Murder (ss. 302 and 303) and culpable homicide (s. 304).

(6) Theft with preparation to cause death or hurt (s. 382).

(7) Robbery and its aggravated forms and dacoity (ss. 392 to 399 ands. 402).

(8) Criminal breach of trust by public servant (s. 409).

(9) Mischief against property (ss. 431 to 439).

(10) House-trespass to commit offence punishable with death (s. 449) or imprisonment for life (s. 450).

(11) Lurking house-trespass or house-breaking by night and its aggravated forms (ss. 456 to 460).

(12) Offence relating to currency notes and banknotes (ss. 489A to 489E) (s. 39).[12.]

(II) **By village officers and persons residing in village.—**(a) Every village officer and (b) every person residing in a village is bound to communicate to the nearest Magistrate or police officer in charge of a police-station, any information respecting—

(1) the permanent or temporary residence of any notorious receiver or vendor of stolen property in the village;

(2) the resort to any place within, or passage through, such village of a thug, robber, escaped convict or proclaimed offender;

(3) the commission or intent to commit in or near the village any non-bailable offence or the offences of unlawful assembly (ss. 143, 144 and 145) or rioting (ss. 147 and 148);

(4) (a) the occurrence in or near the village of any sudden, unnatural or suspicious death; (b) the discovery of any corpse or (c) the disappearance of any person in such suspicious circumstances that a non-bailable offence is believed to have been committed in respect of him;

(5) the commission or intention to commit at a place outside India near such village any of following offences under the Penal Code:—

(i) Coinage offences (ss. 231, 232, 233, 234, 235, 236, 237 and 238).

(ii) Murder (s. 302).

(iii) Culpable homicide (s. 304).

(iv) Theft with preparation to cause death or grievous hurt (s. 382).

(v) Robbery and its aggravated forms (ss. 392, 393, 394, 397 and 398).

(vi) Dacoity and its aggravated forms (ss. 395, 396, 397, 398, 399 and 402).

(vii) Mischief by fire or explosive substance (ss. 435 and 436).

(viii) House-trespass to commit offence punishable with death (s. 449) or imprisonment for life (s. 450).

(ix) Lurking house-trespass or house-breaking by night and its aggravated forms (ss. 457, 458, 459 and 460).

(x) Offences relating to currency notes and banknotes (ss. 489A, 489B, 489C, 489D and 489E).

(6) Any matter likely to affect (a) the maintenance of order, (b) the prevention of crimes or (c) the safety of persons or property respecting which the District Magistrate has directed him to communicate information (s. 40).[13.]

Chapter V.—Arrest of Persons

A. Of arrest generally.—The Supreme Court has held that in cases relating to dowry harassment, police officers should not automatically make arrests. The practice of mechanically reproducing in case dairy all or most of the reasons contained in s. 41 of the Code for affecting arrest should be discouraged and discontinued.[14.]

New ss. 41A to 41D were inserted by the Cr.P.C. (Amendment) Act, 2008 (5 of 2009), s. 6 (w.e.f. 1-11-2010). Arrest of a person even in case of cognizable offences is not mandatory where the offence is punishable with maximum sentence of seven years imprisonment. The provisions of s. 41A make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under cl. (u) of sub-s. (1) of the amended s. 41. But unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued u/s. 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty.[15.]

The police officer or person making the arrest touches or confines the body of the person to be arrested, unless he submits to the custody by word or action (s. 46).[16.] If he forcibly resists or attempts to evade the arrest, force may be used to effect the arrest, but he cannot be killed if he is not accused of an offence punishable with death or imprisonment for life where a woman is to be arrested, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making an arrest. Except in exceptional circumstances, a woman shall not be arrested after sunset or before sunrise. In such exceptional circumstances, the woman police officer is required to obtain the prior permission of the Judicial Magistrate of the first class (s. 46). If he has entered into, or is within, any place, the person in charge of the place must allow free ingress and afford all facilities for a search. If such ingress cannot be obtained, then any outer or inner door or window of any house or place may be broken open to obtain admittance. But if such place is an apartment in the occupancy of a *zanana* woman (not being the person to be arrested) who does not appear in public, notice to withdraw is given before breaking it open and entering it. The police officer or other person authorised to arrest may break open any outer or inner door or window of any place in order to liberate himself (s. 47). The police officer may pursue a person whom he is authorised to arrest to any place in India (s. 48). The person arrested is not to be subjected to unnecessary restraint (s. 49). He should be informed of the grounds for his arrest and also, in case of bailable offence, of his right to bail (s. 50). The police officer is required to give information about the arrest of the person as well as the place where he is

being held to any one of his friends, relatives or such other persons who may be nominated by the arrested person (s. 50A). Where he is not admitted to bail or cannot provide bail, he may be searched and all articles other than necessary wearing-apparel found upon him may be placed in safe custody. He should be given a receipt of articles seized from him. In the case of a woman, the search is made by another woman (s. 51). Any weapons about the person of the arrested person may be seized and delivered to the Court or officer before which or whom he is produced (s. 52).

Medical examination on arrest.—Where the examination of the person becomes necessary for evidence as to the commission of an offence, a registered medical practitioner may examine him acting on request of a police officer not below the rank of Sub-Inspector. In case of females, such examination should be by a lady registered practitioner or under her supervision (s. 53). A detailed medical examination of a person accused of an offence of rape or an attempt to commit rape is required to be made by a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometer's from the place where the offence has been committed by any other registered medical practitioner (s. 53A).

When any person is arrested, it is obligatory on the part of the State to have the arrested person examined by a medical officer in the service of Central or State Governments and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made. Where the arrested person is a female, the examination of the body is required to be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female medical practitioner (s. 54).

Identification of person arrested.—When it is necessary for the purpose of the investigation that the person arrested be identified, then the appropriate court may direct the officer in charge to conduct such identification in the manner and by person/persons as prescribed by the court.

Where the person identifying the person arrested is mentally or physically disabled, such identification would be under the supervision of a Judicial Magistrate and in a manner as that person is comfortable with. Secondly, such an identification process shall be video graphed (s. 54A).

B. Arrest without warrant.—(I) By a police officer.—A police officer may, without a warrant, arrest—

(1) any person who commits a cognizable offence in the presence of a police officer;

(2) any person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than or which may extend to seven years, whether with or without fine, (after recording reasons for the same) where:

(i) the police officer has reason to believe on the basis of such complaint, information or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c)

to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer, or

(e) his presence in the Court cannot be ensured unless such person is arrested;

(3) any person against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years or with death sentence, and the police officer has reason to believe that such person has committed the said offence on the basis of such information;

(4) any proclaimed offender;

(5) any person in possession of anything suspected to be stolen property or who may be suspected of having committed an offence with reference to it;

(6) any person obstructing a police officer in his duty or escaping or attempting to escape from lawful custody;

(7) any deserter from the Armed Forces;

(8) any person concerned in an offence committed outside India or against whom a reasonable complaint or credible information or suspicion of such offence exists and for which he is liable to be apprehended under any extradition law or the Fugitive Offenders Act or otherwise;

(9) any released convict committing a breach of any rule made u/s. 356(5);

(10) any person for whose arrest a requisition has been received from another police officer authorised to arrest him without a warrant (s. 41);

(11) any person who has committed a non-cognizable offence in the presence of the police officer and refuses to give his name and residence or gives a false name or residence. [Such person is released, when his true name and residence have been ascertained, on his executing a bond to appear before a Magistrate. If the true name and residence of such person are not ascertained within 24 hours from the time of arrest or if he fails to execute the bond, he is forwarded to the nearest Magistrate] (s. 42);

(12) any person designing to commit a cognizable offence which cannot be otherwise prevented (s. 151);

(13) any person whose suspension or remission of sentence has been cancelled by the State Government owing to his failure to fulfil any condition [s. 432(3)].

When the arrest is not required u/s. 41(1), the police officer has to issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as specified. Such a person is required to comply with the notice, and if he complies, he shall not be arrested. However, non-compliance with the notice, the police may arrest the person upon relevant court orders in this regard (s. 41A).

Procedure of arrest.— Every police officer while arresting the person has to:

(i) Bear clear and correct identification of his name.

(ii) Prepare an arrest memorandum which is:

(a) Attested by at least one person who is a family member or respectable neighbour

(b) Countersigned by arrested person

(iii) Inform the arrested person that he has right to inform his family member or any other person about his arrest if memorandum is not attested by a member of his family (s. 41B).

Establishment of Police control room.—In every district and at the state level, a police control room shall be established by the State Government. The notice boards at every district control room shall have names of people arrested and of police officers who made the arrests. The state level control room shall maintain a database of all the arrests made for the benefit of general public (s. 41C).

When a police officer deputes his subordinate officer to arrest without a warrant, he gives that officer an order in writing specifying the person and the offence for which he is to be arrested (s. 55). It is the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused (s. 55A). A police officer may for arresting without warrant any person pursue him into any place in India (s. 48). He must send without delay the person arrested before a Magistrate or the officer-in-charge of a police station (s. 56). He cannot detain such person in custody for more than twenty-four hours in the absence of a special order of a Magistrate (s. 57). The arrested person is entitled to meet an advocate of his choice during the interrogation, though not throughout the interrogation (s. 41D). No person arrested by a police officer is discharged except on his own bond, or on bail, or under the special order of a Magistrate (s. 59).

Police to report apprehensions.—Officers in charge of police stations are to report to the District Magistrate or to the Sub-divisional Magistrate the cases of all persons arrested without warrant (s. 58).

(II) **By a private person.—**A private person may arrest or cause to be arrested—

(1) a person committing a non-bailable and cognizable offence in his presence, or

(2) any proclaimed offender.

He must without delay make over such person to a police officer or to the nearest police station (s. 43).

(III) **By a Magistrate.—**A Magistrate, whether Executive or Judicial, may arrest within the local limits of his jurisdiction—

(1) any person who commits an offence in his presence;

(2) any person for whose arrest he is competent at the time and in the circumstances to issue a warrant (s. 44).

Chapter VI

Protection of Members of the Armed Forces.—The provisions regarding arrest by the police or private persons or Magistrate do not apply to the members of the Armed Forces when acting or purporting to act in the discharge of official duties except with

the consent of the Central Government. They also do not apply in case of members of Forces maintaining public order unless the State Government accords its consent (s. 45).

Escape from custody.—If a person in lawful custody escapes or is rescued, the person in whose custody he was may pursue and arrest him in any place in India. The person pursuing may enter into any place for search and may break open any outer or inner door for ingress or egress (s. 60).

All arrests have to be made according to the provisions of the Code of Criminal Procedure or any other law pertaining to arrests (s. 60A).

Process to Compel Appearance

A. **Summons.—**Every summons is in writing, in duplicate, signed by the presiding officer of the Court issuing it or such other officer as the High Court directs and bears the seal of the Court (s. 61).

It is served by (1) a police officer, or (2) an officer of the Court issuing it, or (3) a public servant. It is served personally on the person summoned by delivering or tendering to him one of the duplicates. He signs a receipt on the back of the other duplicate (s. 62). Service of a summons on an incorporated company or body or society may be affected by (1) serving it on its secretary, local manager or principal officer of the corporation, or (2) addressing a registered letter to its chief officer in India (s. 63). When the person summoned cannot be found, the summons may be served by leaving one of the duplicates with some adult male member of his family, residing with him (s. 64). If service cannot be effected as above, the serving officer affixes one of the duplicates to some conspicuous part of the house or homestead in which he ordinarily resides (s. 65). Service on a servant of the Government may be effected by sending the summons in duplicate to the head of the office who causes it to be served and returns it under his signature with the endorsement of the person on whom it is served (s. 66). When a summons is to be served outside the local limits of a Court, it is sent in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides (s. 67). Service may be proved in such cases and in any case where the serving officer is not present at the hearing, by an affidavit that the summons has been served and a duplicate of the summons endorsed by the person to whom it was delivered or with whom it was left is admissible in evidence, and the statement made therein is deemed to be correct until the contrary is proved (s. 68). In addition to or simultaneously with the issue as aforesaid, a Court may issue a summons by registered post to a witness, acknowledgment whereof by the person or endorsement of the postal employee that such person refuses to accept delivery is sufficient (s. 69).

B. Warrant.—Every warrant is in writing, signed by the presiding officer of the Court, and bears the seal of the Court. It remains in force until it is cancelled or executed (s. 70). The warrant may contain a direction that if the person arrested executes a bond with sufficient sureties for his attendance before the Court, he may be released from custody. It states (1) the number of sureties; (2) the amount in which they and the person arrested are to be bound; and (3) the time at which he is to attend before the Court (s. 71). The warrant is ordinarily directed to police officers, but if no police officer is available and its immediate execution is necessary, it may be directed to any other person (s. 72). The warrant may be directed by a Chief Judicial Magistrate or a Magistrate of the first class to any person within his local jurisdiction, for the arrest of any escaped convict, proclaimed offender or person accused of a non-bailable offence and evading arrest. Such person acknowledges receipt of the warrant and executes it if the person to be arrested is or enters on his land. If he is arrested, he is made over with the warrant to the nearest police officer who takes him to a Magistrate having jurisdiction in the case (s. 73). A warrant directed to any police officer may be executed

by another police officer whose name is endorsed by the officer to whom it is directed (s. 74).

The person executing a warrant notifies its substance to the person to be arrested and, if required, shows it to him (s. 75). The person arrested is brought before the Court (subject to the provision of s. 71) before which he should be produced without delay. The delay does not exceed 24 hours exclusive of time necessary for the journey (s. 76). A warrant may be executed at any place in India (s. 77).

Execution outside jurisdiction.—(1) The warrant may be directed to a police officer within jurisdiction; or (2) it may be forwarded by post or otherwise to any Executive Magistrate, District Superintendent of Police or Commissioner of Police, within whose jurisdiction it is to be executed. Substance of relevant information and documents are also sent. Such officer endorses his name thereon and causes it to be executed (s. 78). When a warrant directed to a police officer is to be executed outside the jurisdiction of the Court, the police officer takes it for endorsement to an Executive Magistrate or to a police officer not below the rank of an officer-in-charge of a police station within whose jurisdiction it is to be executed. The Magistrate or the police officer endorses his name thereon and such endorsement authorises the police officer to execute it within such limits. If the delay occasioned in obtaining the endorsement is likely to prevent its execution, it may be executed at once (s. 79). The person arrested is taken to the Executive Magistrate, the District Superintendent of Police or the Commissioner of Police, unless the Court issuing the warrant is (1) within thirty kilometer's of the place of arrest, or (2) nearer than the above officers, or (3) security u/s. 71 is taken (s. 80). The Executive Magistrate or the District Superintendent or the Commissioner of Police directs his removal in custody to such Court. But if the offence is bailable or there is a direction on the warrant as regards securities to be taken, then such officer takes bail or security if the person arrested is willing to give it and forward the bond to the Court. If the offence is non-bailable, then the Chief Judicial Magistrate or the Sessions Judge, considering the relevant information and documents sent u/s. 78, may release the person on bail (s. 81).

Certain other rules of process.—The Court may issue a warrant in lieu of or in addition to a summons, after recording its reasons in writing for the appearance of any person, if—

(1) it has reason to believe that such person has absconded or will not obey the summons; or

(2) he fails to appear after the summons is served without any reasonable excuse (s. 87).

The Court may require any person present in Court to execute a bond for his appearance before it, provided it is empowered to issue a summons or warrant for his appearance (s. 88).

A warrant may be issued to arrest a person who is bound by a bond to appear before a Court but does not appear (s. 89).

C. Proclamation for person absconding.—If the person against whom a warrant has been issued has absconded or is concealing himself, the Court may publish a written proclamation requiring him to appear at a specified place and time not less than thirty days from its date. The proclamation is published—

(1) by publicly reading it in some conspicuous place of the town or village in which he resides;

(2) by affixing it to some conspicuous part of the house or homestead in which he

resides or to some conspicuous place of the town or village;

(3) by affixing its copy to some conspicuous part of the Courthouse.

The Court *may* direct publishing of the proclamation in a local daily newspaper

Where a proclamation is published in respect of a person accused of an offence punishable u/ss. 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 and460 of the IPC, and such person fails to appear at the specified place and time required by the proclamation, the court after making suitable inquiry pronounce him a proclaimed offender through declaration (s. 82).

Attachment of property of the person absconding.—The Court issuing a proclamation may, at any time after such issue, order the attachment of the property of the proclaimed person; but where the Court is satisfied that (i) such person is about to dispose of whole or any part of his property, or (ii) remove it from the local jurisdiction of the Court, it may order attachment simultaneously with the proclamation. The order may be executed outside the district when it is endorsed by the District Magistrate within whose district the property is situated.

(I) If the property to be attached is a debt or moveable property, the attachment is made by—

(1) seizure;

(2) appointment of a receiver;

(3) an order in writing prohibiting the delivery of the property to the proclaimed person or to anyone on his behalf;

(4) all or any two of such methods.

(II) If the property to be attached is immoveable property, the attachment is made—

(a) in the case of land paying revenue to the Government, through the Collector;

(b) in other cases—

(i) by taking possession;

(ii) by the appointment of a receiver;

(iii) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to anyone on his behalf;

(iv) by all or any two of such methods.

(III) If the property to be attached consists of live-stock or is of a perishable nature, the Court may order its immediate sale (s. 83).

Claim to attach property.—If a person prefers a claim or objects to the attachment, within six months from the date of such attachment, on the ground that he has such an interest in the property as is not liable to attachment, the claim or objection is inquired into. In the event of the death of the claimant or objector, it may be continued by his legal representative. The claim or objection may be made in the Court issuing the attachment or in the Court of the Chief Judicial Magistrate in whose jurisdiction the property is situated. If the claim or objection is disallowed in whole or in part, the claimant or objector may, within one year from the order disallowing it, institute a suit to establish his right, but subject to the result of the suit the order is conclusive (s. 84).

If the proclaimed person appears within the time specified in the proclamation, the Court releases the property from attachment. If he does not appear within the time, the property remains at the disposal of the State Government, but it is not sold, until (1) the expiration of six months from the date of attachment, and (2) any claim or objection has been disposed of. But the Court may sell it if (1) it is subject to speedy and natural decay and (2) the sale would be for the benefit of the owner (s. 85).

Restoration of attached property.—If within two years from the date of attachment, the proclaimed person appears or is apprehended, and proves to the satisfaction of the Court that he did not abscond or conceal himself, and that he had no notice of proclamation, the property or the net proceeds of the sale is, after deducting the costs incurred, are delivered to him (s. 85).

An appeal lies against an order refusing restoration (s. 86).

Chapter VII.—Process to Compel the Production of Things

A. Summons to produce.—When (a) a Court or (b) an officer in charge of a police station considers that a document or thing is necessary or desirable for any investigation, inquiry or trial or other proceeding, the Court may issue a summons, or the officer an order, to the person in whose possession or power it is to produce it at a specified time and place. Such document or thing may be produced by the person himself or by someone on his behalf (s. 91).[17.]

If the document (letter or telegram) or thing (Parcel) is in the custody of the Postal or Telegraph authorities, the District Magistrate, the Chief Judicial Magistrate, Court of Session or the High Court may require such authorities to deliver it to such person as the Court directs. If such document or thing is wanted by any other Magistrate, or the Commissioner of Police, or the District Superintendent of Police, he may require the Postal or Telegraph authorities to search for and detain it pending the orders of the District Magistrate, Chief Judicial Magistrate or the Court (s. 92).

B. Search warrants.—The Court may issue a search warrant for—

(I) Production of a document or thing.

(II) Search of a house suspected to contain stolen property, forged documents, *etc.*

(III) Seizure of any forfeited publications.

(IV) Discovery of persons wrongfully confined.

(I) Production of a document or thing.—A search warrant may be issued—

(1) where the Court believes that the person to whom a summons or order or requisition to produce a document or thing has been or might be addressed will not produce it;

(2) where the document or thing is not known to the Court to be in the possession of any person;

(3) where the Court considers that the purpose of any inquiry, trial or proceeding will be served by general search or inspection.

The Court may specify in the warrant the particular place or part to which only the search or inspection is to extend.

No Magistrate other than a District Magistrate or Chief Judicial Magistrate can grant a search warrant for an article in the custody of the Postal or Telegraph authorities (s. 93).

(II) Search of a place.—A District Magistrate, Sub-divisional Magistrate or Magistrate of the first class may issue a search warrant to a police officer above the rank of a constable if upon information and after inquiry he believes that any place is used for—

(1) deposit or sale of stolen property; or

(2) deposit or sale or production of objectionable articles, *viz.,* counterfeit coin; pieces of metal made in contravention of Metal Tokens Act, 1889, or brought into India in contravention of notifications made u/s. 11 of the Customs Act, 1962; counterfeit currency notes or counterfeit stamps; forged documents, false seals, obscene objects u/s. 292, Penal Code; and instruments or materials used for the production of any one or more of them.

Such warrant may authorise the police officer—

(1) to enter and search the place;

(2) to take possession of any property or article which is reasonably suspected to be stolen property, or objectionable article;

(3) to convey such property, *etc.*, before a Magistrate or to guard the same or to keep it in a place of safety;

(4) to take into custody and carry before a Magistrate every person found in such place who is privy to the deposit, sale, *etc*. (s. 94).

Things found in search at a place beyond the local limits of the Court are taken before it, unless the place is nearer to the Magistrate having jurisdiction than to such Court, in which case they are taken before that Magistrate who makes an order to take them to such Court (s. 101).

(III) Forfeiture of newspapers, books or documents.—If any newspaper, book or document, wherever printed, appears to the State Government to contain matter which is seditious, or promotes feelings of enmity between different groups or classes, or imputes assertions prejudicial to national integration or relates to sale *etc.* of obscene articles or outrages the feelings and insults the religion of any class, the State Government may, by notification in the Official Gazette, stating the grounds for its opinion, declare every copy of such publication to be forfeited to Government and thereupon any police officer may seize it wherever found in India. Any Magistrate may by warrant authorise any police officer not below the rank of Sub-Inspector to enter upon and search for it in any premises where it is suspected to be (s. 95).

Any person having any interest in such publication may within two months from the date of the order apply to the High Court to set it aside on the ground that the publication did not contain any seditious or other objectionable matter. Such application is heard and determined by a Special Bench composed of three Judges. If the Bench is not satisfied that the publication contained any seditious or objectionable matter, it will set aside the order of forfeiture. If there is a difference of opinion among the Judges, the decision is in accordance with the opinion of the majority. When the application is with reference to a newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in it (s. 96).

(IV) Discovery of persons wrongfully confined.—If a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to believe that a person is wrongfully confined, he may issue a search warrant for the search of that person, and if he is found, he is taken before a Magistrate (s. 97).

Restoration of abducted females.—Upon complaint on oath made of the abduction or unlawful detention of a woman or a female child under eighteen years for unlawful purpose, the District Magistrate, Sub-divisional Magistrate or Magistrate of the first class makes an order for the immediate restoration of the woman to her liberty or the child to her husband, parent or guardian or other person. Necessary force may be used to compel compliance with such order (s. 98).

General provisions relating to searches.—Persons in charge of closed places must allow free ingress and egress and facilities to the officer or person executing the warrant. The officer or person making the search must (1) call two or more independent and respectable inhabitants of the locality or of another locality to witness the search, (2) make the search in their presence, (3) prepare a list of all things seized and have it signed by the witnesses, (4) permit occupant of the place searched or some person in his behalf to attend during the search and (5) deliver a copy of the list to him, and (6) if the person is a woman, search shall be made by another woman with strict regard to decency. Persons refusing to attend a search, when called upon by an order in writing, are guilty of an offence u/s. 187 Penal Code (s. 100).[18.] A Court may impound any document or thing produced before it (s. 104). A Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant (s. 103).

Seizure of suspicious stolen property.—Any police officer may seize any property (1) suspected to have been stolen, or (2) found under circumstances which create suspicion of the commission of any offence. He has to report the seizure to the Magistrate having jurisdiction. Where the property seized is subject to speedy and natural decay and if the person entitled to possession of property is unknown or absent and the value of such property is less than Rs. 500, it may be sold by auction under the orders of the Superintendent of Police (s. 102).

Special rules regarding certain processes.—Where a Court in territories to which this Code extends desires that a summons to or a warrant for the arrest of, an accused person or a summons to a person to attend and produce a document or thing or a search warrant, issued by it shall be served or executed at any place within the local jurisdiction of a Court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate to the presiding officer of that Court to be served or executed, and where any summons to an accused person or a summons to any person to attend and produce a document or thing has been served, s. 68 shall apply to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories. Where a Court in the said territories has received for service or execution such summons or warrant, issued by a court in any state or area in India outside the said territories, it shall cause the same to be served or executed as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its jurisdiction; where a warrant of arrest has been executed, the person arrested shall be dealt with in accordance with procedure u/ss. 80 and 81, and where a search warrant has been executed, the things found in the search shall be dealt with in accordance with procedure u/s. 101(s. 105).

Chapter VIII.—Security for Keeping the Peace and for Good Behaviour

Security for keeping the peace.—(I) On conviction.—When a person is convicted of offence against—

(1) public tranquility (Chapter VIII, Penal Code)—except offences u/s. 153A (promoting enmity between classes), s. 153B (imputations prejudicial to national integration) or s. 154 (owner of land not preventing unlawful assembly); or

(2) assault; or

(3) criminal intimidation; or

(4) any offence involving breach of the peace; or

(5) abetting any of the aforesaid offences,

before a Court of Session, or a first class Magistrate, and such Court is of opinion that it is necessary that such person should execute a bond for keeping the peace, it may, at the time of passing sentence, order him to execute a bond for a sum proportionate to his means with or without sureties for keeping the peace for a period not exceeding three years. If the conviction is set aside on appeal or otherwise, the bond becomes void. An order under this section may be made by an appellate Court or a Court in revision (s. 106).

(II) In other cases.—When an Executive Magistrate is informed that any person is likely to

(1) commit a breach of the peace, or

(2) disturb the public tranquillity, or

(3) do any wrongful act that may occasion a breach of the peace or disturb the public tranquillity,

the Magistrate may require such person to show cause why he should not be ordered to execute a bond, for keeping the peace for a period not exceeding one year. Proceedings may be taken before any Executive Magistrate empowered to proceed when either (1) the place where the breach of the peace is apprehended is within his jurisdiction, or (2) there is within such limits a person who is likely to commit a breach of the peace, or do any wrongful act beyond such limit (s. 107). A quarrel of private nature between two individuals is not contemplated by proceedings relating to security.[19.]

Security for good behaviour.—This may be taken from—

(I) persons disseminating seditious matter;

(II) suspected persons; and

(III) habitual offenders.

(I) When an Executive Magistrate has information that there is a person within his jurisdiction who, within or without such jurisdiction, intentionally disseminates or attempts or abets the dissemination of any matter, which

(1) is seditious matter (s. 124A, IPC); or

(2) promotes enmity between classes (s. 153A, IPC); or

(3) imputes or asserts something prejudicial to national integration (s. 253A, IPC); or

(4) outrages religious feelings of any class (s. 295, IPC); or

(5) concerns a Judge and amounts to criminal intimidation or defamation; or

(6) relates to a person who makes, produces, *etc.* any obscene matter (s. 292 of Penal Code),

such Magistrate may require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for a period not exceeding one year. Where any such publication is registered under the Press and Registration of Books Act, 1867, no proceedings can be taken except by the order or under authority of the State Government (s. 108).

(II) When an Executive Magistrate receives information that any person within his jurisdiction is taking precautions to conceal his presence with a view to committing any cognizable offence, such Magistrate may require him to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for a period not exceeding one year (s. 109).

(III) When an Executive Magistrate receives information that any person within his jurisdiction—

(1) is by habit a robber, house-breaker, thief or forger; or

(2) is by habit a receiver of stolen property; or

(3) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property; or

(4) habitually commits or attempts to commit or abets the commission of kidnapping, abduction, extortion, cheating or mischief or any offence punishable under Chapter XII or ss. 489A, 489B, 489C, 489D and 489E of the Penal Code; or

(5) habitually commits or attempts to commit or abets the commission of offences involving a breach of the peace; or

(6) habitually commits or attempts to commit or abets the commission of an offence under any one or more of these Acts, *viz.,* Drugs and Cosmetics Act, 1940, Foreign Exchange Regulation Act, 1973, Employees' Provident Funds [and Family Pension Fund] Act, 1952, Prevention of Food Adulteration Act, 1954, Essential Commodities Act, 1955, Untouchability (Offences) Act, 1955, Customs Act, 1962, Foreigners Act, 1946, or any other law relating to the prevention of hoarding, profiteering or adulteration of drugs or corruption; or

(7) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may require him to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for a period not exceeding three years (s. 110).

Order how made.—The order requiring any person to show cause must be in writing, setting forth (1) the substance of the information, (2) the amount of the bond to be executed, (3) the term for which it is to be in force and (4) the number, character and class of sureties required (s. 111). If such person is present in Court, the order must be read over or explained to him (s. 112). If he is not present, a summons is issued for his appearance; if he is in custody, a warrant is issued directing the officer in whose custody he is to bring him before the Court. If there is reason to fear that he is likely to

commit a breach of the peace and such breach cannot be prevented otherwise than by his arrest, then the Magistrate may issue a warrant for his immediate arrest (s. 113). Every summons or warrant is accompanied by a copy of the written order of the Magistrate and this is delivered to the person to be served or arrested (s. 114). He may appear by pleader, if the Magistrate dispenses with personal attendance (s. 115). When he comes before the Court, the Magistrate proceeds to inquire into the truth of the information upon which action has been taken and takes further evidence, if necessary. Inquiry is made in the same manner as of conducting trial in summons cases. Pending the inquiry, the Magistrate may direct the person to execute a bond, with or without sureties for keeping the peace or maintaining good behaviour until the conclusion of the inquiry. The Magistrate may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded. But a person against whom proceedings are not taken u/s. 108, s. 109 or s. 110 is not directed to execute a bond for maintaining good behaviour. The conditions of such bond as to the amount, number of sureties and their pecuniary liability are not more onerous than the written order issued. The fact that a person is a habitual offender or is a desperate or dangerous character may be proved by evidence of general repute. The inquiry should be completed within a period of six months from its commencement; otherwise, it shall stand terminated after such period. Even after such period, the Magistrate may, after recording special reasons, continue the inquiry but (i) if the person has been in detention pending inquiry, the proceeding shall stand terminated on expiry of six months; and (ii) the person may also apply to the Sessions Judge for setting aside the order of the Magistrate continuing inquiry after six months (s. 116). Some of the effects of this provision were explained in *Christalin Costa v. State of Goa*.[20.]

If upon inquiry, it is found necessary that the person concerned should execute a bond, with or without sureties, the Magistrate makes the order. But

(1) no person is ordered to give security of a nature different from, or of an amount larger than, or for a period longer than that specified in the order u/s. 111;

(2) the amount of the bond is not excessive; and

(3) when the person is a minor, the bond is executed by his sureties (s. 117).

If, on inquiry, it is not proved that it is necessary that such person should execute a bond, the Magistrate makes an entry on the record, and discharges him or, if he is in custody, releases him (s. 118).

Proceedings subsequent to order.—If the person, in respect of whom an order requiring security is made, is sentenced to, or undergoing, imprisonment, the period for which such security is required commences on the expiration of such sentence. In other cases, the period runs from the date of the order unless the Magistrate fixes a later date (s. 119).

If the person executing a bond for keeping good behaviour commits, or attempts to commit, or abets the commission of any offence punishable with imprisonment, there is a breach of the bond (s. 120). A Magistrate may, after holding an inquiry on oath, refuse to accept any surety, or reject any surety previously accepted by him or his predecessor, on the ground that such surety is an unfit person. Before holding such inquiry, reasonable notice must be given to the surety and to the person offering the same. Such inquiry may be directed to be held by a subordinate Magistrate. Before making an order rejecting any surety who has previously been accepted, the Magistrate issues a summons or warrant and causes the person for whom the surety is bound, to appear or to be brought before him. The Magistrate records his reason for refusal (s. 121). If any person ordered to give security does not give it, he is committed to prison, or if he is in prison, is detained there until such period expires or until within such period he gives the security. If a person executing a bond, with or without sureties, for

keeping the peace commits a breach thereof, the Magistrate may order his arrest and detention in prison until the expiry of the bond period. He may also be liable to an order of forfeiture of the bond. When such person has been ordered to give security for a period exceeding one year, the Magistrate, if he does not give security, issues a warrant directing him to be detained in prison pending the order of the Sessions Judge, and the proceedings are laid before such Court. Such Court may, after giving the person a hearing, pass any order as it thinks fit, but he cannot be imprisoned for failure to give security for more than three years. Imprisonment for failure to give security for keeping the peace is simple; for failure to give security for good behaviour is where proceedings have been taken u/s. 108, simple, and where the proceedings have been taken u/s. 109 or s. 110, rigorous or simple (s. 122). The District Magistrate in the case of an order passed by the Executive Magistrate or the Chief Judicial Magistrate in any other case may release with or without conditions persons imprisoned for failing to give security if he thinks there is no hazard to the community. The High Court, the Court of Session or the Chief Judicial Magistrate may make an order reducing the amount of the security or the number of sureties or the period. The State Government may prescribe conditions for conditional discharge; if any condition is not fulfilled, the Magistrate cancels such order and such person may then be arrested. If the person gives security in accordance with the original order for the unexpired term, he is released; otherwise, he is remanded to prison. He may be released from prison if he gives security in terms of the original order. The High Court or the Court of Session may at any time cancel any bond for sufficient reasons, so also can the Chief Judicial Magistrate (s. 123). Any surety may apply to the Court making the order to cancel any bond. The Court issues a summons or a warrant for the appearance of the person for whom such surety is bound (s. 123). When such person appears or is brought, the Court cancels the bond and orders him to give for the unexpired period of such bond fresh security of the same kind (s. 124).

Chapter IX.—Order for Maintenance of Wives, Children and Parents

Maintenance.—If any person having sufficient means neglects or refuses to maintain his (1) wife, unable to maintain herself, (2) his legitimate or illegitimate minor child (whether married or not), unable to maintain itself, (3) his legitimate or illegitimate major child (not being a married daughter) unable to maintain itself because of physical disability; or (4) his father or mother unable to maintain himself or herself, he may, upon proof of such neglect or refusal, be ordered by a Magistrate of the first class to make a monthly allowance for the maintenance of such persons, at such monthly rate, as such Magistrate thinks fit. Earlier the amount was fixed at Rs 500 per month, but now it is unlimited. If the husband of the married female child does not possess sufficient means, she may be granted an allowance till she attains majority. The allowance is payable from the date of (1) the order or (2) application for maintenance.[21.] A divorced wife is included within the term "wife."[22.] (s. 125). Section 125 applied to all women irrespective of their religion. But Parliament recently enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986, which excludes Muslim women from its purview except in cases where both husband and wife agree to take recourse to it. The provision is a measure for social justice. It is specially enacted to protect women and children (also old and infirm poor parents) and falls within constitutional sweep of Art. 15(3) as reinforced by Art. 39.[23.] Paternity test may be ordered where paternity is denied.[24.]

Enforcement of order.—If the person ordered fails, without sufficient cause, to comply with it, the Magistrate may, for every breach thereof, (1) issue a warrant for levying the amount as if it were a fine (provided the application is made within one year from the date on which it became payable) and (2) sentence him, for any amount remaining due for whole or part of a month to imprisonment up to one month. If he offers to maintain

his wife if she lives with him, but she refuses to do so, the Magistrate considers the grounds of such refusal and, if they are just, makes an order granting maintenance. If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him. Where the husband failed to gain potency for a fairly long time and the wife started living separately, she was allowed maintenance.[25.]

A wife is not entitled to receive an allowance from her husband and the Magistrate may cancel the order, if—(1) she lives in adultery, or (2) refuses to live with her husband without sufficient reason, or (3) they are living separately by mutual consent (s. 125).

All evidence is taken in the presence of the person against whom an order of maintenance is proposed or before his pleader and is recorded as in a summons case. If he wilfully avoids service or neglects to attend the Court, the Magistrate may hear and determine the case *ex parte*. An *ex parte* order may be set aside, for good cause, if an application is made within three months from its date. Costs lie at the discretion of the Court.

Proceedings may be taken in any district (1) where the husband is; or (2) where he or his wife resides; or (3) where he last resided with his wife or the mother of the illegitimate child (s. 126).[26.]

A copy of the maintenance order is given without payment to the person or to his guardian, if any, in whose favour it is made and it may be enforced by any Magistrate in any place where the person against whom it is made may be (s. 128). For a comparison of the right under the applicable matrimonial legislation and under this section.[27.]

Alteration in maintenance.—In case of an order made in favour of a woman who has been divorced by, or has obtained divorce from, her husband, the Magistrate shall cancel such order (1) if the woman has re-married after such divorce (from the date of such remarriage); (2) in case she has been divorced by her husband, if she has received the whole of the sum payable to her under customary or personal law on divorce (from the date of the order if the sum has been paid before such date; in any other case from the date of the expiry of period for which maintenance has been actually paid); or (3) if the woman who has obtained divorce has voluntarily surrendered her right of maintenance (s. 127).

Constitutional validity.—*Basant Lal v. State of U.P.*[28.]

Chapter X.—Maintenance of Public Order and Tranquillity

A. Unlawful assemblies—Any Executive Magistrate or officer in charge of a police station (or, in his absence, any officer not below the rank of Sub-Inspector) may command any unlawful assembly to disperse. If such assembly does not disperse or shows determination not to disperse, the Magistrate or officer may disperse it by force with the assistance of any male person and may arrest and confine the persons forming part of it (s. 129). (1) If the assembly cannot be otherwise dispersed and (2) if for public security it should be dispersed, the Executive Magistrate of the highest rank who is present may disperse it by the armed forces. The officer commanding troops disperses the assembly with the help of forces under his command and arrests and confines persons as the Magistrate directs. He must obey the requisition of the Magistrate and use as little force and do as little injury to person and property as may be necessary in dispersing it (s. 130). Any commissioned or gazetted military officer may disperse such assembly by military force if (a) public security is manifestly

endangered, and (b) no Executive Magistrate can be communicated with (s. 131). Sanction of the Central or State Government is necessary for prosecution against any person, Magistrate or officer, for an act done under this Chapter in good faith. Sanction of the Central Government is necessary in the case of any officer or soldier, sailor or airman in the armed forces. Any act done in good faith and any act done by an inferior officer or soldier in obedience to any order is not an offence (s. 132).

B. Public nuisances.—When a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by the State Government, considers on receiving a report of a police officer or other information, and on taking necessary evidence, that—

(1) any obstruction or nuisance should be removed from any public place or from any way, river, or channel;

(2) any trade or the keeping of goods is injurious to the health or comfort of the community;

(3) any building or substance is likely to cause conflagration or explosion;

(4) any building, tent, or structure, or a tree is likely to fall and cause injury;

(5) any tank, well, or excavation should be fenced to prevent danger to the public; or

(6) any dangerous animal should be destroyed or confined,

he may make a conditional order requiring the person causing the nuisance to do the necessary acts to remove, prevent or stop it, or, if he objects, to appear before himself or some other Executive Magistrate subordinate to him to show cause. Such an order is not called in question in a Civil Court (s. 133).

Ban on smoking.—For maintenance of health and environment, a ban on smoking of tobacco in any form in public places was held to be illegal, unconstitutional and violative of Art. 21.[29.] Considering the adverse effect of smoking on smokers and passive smokers, the Supreme Court issued directions to be Union of India. State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in public places namely: Auditoriums; Hospital Buildings; Health Institutions; Educational Institutions; Libraries; Court Buildings; Public Offices, and Public Conveyances, including Railways.[30.]

The order served as a summons and, if it cannot be so served, it is notified by proclamation and published, and its copy is stuck up at a place best fitted for conveying the information (s. 134). The person against whom the order is made

(a) performs, within the time and in the manner specified in the order, the act directed; or

(b) appears and shows cause against the order (s. 135).

If he does not do so, he is punished u/s. 188, Penal Code, and the order is made absolute (s. 136). Where an order is made against a person for preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate questions him whether he denies the existence of public right therein, and if he does so, the Magistrate inquiries into the matter. If the Magistrate finds that there is reliable evidence in support of such denial, he stays the proceedings until the matter is decided by a Civil Court; if there is no evidence, he proceeds u/s. 138. If he does not deny the existence of a public right, or fails to adduce evidence in his support, he is not in subsequent proceedings permitted to make any such denial (s. 137). In other cases, if the person appears to show cause against the order, the Magistrate takes evidence

as in a summons case. If the Magistrate is satisfied that the order is reasonable and proper, the order is made absolute; if he is not so satisfied, no further proceedings are taken (s. 138). For purposes of his inquiry, the Magistrate may direct a local investigation or examine an expert (s. 139) and may give written instructions for the guidance of the person who makes local inspection. He may pass orders for payment of costs of local inspection or summoning and examining expert (s. 140).

When the order is made absolute, the Magistrate gives notice of it to the person against whom it was made and requires him to perform the act directed by the order within a fixed time and informs him that in case of disobedience, he is liable u/s. 188, IPC. If the act is not so performed, Magistrate may cause it to be performed and recover the costs (1) by sale of any building, goods or property removed, (2) by distress and sale of his moveable property, within or without his jurisdiction. Where the property is outside jurisdiction, the order authorises its attachment and sale when endorsed by the Magistrate within whose jurisdiction it is situated (s. 141). If the Magistrate thinks that immediate measures are necessary to prevent imminent danger or injury of a serious kind, he may issue an injunction to obviate or prevent such danger or injury, pending the determination of the matter. If the injunction is not obeyed, the Magistrate may use means to obviate or prevent such danger or injury. No suit lies in respect of anything done in good faith u/ss. 141 and 142 (s. 142). The Magistrate may order any person not to repeat or continue a public nuisance (s. 143).

C. Urgent cases of nuisance and apprehended danger.—When a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered is of opinion that immediate prevention or speedy remedy is desirable, he may, by a written order stating the material facts and served as a summons, direct any person

(1) to abstain from a certain act, or

(2) to take certain order with certain property in his possession or management, if such direction is likely to prevent

  (i) obstruction, annoyance or injury to any person lawfully employed; or

  (ii) danger to human life, health or safety; or

  (iii) a disturbance of the public tranquillity, or a riot, or an affray.

In cases of emergency, or where such an order cannot be served in due time, it may be passed *ex parte*. The order may be directed to a particular individual, to persons residing in a particular place or area or to the public generally when frequenting or visiting or particular place or area. The order does not remain in force for more than two months, unless in cases of (1) danger to human life, health or safety, or (2) a riot or an affray, the State Government by notification extends it for a further period, not exceeding six months, any Magistrate may, on his own motion or on the application of any aggrieved person, rescind or alter any order made by himself or his predecessor or by any Magistrate subordinate to him. The State Government may alter or rescind any order of extension of time made by it either on its own motion or on an application from the aggrieved party. On receiving an application, the State Government or the Magistrate affords to the applicant an early opportunity of showing cause against the order. Where such application is rejected, reasons for its rejection shall be recorded in writing (s. 144). The District Magistrate is empowered to prohibit in any area within the local limits of his Jurisdiction, the carrying of arms in any procession or organising or holding of, or taking part in, any mass drill or mass training with arms in any public place (s. 144A).

D. Disputes as to immovable property.—The dispute may be concerning (I) 'land or water' [which includes buildings, markets, fisheries, crops, other produce, rents or profits]; or (II) user thereof.

(I) When an Executive Magistrate is satisfied, from a report of a police officer or other information, that a dispute likely to cause a breach of the peace exists concerning any 'land or water' or boundaries thereof within his jurisdiction, he makes an order stating his grounds and requiring the parties concerned in such dispute to attend his Court and put in written statements of their claims as to the fact of actual possession of the subject of dispute. A copy of the order is served as a summons and one copy is affixed to some conspicuous place near the subject of dispute.

The Magistrate shall peruse the statements, and hear the parties, receive evidence produced by parties and take further evidence, if any, and decide which of the parties was, at the date of the order, in possession of the property. The Magistrate may, either on his own or on application by either party, issue summons to witness to attend or produce a document or thing. If any party has within two months next before the date of police officer's report or other information received by the Magistrate or after that date and before the date of his order been forcibly and wrongfully dispossessed, the Magistrate may treat the party so dispossessed as if he had been in possession on the date of the order. After the Magistrate decides as to which party should be treated as being in possession, he issues an order declaring such party to be entitled to possession until evicted in due course of law, and forbidding all disturbance until eviction; and he may restore to possession the party forcibly and wrongfully dispossessed. The order so made shall be served as summons, and one copy thereof shall be affixed to some conspicuous place near the subject of dispute. If any party shows that no such dispute exists, the Magistrate cancels his order, and all proceedings are stayed; otherwise, the order is final. If a party dies during inquiry, his legal representatives may be made parties to the proceedings. If any crop or produce of the property in dispute is subject to speedy and natural decay, the Magistrate may make an order for proper custody, or sale, and upon completion of the inquiry, he makes an order for the disposal of the property or its sale proceeds (s. 145).

The object of s. 145 of Cr.P.C. is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under s. 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute. Sections 145 and 146 of the Cr.P.C. together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace and s. 146 cannot be separated from s. 145 of Cr.P.C. It can only be read in the context of s. 145 of Cr.P.C. If after the enquiry under s. 145 of the Code, the Magistrate is of the opinion that none of the parties were in actual possession of the subject of dispute at the time of the order passed under s. 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent Court has determined the right of the parties thereto with regard to the person entitled to possession thereof.[31.]

Decision on title and right to possession is not germane to relief under the section.[32.]

If the Magistrate after making an order u/s. 145(1) (1) considers the case to be one of emergency, or (2) is of opinion that none of the parties was in possession, or (3) is unable to decide as to which of them was in possession, he may attach the subject of dispute until a competent Court decides the rights of the parties. The Magistrate may withdraw the attachment if there is no likelihood of the breach of the peace. The Magistrate, if he has attached the subject of dispute, makes provision for looking after the property. For that purpose, he may appoint a receiver; but if a receiver is subsequently appointed by the Civil Court, the Magistrate orders his receiver to hand over possession to such receiver (s. 146). A receiver was held to be wrongly appointed where the possession had already been handed over under a civil court order.[33.] A civil suit normally excludes criminal proceedings, but not where there is no dispute as to title. Thus, notwithstanding civil proceedings, a father was restored to the possession

of his house where his son had thrown him out.[34.] A Magistrate's order of attachment would end on the appointment of a receiver or issuing of an interim injunction by a civil court; danger to peace may then end.[35.]

Observations made in the proceedings drawn u/s. 145 of Cr.P.C. do not bind the competent Court in a legal proceedings initiated before it. A decision given u/s. 145 of Cr.P.C. has relevance in evidence to show one or more of the following facts: (a) that there was a dispute relating to a particular property; (b) that the dispute was between the parties; (c) that such dispute led to the passing of a preliminary order u/s. 145(1) of Cr.P.C. or an order of attachment issued u/s. 146(1) of Cr.P.C.; and (d) that the Magistrate found particular party or parties in possession or fictional possession of the disputed property.[36.]

(II) When an Executive Magistrate is satisfied from the report of a police officer or other information that a dispute likely to cause a breach of the peace exists regarding any right of user (including easement) of any land or water within his jurisdiction, he makes an order in writing stating his grounds and requiring the parties concerned to attend the Court and put in written statements of their claims. The Magistrate peruses the statements put in, hears the parties, receives evidence, takes such further evidence as he thinks necessary and decides whether such right exists. If such right exists, he may make an order prohibiting any interference with its exercise or ordering removal of any obstruction to such right. But no such order is made (1) where the right is exercisable at all times of the year, unless it has been exercised within three months, before the receipt of report of the police officer or other information, or (2) where the right is exercisable at particular seasons or occasions unless it has been exercised during the last of such seasons or occasions. The Magistrate may convert a proceeding u/s. 145 to one u/s. 147 or *vice versa* as he finds appropriate (s. 147).

Local inquiry.—The District Magistrate or the Sub-divisional Magistrate may depute any subordinate Magistrate to make local inquiry, and his report may be read as evidence in the case (s. 148).

Costs.—The Magistrate passing the order may direct by whom and in what proportion the costs incurred by a party are to be paid (s. 148).

Chapter XI.—Preventive Action of the Police

Preventive action of the police.—(1) Every police officer may interpose for preventing the commission of a cognizable offence (s. 149).

(2) On receiving information of a design to commit such offence, he communicates it to his superior officer and to any other officer whose duty it is to prevent or take cognizance of the commission of it (s. 150).

(3) He may arrest without a warrant the person so designing if the offence cannot be otherwise prevented. Such person shall not be detained for more than 24 hours unless authorised (s. 151).

(4) He may interpose to prevent any injury to any public property, public land mark, or buoy, or other mark used for navigation (s. 152).

(5) Any officer-in-charge of a police station may, without a warrant, enter any place within the limits of such station for inspecting or searching for any false weights or measures, or false instruments for weighing. He may seize any such false weights,

measures, or instruments, and give information of such seizure to a Magistrate having jurisdiction (s. 153).

Chapter XII.—Information to the Police and Their Powers to investigate

Cognizable cases.—Information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a police station, is (1) reduced to writing, (2) read over to the informant, (3) signed by the informant and (4) its substance is entered in a prescribed book. If the information be in writing, (1) it is signed by the informant, and (2) the substance thereof is entered in the prescribed book. Such information is called "First informant report" (FIR).

A copy of information so recorded is given free of charge to the informant. The informant may, on refusal to record information, send the substance by post to the Superintendent of Police, who, if satisfied, either makes investigation himself or orders investigation by his subordinates.

In *Youth Bar Association of India v. Union of India*,[37.] the Supreme Court heard a PIL seeking a direction to the Centre and all states that each and every FIR registered in police stations must be uploaded on the official websites as early as possible and preferably within 24 hours from the time of registration.

Where a "First Information Report" is given by a woman for allegation of attempt or perpetration of an offence u/s. 326A, s. 326B, s. 354, s. 354A, s. 354B, s. 354C, s. 354D, s. 376, s. 376A, s. 376AB, s. 376B, s. 376C, s. 376D, s. 376DA, s. 376DB, s. 376E or s. 509 of the IPC (45 of 1860) against her, then it has to be recorded by a woman officer. Further, if the woman is temporarily or permanently, mentally or physically disabled, then such information has to be recorded at the place of residence of the person seeking record of such information or any other convenient place and in the presence of an interpreter or special educator, as is required. Also, such recording of information has to be videographed. It is incumbent upon the police officer to get the statement recorded by a Judicial Magistrate under cl. (a) of s. 164(5A) as soon as possible (s. 154). Refusal to record information is a dereliction of duty even if a wrong police station is approached.[38.] Statements taken in the conduct of investigation cannot be turned into an FIR.[39.] Where there is delay in lodging an FIR, some justification for the delay must be shown.[40.] An FIR is not a substantive evidence.[41.]

An officer-in-charge of a police station may, without the order of a Magistrate, investigate any cognizable case. The Courts do not interfere in the matters of investigation.[42.] Exceptionally, they may do so, *e.g.*, the Supreme Court ordered investigation by CBI where the allegation was that the investigating police might have been involved in the crime.[43.] On receiving information of the commission of such offence, he sends a report to a Magistrate empowered to take cognizance of it upon a police report and proceeds in person or deputes one of his subordinates to investigate the facts and circumstances of the case and to take measures for the discovery and arrest of the offender. Local investigation may be dispensed with where the informant gives the name of the offender and the offence is not of a serious nature or there are not sufficient grounds. In case of offence of rape, the statement of the victim has to be recorded at the place of her residence or any place suitable to her by a woman officer and in the presence of either her parents or guardians or local social worker. If the police officer thinks there are not sufficient grounds for investigation or the offence is not serious, he states his reasons in the report to the Magistrate and notifies to the informant the fact that he will not investigate it.[44.] The report is sent through such superior officer as the State Government may direct, and such officer gives any

necessary instructions to the police officer and transmits it to the Magistrate (s. 158). The Magistrate may (1) direct investigation, or (2) proceed to hold a preliminary inquiry or depute any subordinate Magistrate to do so, or (3) otherwise dispose of the case (s. 159).

Non-cognizable cases.—In the case of information of a non-cognizable offence committed within the limits of a police station, the police officer in charge of the station enters its substance or causes it to be entered in the prescribed book and refers the informant to a Magistrate. A police officer does not investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the same for trial. Any police officer receiving such order may exercise the same powers in respect of the investigation (except power to arrest without warrant), as an officer-in-charge of a police station may exercise in a cognizable case. If a case relates to two or more offences of which one is cognizable, the case is deemed to be a cognizable case (s. 155).

It has now been held that applications u/s. 156(3) have to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. The Magistrate is also empowered to verify the truth and veracity of the allegations.[45.]

Attendance of witnesses.—A police officer making an investigation may by a written order require the attendance of persons acquainted with the circumstances of the case. No male under fifteen years or woman shall be required to attend at any place other than the place in which such male or woman resides. Reasonable expenses of such persons may be paid. Further, no male or female above the age of 65 years and no mentally or physically disabled person shall be required to attend at any other place than his or her place of residence (s. 160). In case of an offence of rape, the recording of statement of the victim is required to be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality (s. 157). The police officer may examine the witnesses orally and they are bound to answer truly all questions relating to the case, other than questions the answers to which would have a tendency to expose them to a criminal charge or to a penalty or forfeiture. Such statements may be reduced to writing. Such statements may also be recorded by audio-video electronic means. However, examination of a woman against whom offences u/s. 354, s. 354A, s. 354B, s. 354C, s. 354D, s. 376, s. 376A, s. 376AB, s. 376B, s. 376C, s. 376D, s. 376DA, s. 376DB, s. 376E or s. 509 of the IPC (45 of 1860) are alleged to have been committed has to be conducted by a woman police officer or any other woman officer. Delay in recording statement does not by itself affect the credibility of the witness.[46.]

Statement to police.—A statement made to the police, if reduced into writing, is not to be signed by the person making it; and the statement or any record thereof, whether in a police diary or otherwise, is not to be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when the statement was made except in the following way:—

When any witness is called for the prosecution whose statement has been reduced into writing, any part of his statement may be used by the accused, and with the permission of the Court by the prosecution, to contradict such witness u/s. 145 of the Evidence Act. It may also be used in his re-examination for explaining any matter referred to in cross-examination. This section does not (1) apply to any statement falling within the provisions of s. 32, cl. (1), of the Evidence Act, or (2) affect the provisions of s. 27 of the Evidence Act. An omission to state a fact in the statement may amount to contradiction if such omission is either significant or relevant (s. 162). A police officer or a person in authority shall not offer any such inducement, threat or promise to the

person making the statement as is mentioned in s. 24 of the Evidence Act. He shall not by caution prevent any person from making any statement of his own free will subject to caution in case of confession u/s. 164 (s. 163).

Power to record a statement or confession.—A Metropolitan or Judicial Magistrate may record a statement or confession made (1) in the course of an investigation, or (2) at any time before the commencement of the inquiry or trial. Such confession or statement may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence. No police officer on whom any power of Magistrate has been conferred can record a confession.

The confession is recorded in the manner provided by s. 281. Any other statement is recorded in the manner, as, in the opinion of the Magistrate, is best suited to the circumstances.

The statement or confession is forwarded to the Magistrate by whom the case is to be inquired into or tried. The Magistrate recording it may not be the Magistrate having jurisdiction in the case.

(1) Before recording a confession, the Magistrate explains to the person making it

(i) that he is not bound to make it;

(ii) that it may be used as evidence against him.

(2) The Magistrate does not record it unless upon questioning the person making it, he has reason to believe that it was made voluntarily.

(3) When recording it, he makes a memorandum stating that it has been explained to the accused that

(i) he is not bound to make a confession;

(ii) it may be used as evidence against him;

(iii) it was voluntarily made;

(iv) it was taken in his presence and hearing;

(v) it was read over to him;

(vi) it was admitted by him to be correct; and

(vii) it contained a full and true account of the statement made by him.

If at any time before confession is recorded, the person states his unwillingness to make the confession, the Magistrate does not authorise his detention in police custody. Omission in observing these formalities may render the confessional statement inadmissible in evidence.[47.] Any statement which is not in the nature of a confession has to be recorded in the manner as the Magistrate feels is best suited according to facts and circumstances of the case. Where offences that are punishable u/s. 354, s. 354A, s. 354B, s. 354C, s. 354D, sub-section (1) or sub-section (2) of section 376, s. 376A, s. 376AB, s. 376B, s. 376C, s. 376D, s. 376DA, 376DB, s. 376E or s. 509 of the IPC (45 of 1860) are brought to the attention of the police, the Judicial Magistrate has to immediately take the statement of those against whom the offences are committed.

In case the person making the statement is temporarily or permanently mentally or physically disabled,

(i) The magistrate shall take assistance of a special educator or interpreter

(ii) The statement shall be videographed

(iii) The statement shall be considered a statement in lieu of examination-in-chief, as specified in s. 137 of the Indian Evidence Act, 1872 (1 of 1872), and the maker of the statement can be cross examined based on this statement (s. 164).

Medical examination of rape victim.—During the investigation of a case under the offence of attempt to or committing of rape, if the need for medical examination of victim arises, then it shall be conducted by a registered medical practitioner in a hospital or medical facility run by the Government, or by any other registered practitioner in the absence of one at the government-run facility within twenty-four hours of receiving information regarding the offence, with the consent of the woman. The decided practitioner has to carry out the examination without delay and prepare a report giving the following particulars, namely:—

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

The report has to provide reasoned conclusions. It has to specifically record the consent of the woman or of the person competent to give such consent on her behalf. The exact time of commencement and completion of the examination shall also be noted in the report. The report has to be forwarded to the investigating officer without delay. Any examination without the consent of the woman or of the competent person on her behalf will be unlawful.

Search.—A police officer may search any place within the limits of his police station for anything necessary for investigation into an offence, if it cannot be obtained without undue delay, after recording in writing the grounds of his belief and specifying the thing for which the search is to be made. He conducts the search in person or deputes his subordinate after recording his reasons for doing so. An order in writing is given to the subordinate officer specifying the place to be searched and the thing for which search is to be made. Copies of record are sent to the Magistrate empowered to take cognizance, and the owner or occupier of the place searched is, on application, furnished with a copy by the Magistrate free of cost (s. 165). An officer-in-charge of a police station or a police officer not below the rank of a Sub-Inspector may require an officer-in-charge of another police station, in the same or a different district, to cause a search to be made in any place within the limits of such station. Such officer proceeds as u/s. 165 and forwards the things found to the officer at whose request the search was made. If the delay caused in proceeding in this way might result in evidence of the commission of an offence being concealed or destroyed, the police officer may himself search any place in the limits of another police station. He must send notice of the search to the officer-in-charge of that police station together with a copy of the list made in the presence of witnesses and send to the Magistrate empowered to take cognizance copies of the record referred to in s. 165. The owner or the occupier shall be furnished free of cost a copy of the record sent to the Magistrate (s. 166).

If, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to investigating officer that evidence may available in a country place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country, or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement in the course of such examination and also to require such person or any other person to produce any document or anything which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the court issuing such letter.

The letter of request may be transmitted in a manner the Central Government may specify. Every statement recorded or document or thing received shall be deemed to be collected during the course of investigation under this Chapter (s. 166A).

Upon receipt of a letter of request from a Court or an authority in a country or place outside India competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to an offence under investigation in that country or place, the Central Government may, if it thinks fit,

(i) forward the same to the Chief Metropolitan Magistrate or Chief Judicial Magistrate or such Metropolitan Magistrate or Judicial Magistrate as he may appoint in this behalf, who shall thereupon summon the person before him and record his statement or cause the document or thing to be produced; or

(ii) send the letter to any police officer for investigation, who shall thereupon investigate into the offence in the same manner, as if the offence had been committed within India.

Investigation.—When a person is arrested and is in custody and it appears that the investigation cannot be completed within twenty-four hours, and the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation (not below the rank of Sub-Inspector) forwards to the nearest Magistrate (whether he has jurisdiction to try the case or not) a copy of the entries in his diary and the accused. Such Magistrate may from time to time authorise the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or commit it, and considers further detention unnecessary, he may forward the accused to a Magistrate having jurisdiction. The Magistrate may authorise detention otherwise than in police custody for adequate grounds for a maximum period of ninety days, where the investigation relates to an offence punishable with death; imprisonment for life or imprisonment for a term of not less than ten years and sixty days, where the investigation relates to any other offence. After the expiry of the said period of ninety days or sixty days, as the case may be, the accused is released on bail. No Magistrate shall authorise detention of the accused in custody of the police unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police. The Magistrate may extend further detention in Judicial custody on production of the accused either in person or through the medium of electronic video linkage. A Magistrate of the second class, unless specially empowered by the High Court, cannot authorise detention in police custody. A Magistrate authorising detention in the custody of the police records his reasons. If order for detention is made by a Magistrate other than the Chief Judicial Magistrate, its copy together with reasons for making it is forwarded to the Chief Judicial Magistrate. In case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution. If, in any case triable as a summons case, the investigation is not concluded within six months from

the date of arrest, the Magistrate stops further investigation unless the Magistrate is satisfied for special reasons and in the interests of justice that its further continuation is necessary. If the Magistrate stops further investigation, the Sessions Judge may vacate such order of the Magistrate and also give directions as to bail (s. 167). A statement of some principles to be followed in this connection is to be found in *Directorate of Enforcement v. Deepak Mahajan*.[48.] A bail cannot be cancelled merely on the production of a charge-sheet.[49.] Effect of delay is examined in *Uday Mohan Lal Acharya v. State of Maharashtra*.[50.] Detention in contravention of provisions amounts to violation of right to life (*Ibid*). Right to be released on bail arises.[51.]

An order for release on bail u/s. 167(2)(a) is not an order on merits but an order on default of the prosecuting agency. Such an order could be nullified for special reasons after the default has been cured. The accused cannot therefore claim any special right to remain on bail. If the investigation reveals that the accused had committed a serious offence and charge-sheet is filed, the bail granted u/s. 167(2)(a) could be cancelled on an application by the prosecuting agency.[52.]

A subordinate police officer making an investigation reports the result to the officer-in-charge of the police station (s. 168).

If it appears to the officer-in-charge of the police station that there is not sufficient evidence to justify the forwarding of the accused to a Magistrate, he may release the accused if in custody on the accused's executing a bond with or without sureties, to appear before a Magistrate if required (s. 169). But if there is sufficient evidence or reasonable ground, he

(1) forwards the accused to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial or, if the offence is bailable and the accused is able to give security, takes security from him for his appearance before such Magistrate;

(2) sends to such Magistrate any weapon or article which it may be necessary to produce before him;

(3) requires the complainant and witnesses to execute a bond to appear before the Magistrate to give evidence;

(4) delivers a copy of such bond to one of the persons executing it, and sends the original with his report to the Magistrate (s. 170).

The complainant or the witness is not required to accompany a police officer on his way to the Court or subjected to any restraint or inconvenience, or required to give any security for his appearance other than his own bond. But if he refuses to attend or to execute a bond, he may be forwarded in custody to the Magistrate who may detain him in custody until he executes such bond or the hearing is completed (s. 171).

Every investigating police officer enters his proceedings in a diary, setting forth—

(1) the time at which the information reached him;

(2) the time at which he began and closed his investigation;

(3) the place or places visited by him; and

(4) a statement of the circumstances ascertained through his investigation.

The statements of witnesses recorded during the course of investigation u/s. 161 are to be recorded in the case diary and such diary shall be a volume and duly paginated. A

Criminal Court may send for the police diaries and may use them not as evidence in the case, but to aid the Court in such inquiry or trial. The accused is not entitled to call for them because the Court refers to them. But he can call for them if

(1) they are used by the police-officer to refresh his memory; or

(2) if the Court uses them for the purpose of contradicting such police-officer (the provision of s. 161 or s. 145 of the Evidence Act shall apply) (s. 172).

Non-examination of the investigating officer cannot fail the prosecution case by itself.[53.]

Report.— Every investigation is to be completed without delay, and the officer in charge of the police station shall—

(1) forward to a Magistrate empowered to take cognizance of the offence on a police report, a report setting forth (i) the names of the parties, (ii) the nature of the information, (iii) the names of the persons who are acquainted with the case, (iv) whether an offence has been committed and by whom, (v) whether the accused has been arrested, (vi) whether he has been released on bond with or without sureties, (vii) whether the accused has been forwarded in custody, (viii) whether the report of medical examination of the woman has been attached where medical examination relates to an offence u/ss. 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or s. 376E of the IPC (45 of1860).

(2) communicate the action taken by him to the informant;

(3) send to the Magistrate (in cases u/s. 170) along with the report all documents or relevant extracts thereof on which the prosecution proposes to relay and statements recorded u/s. 161 of all witnesses whom the prosecution wants to examine indicating to the Magistrate the statements or parts thereof which should not be disclosed to the accused giving reasons therefor; and

(4) if convenient, furnish to the accused copies of such statements.

In case of an offence under ss. 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code, the investigation shall be completed within two months from recording of the "First Information Report". Further investigation even after submission of report is not excluded, and the above provisions will apply to further report. Where a Magistrate closed a complaint on the basis of the final report by the police, without giving any reasons, the Supreme Court ordered the Magistrate to decide according to merits.

In *Narendra Kumar Amin v. CBI,*[54.] it was held that it is incorrect to hold that the report shall be deemed to be complete if it is accompanied by all documents and statements of witnesses as required u/s. 173(5). The word 'shall' used in s. 173(5) is directory in nature and cannot be interpreted as mandatory. A default bail therefore cannot be granted on the contention that the police report filed is not as per legal requirement u/ss. 173(2) and (5).

As regards the power to order investigation beyond the first investigation, the Supreme Court has ruled that where the Magistrate can only direct 'further investigation', the higher Courts can direct further investigation, re-investigation or even investigation *denovo* depending on the facts of the case.[55.]

Report on suicide, murder and accident.—The officer-in-charge of a police station or other police officer specially empowered on receiving information that a person (i) has committed suicide, or (ii) has been killed by another, or by an animal or machinery, or by

an accident, or (iii) has died under circumstances raising a reasonable suspicion that some other person has committed an offence:

(1) immediately gives intimation to the nearest Executive Magistrate empowered to hold inquests (or District Magistrate or Sub-divisional Magistrate);

(2) proceeds, unless otherwise directed, to the place where the body of the deceased is, and in the presence of two or more respectable inhabitants of the neighbourhood makes an investigation and draws up a report of the cause of death describing wounds, fractures, bruises, marks of injury, weapons, *etc.*;

(3) forwards the report, after signing it himself and getting it signed by the other persons who concur therein, to the District Magistrate or Sub-divisional Magistrate.

If the cause of death is doubtful, he forwards the body with a view to its being examined to the nearest Civil Surgeon or other medical officer appointed by the State Government, if the state of weather and the distance admit of its being so forwarded without risk of putrefaction (s. 174). Sub-s. (3) was added in 1983 to provide for inquest by the Executive Magistrate for post-mortem in all cases where a woman has within seven years of her marriage committed suicide or has died in suspicious circumstances. Post-mortem is also provided for in all cases in which a married woman has died within seven years of her marriage on a request from a relative of such woman. The contents of an inquest report cannot be treated as evidence, though they can be looked into to test the veracity of a witness.[56.] The police officer may by order in writing summon two or more persons for investigation and persons acquainted with the fact of the case and every such person is bound to answer truly all questions (s. 175).

Inquest by a Magistrate.— In cases reported u/s. 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of or in addition to the investigation held by the police officer. He may cause the dead body of any person to be disinterred and examined. The Magistrate informs the relatives of the deceased and allows them to be present in the inquiry. In case of death or disappearance of a person, or rape of a woman while in the custody of the police, a mandatory Judicial inquiry is required to be held, and in case of death, examination of the dead body is to be conducted within twenty-four hours of the death (s. 176).

Chapter XIII.—Jurisdiction of the Criminal Courts in Inquiries and Trials

Place of inquiry and trial.—1. Every offence is ordinarily inquired into and tried by a Court within whose local jurisdiction it was committed (s. 177).

2. (i) When it is uncertain in which of several local areas an offence was committed, or

(ii) where an offence is committed partly in one local area and partly in another, [*Sujata Mukherjee v. Prashant Kumar Mukherjee,*[57.] cruel treatment to wife at different places], or

(iii) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(iv) where it consists of several acts done in different local areas,[58.] smuggled goods passing through different states]

it may be tried by a Court having jurisdiction over any of the local areas (s. 178).

3. An offence is triable by a Court within whose jurisdiction (1) any act is done, or (2) any consequence of such act has ensued, *State of Madhya Pradesh v. Suresh Kaushal,*[59.] (s. 179). Where the conspiracy to cheat a bank was hatched at Chandigarh, the court at that place had jurisdiction, though everything else was done elsewhere.[60.]

4. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, it may be tried by a Court within whose local jurisdiction either act was done (s. 180).

5. The offence of (1) being a thug or murder committed by a thug, or (2) of dacoity or murder with dacoity or belonging to a gang of dacoits, or (3) escape from custody may be tried by a Court within whose jurisdiction the offence was committed or the accused is (s. 181).

6. Kidnapping or abduction may be tried by a Court within whose jurisdiction the person was (1) kidnapped or abducted, or (2) conveyed, concealed or detained (s. 181).

7. Theft, extortion or robbery may be tried by a Court within whose jurisdiction (1) the offence was committed, or (2) the property stolen was possessed (i) by the thief or (ii) by any person who received or retained the same knowing it to be stolen (s. 181).

8. Criminal misappropriation or criminal breach of trust may be tried—by a Court within whose jurisdiction (1) the offence was committed, or (2) any part of the property was received or retained, or (3) the property was to be returned or accounted for (s. 181).

9. An offence which includes possession of stolen property may be tried by (a) the Court within whose local jurisdiction the offence was committed, or (b) the stolen property was possessed knowing or believing it to be stolen (s. 181).

10. If the offence includes cheating and the deception is practised by letters or telecommunication messages, it may be tried by the Court within whose local jurisdiction (1) the letters or messages were sent or (2) were received (s. 182).

11. Cheating and dishonestly inducing delivery of property—by Court within whose local jurisdiction the property was (1) delivered by the person deceived or (2) received by the accused (s. 182).

12. The offence u/ss. 494 and 495 (of bigamy) by the Court (1) within whose local jurisdiction the offence was committed, (2) the offender last resided with his or her spouse by first marriage or (3) the wife by the first marriage has taken up permanent residence after the commission of the offence (s. 182 (2)).

13. An offence committed in the course of a journey or voyage may be inquired into or tried by a Court through or into whose local jurisdiction (1) the offender, or (2) the person against whom, or (3) the thing in respect of which the offence was committed, passed in the course of that journey or voyage (s. 183).

Place of trial for offences triable together.—If offences committed are such as can be tried at one trial u/s. 219, 220 or 221, or if offences committed by several persons are such as they can be tried together (s. 223), then trial can be held by any Court competent to try any of the offences (s. 184).

Power of State Government to order cases to be tried in different Sessions divisions. —The State Government may direct trial of any case or class of cases committed for trial in any district to any sessions division; such direction should not, however, be repugnant to any direction previously issued by the High Court or the Supreme Court or under the present Code or under any other law (s. 185).

Doubt as to jurisdiction.—When a question arises as to which of two or more Courts which have taken cognizance ought to try the offence, it is decided by the High Court to which they are subordinate and where the courts are subordinate to different High Courts by the High Court within whose appellate criminal jurisdiction the proceedings were first commenced (s. 186).

Offence committed beyond local jurisdiction.—When a Magistrate of the first class has reason to believe that any person within his jurisdiction has committed without it (whether within or without India) an offence which cannot be tried within his jurisdiction, but is triable in India, he may

(1) inquire into the offence as if it has been committed within his jurisdiction,

(2) compel such person to appear before him,

(3) send him to the Magistrate having jurisdiction to try such offence, or if the offence is not punishable with death or imprisonment for life take a bond for his appearance before such Magistrate. He may report the case to the High Court if there are more Magistrates than one having jurisdiction to try the offence (s. 187).

Liability of Indian citizens for offences committed out of India.—(1) When any citizen of India commits an offence outside India or on the high seas, or

(2) when any person, not being a citizen commits an offence on any ship or air-craft registered in India,

he may be dealt with as if the offence had been committed at any place in India where he may be found. But the offence is not inquired into or tried in India unless the previous sanction of the Central Government is obtained (s. 188). Where a conspiracy to cheat a bank at Dubai was hatched in Chandigarh and the money was ultimately received in India, it was held to be a crime committed in India.[61.] When such offence is tried, the Central Government may direct that copies of deposition made or exhibits produced before a judicial officer or before a consular or diplomatic representative for that territory shall be received in evidence by the trial Court (s. 189).

Chapter XIV.—Conditions Requisite for Initiation of Proceedings

Cognizance of offences.—I. By a Magistrate.—Any Magistrate of the first class and any Magistrate of the second class specially empowered may take cognizance of an offence upon

(a) receiving a complaint;

(b) a police report;

(c) information from any person other than a police officer;

(d) his own knowledge (s. 190).

Cognizance is taken of the fact of offence and not of the persons who might have committed it.[62.]

When a Magistrate takes cognizance of an offence upon information received from a person other than a police officer or on his own knowledge, the accused is informed that he is entitled to have the case tried by another Magistrate, and, if the accused

objects, the case is transferred to such other Magistrate as is specified by the Chief Judicial Magistrate (s. 191). A Chief Judicial Magistrate may transfer a case of which he has taken cognizance to any competent Magistrate subordinate to him. A first class Magistrate empowered in this behalf may transfer a case to any other Magistrate competent to try or commit for trial as the Chief Judicial Magistrate specifies (s. 192).[63.]

II. **By a Court of Session.—**A Court of Session does not take cognizance of an offence as a Court of original jurisdiction unless the accused has been committed to it by a competent Magistrate. He may, however, exceptionally do so if the involvement of the accused appears to the *prima facie* extent from the record, though the accused was not committed to him for trial.[64.] Additional Sessions Judges and Assistant Sessions Judges try such cases as the High Court may direct them to try or the Sessions Judge may make over to them (s. 194).

Exceptions to the rule that any person may set the criminal law in motion.—No Court takes cognizance of—

1. Contempt of lawful authority of public servant, punishable u/ss. 172 to 188, Penal Code, or abetment of, or criminal conspiracy to commit, such offence, except on the complaint in writing of the public servant concerned, or the public servant to whom he is administratively subordinate. [The authority to whom the public servant is administratively subordinate may order withdrawal of complaint.]

2. Offences against public justice, punishable u/ss. 193 to 196, 199, 200, 205 to 211 and 228, Penal Code, committed in any proceedings in any Court, or criminal conspiracy to commit or abetment of or attempt to commit such offence, except on the complaint in writing of such Court or the Court to which it is subordinate.

3. Offences relating to documents given in evidence (s. 463), punishable u/ss. 471, 475 and 476, Penal Code, or criminal conspiracy to commit or attempt to commit or abetment of such offence, except on the complaint in writing of such Court or the Court to which it is subordinate (s. 195). For circumstances in which cognizance can be taken without such complaint[65.]

["Court" for purposes of 2 and 3 means a civil, revenue or criminal Court or a tribunal if so declared by the Act, whether Central or State, which constitutes it.]

A witness or any other person can file a complaint if threatened to give false evidence to court as per s. 195A of the IPC (s. 195A).

4. Offences against the State punishable under Chapter VI or u/ss. 153A and 295A or sub-s. (1) of s. 505 of the IPC or a criminal conspiracy to commit such offence or any abetment thereof as described in s. 108 of the Penal Code with the previous sanction of the Central or the State Government (s. 196(1)).

Offence punishable u/s. 143B or sub-s. (2) or sub-s. (3) of s. 505 of the IPC or a criminal conspiracy to commit such offence with the previous sanction of the Central or State Government or of the District Magistrate (s. 196(1a)).

5. Criminal conspiracy punishable u/s. 120B, Penal Code, other than the conspiracy to commit a cognizable offence punishable with death, imprisonment for life or rigorous imprisonment for two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings (s. 196(2)).

6. Offence committed, while acting in the discharge of his duty, by (a) a Judge, (b) a Magistrate or (c) a public servant not removable from office save by or with the sanction of the Government, except with the previous sanction (a) in the case of a

person employed in connection with the affairs of the Union, of the Central Government; and (b) in the case of a person employed in connection with the affairs of a State, of the State Government. The court has to see whether the act in question which constituted the offence has a reasonable and rational nexus with the official duty. The list to be applied was stated by the Supreme Court in *Gauri Shankar Prasad v. State of Bihar*.[66.]

The protection u/s. 197 is available to a public servant even after retirement in respect of offences punishable under IPC. But sanction to prosecute a public servant for the offences under Prevention of Corruption Act is not required if the public servant had already retired on the date of cognizance by the Court. However, the prosecution cannot wait for a public servant to retire before proceeding.[67.]

Where the alleged offence was committed by a person during the period while the proclamation issued under cl. (1) of Art. 356 of the Constitution was in force, sanction of the Central Government will be required.

Where such offences are alleged to be committed during the period while a proclamation issued under cl. (1) of Art. 356 of the Constitution, such prosecution shall not be made without the sanction of the Central Government. It is further provided that notwithstanding anything contained in the Code or any other law, any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction during the period commencing on the 20th day of August 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, received the assent of the President, while the proclamation under Art. 356 of the Constitution was in force in that State shall be invalid and it shall be competent for the Central Government to accord sanction and for the Court to take cognizance thereupon. In case the public servant, Judge or Magistrate has been accused of committing an offence u/s. 166A, s. 166B, s. 354, s. 354A, s. 354 B, s. 354C, s. 354D, s. 370, s. 375, s. 376, s. 376A, s. 376AB, s. 376C, s. 376D, s. 376DA, s. 376DB, or s. 509 of the IPC (45 of 1860)], then the sanction is not required.

7. Offence committed by any member of the Armed Forces of the Union acting or purporting to act in discharge of official duties—with the previous sanction of the Central Government. [The State Government may extend this provision to Forces maintaining public order. In such cases, prior sanction of the State Government is necessary for prosecution.] The test to be applied for attracting this provision was stated by the Supreme Court in *Rizwan Ahmed Javed v. Jamal Patel*.[68.]

The Central Government or the State Government may (1) determine the person by whom the manner in which and offences for which the prosecution is to be conducted, and (2) specify the Court before which the trial is to be held (s. 197). Sanction granted by a superior authority than the appointing authority was held to be valid.[69.] Sanction should be granted with full application of mind and not mechanically.[70.] Sanction is not necessary in cases of employees of semi-Government bodies like Government companies or public sector undertakings.[71.]

8. Offences falling under Chapter XX, Penal Code, except upon a complaint by some aggrieved person. Where such person is (1) a woman who according to custom ought not to be compelled to appear in public, or (2) under the age of eighteen years, or (3) an idiot or lunatic, or (4) from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf. If there be a guardian appointed or declared, the Court, before granting leave to another person, will give notice to such guardian. When the aggrieved person is a member of the Armed Forces precluded from obtaining leave to enable him (to be so certified by his Commanding Officer) to file complaint in person, a person authorised by him may make a complaint. In case of an offence u/s. 494, Penal Code, if the person aggrieved

is the wife, then her father, mother, brother, sister, son or daughter or her father's or mother's brother or sister may file complaint on her behalf. For offence u/s. 497 or s. 498, the husband, and, in his absence, with the leave of Court some person, who had care of the woman, can file complaint. A complaint filed by an unauthorised person but satisfying the requirements of a complaint should nevertheless be investigated.[72.]

9. Offences of rape u/s. 376, Penal Code, where offence consists of sexual intercourse by a man with his own wife, the wife being under eighteen years of age and if more than one year has elapsed from the date of the commission of the offence, no court shall take cognizance (s. 198).

10. Courts cannot take cognizance of complaints made u/s. 498A of the IPC, unless:

(i) a police report is made describing the facts, or

(ii) upon a complaint made by the person aggrieved, or

(iii) by her father, mother, brother, sister or by her father's or mother's brother or sister or,

(iv) with the leave of the Court, by any other person related to her by blood, marriage or adoption (s. 198A).

11. If persons are in marital relationship, then court shall not take cognizance of an offence alleged to have been committed u/s. 376B of the IPC, unless a complaint has been made by the wife against the husband and the court is satisfied of the fact's *prima facie*.

Offence of cruelty to woman by her husband or other relative punishable u/s. 498A of the IPC except upon a complaint made by the person aggrieved or by her father, mother, brother, sister or by her father's or mother's brother or sister or with the leave of the Court by any other person related to her by blood, marriage or adoption.

Offences falling under Chapter XXI of the Penal Code—upon complaint by an aggrieved person. If the aggrieved person is (1) an idiot or a lunatic, (2) from sickness or infirmity unable to make a complaint, (3) a woman who according to local custom should not be compelled to appear in public or (4) under eighteen, then upon complaint by some other person, with leave of the Court (s. 199).

12. Defamation of public servants.—

(i) When an offence of defamation is committed against the President, or the Vice-President, or the Governor of a State, or the Administrator of a Union territory, or a Minister, or any public servant in respect of his conduct in the discharge of his public function, a Court of Session may take cognizance of such offence without the accused being committed to it for trial, upon a complaint made by the Public Prosecutor.

(ii) Such complaint shall set forth the facts which constitute the offence alleged, the nature of such offence and such particulars as are sufficient to give notice to the accused of the offence committed by him.

(iii) No complaint shall be made by the Public Prosecutor except with the previous sanction—

  (a) in the case of the Governor or Minister, of the State Government;

  (b) in the case of any other public servant employed in connection with the affairs of a State, of the State Government concerned; and

(c) in any other case, of the Central Government.

(iv) The Court shall not take cognizance of this offence unless the complaint is made within six months from the date of the offence.

(v) The persons against whom the offence is committed may make a complaint himself to the Magistrate having jurisdiction (s. 199).

In *Subramanian Swamy v. Union of India,*[73.] a challenge to constitutional validity of ss. 499 and 500 of the IPC, 1860, and s. 199 of the Cr.P.C. was made. The main challenge to the provision was that 'some person aggrieved' was on a broader spectrum, and it allows all kinds of persons to take recourse to defamation. The other challenge was that when a complaint is made to a Court of Sessions, it curtails the right to appeal. It was held that both the said challenges have already been adhered too and s. 199 was held to be constitutionally valid.

Chapter XV.—Complaints to Magistrates

Examination of complainant.— A Magistrate taking cognizance of an offence on complaint examines the complainant and the witnesses upon oath and the substance of the examination is reduced to writing and signed by the complainant and the witnesses and also by the Magistrate. Such examination is not necessary—

(1) when a complaint in writing is made by a Court or a public servant in the discharge of his official duties;

(2) when the case is transferred to another Magistrate u/s. 192 after the complainant and the witnesses are examined. The Supreme Court stated the duty of the Magistrate in this respect in *S.W. Palanitkar v. State of Bihar,* 2002 CrLJ 548 (SC) (s. 200).

If a complaint is made to a Magistrate who is not competent to take cognizance of the case, he, (1) if the complaint is in writing, returns it for presentation to the proper Court, and (2) if the complaint is oral, directs the complainant to the proper Court (s. 201). Any Magistrate on receipt of a complaint may postpone where the accused resides at a place beyond the area of his jurisdiction or if he thinks fit, the issue of process for compelling the attendance of the person complained against, and either (1) inquire into the case himself, or (2) direct an investigation by a police officer, or any other person for ascertaining whether there is ground for proceeding. No such direction is made (a) where the offence complained of is exclusively triable by the Court of Session or (b) unless the complainant has been examined u/s. 200, except where the complaint has been made by a Court. The Magistrate inquiring into a case may take evidence of witnesses on oath but where the offence is triable by the Court of Session, be calls upon the complainant to produce all his witnesses and examines them on oath (s. 202). Proceedings should not be quashed where there is a *prima facie* case.[74.] He may dismiss the complaint, if after considering the statement on oath of the complainant and the witnesses, and the result of the investigation or inquiry, there is no sufficient ground for proceeding. He must briefly record his reasons for so doing, *Jatinder Singh v. Ranjit Kaur,* AIR 2001 SC 784 . The court added that default on the part of the complainant in appearance should not lead to shutting of the door once and for all (s. 203).

Chapter XVI.—Commencement of Proceedings before Magistrates

Issue of process.— If there is sufficient ground for proceeding, the Magistrate (a) in a summons case issues a summons for the attendance of the accused; or (b) in a warrant case issues a warrant or summons as he thinks fit for causing the accused to be brought before him or before some other Magistrate having jurisdiction. No summons or warrant is issued unless a list of prosecution witnesses has been filed. A copy of complaint should accompany summons or warrant. Process will issue on payment of process fees leviable. In issuing a process, the only consideration is whether the allegations in the complaint make out a *prima facie* case.[75.] Proceedings can be dropped if the complaint on the face of it does not disclose any offence against the accused.[76.] Personal attendance may be dispensed with if summons is issued and the accused may be permitted to appear by pleader; but the Magistrate may, in his discretion, enforce his attendance at any stage of proceedings (s. 205).

Summons in case of petty offences.—In case of offences punishable with fine not exceeding Rs. 1,000 (but not offences under the Motor Vehicles Act, 1939, or under any other law which provides for conviction of accused person *in absentia* on plea of guilty), which may be summarily disposed of u/s. 260 or 261, the Magistrate issues summons to the accused (unless the Magistrate is of contrary opinion to be recorded in writing) requiring him (a) to appear himself or by pleader on a specified date or (b) where the accused so desire to plead guilty and transmit by post or by messenger the said plea and the amount of fine specified in the summons or (c) to appear by pleader, plead guilty through him and pay the fine. The amount mentioned in summons shall not exceed Rs. 1,000 (s. 206).

The State Government may by notification empower any Magistrate to exercise the power of summary disposal in relation to any offence compoundable u/s. 320 or any offence punishable with imprisonment for a term not exceeding three months or with fine or with both where the Magistrate is of opinion that imposition of fine would meet the ends of justice (s. 206(3)).

Supply of copies of police report and documents to accused.—Where proceeding is instituted on police report, the Magistrate furnishes free of cost to the accused copies of (1) the police report, (2) the first information report, (3) statements of all persons whom the prosecution proposes to examine as witness (excluding therefrom irrelevant and extraneous parts or parts inexpedient in the public interest to be given), (4) confessional or other statements recorded before Magistrate, and (5) any other document or relevant extract thereof which were forwarded to the Magistrate by the police u/s. 173(5). In case of voluminous documents under (5), he may allow inspection either by the accused or his pleader (s. 207).

Supply of copies of documents in other cases triable by Court of Session.—In case of offence exclusively triable by Court of Session in a case instituted otherwise than on a police report, the Magistrate furnishes to the accused free of cost copies of (1) statements recorded u/s. 200 or s. 202, (2) statements and confessions u/s. 161 or s. 164, and (3) documents produced (if they are voluminous, only inspection is allowed) before the Magistrate on which prosecution relies (s. 208).

Commitment to Court of Session.—Where the offence, according to the Magistrate, is exclusively triable by the Court of Session, he

(1) commits the case to the Court of Session after complying with the provisions of ss. 207 and 208 and subject to the provisions of the Code relating to bail, remand the accused to custody until such commitment is made.

(2) remands the accused to custody (subject to the provision as regards bail);

(3) sends to the Sessions Court record of the case and documents and articles to be produced in evidence; and

(4) notifies the Public Prosecutor about commitment (s. 209).

Procedure where police investigation in complaint case—In respect of a case instituted otherwise than on a police report, *i.e*., in a complaint case, if there is an investigation also by the police in progress, the Magistrate stays the inquiry or trial before him and calls for a report from the police. If on report made u/s. 173, cognizance of an offence is taken by the Magistrate against the person accused in complaint case, then both the cases, *i.e.*, the complaint case and the case arising out of the police report, are heard together as if both of them were instituted on police report. If the police report does not relate to the accused or, if the Magistrate does not take cognizance on police report, the Magistrate proceeds with the original inquiry or trial which was stayed by him (s. 210).

Chapter XVII.—The Charge

A. Form of Charges—Contents of charge.—The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged is fulfilled. The following are the essentials of a charge:

(1) The charge should state the offence with which the accused is charged.

(2) If the offence has a specific name, it may be described by that name; otherwise so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(3) The law and section of the law against which the offence is committed should be mentioned.

(4) The charge shall be in the language of the Court.

(5) If previous conviction of the accused is to be proved for affecting the sentence, the fact, date and place of the previous conviction are stated (s. 211).

(6) Particulars as to the time and place of the offence, and the person against whom or the thing in respect of which it was committed should be stated.

(7) When the charge is of criminal breach of trust or dishonest misappropriation of money or other movable property, it is sufficient to specify the gross sum or describe movable property in respect of which the offence is committed and the dates between which it is committed (without specifying particular items or exact dates), provided the time between the first and the last date does not exceed one year (s. 212).

(8) Particulars of the manner in which the offence was committed if the accused has not sufficient notice otherwise (s. 213).

Effect of errors.—No error or omission in stating the offence or particulars is regarded as material unless the accused is misled by it and it occasions a failure of justice, *R.K. Prema Rao v. V. Srinivasa Rao,* (2003) 1 SCC 217 , the Supreme Court explained when conviction can be made inspite of errors in the framing of charges (s. 215). If any appellate Court, Court of revision or confirmation is of opinion that a failure of justice has been occasioned (1) by the absence of a charge or (2) by an error in the charge, it directs a trial from the stage of framing the charge in the first case and a new trial upon the proper charge framed in the second case. If no valid charge could be preferred against the accused, in respect of the facts proved, it quashes the conviction (s. 464).

Alteration in charge.—Any Court may alter or add to any charge at any time before judgment is pronounced. Such alteration or addition is read to and explained to the accused. After alteration or addition, the trial may proceed if the accused or the prosecutor is not likely to be prejudiced. If the new, altered or added charge is such that the accused or the prosecution is likely to be prejudiced if the trial proceeded immediately, the Court may direct a new trial or adjourn it. If the offence in such charge required previous sanction, the case is not proceeded with until the sanction is obtained (s. 216).[77.] If a charge is altered or added after the commencement of the trial, the prosecutor and the accused are allowed (1) to recall and examine with reference to such alteration or addition any witnesses who may have been examined, and (2) to call any further witnesses (s. 217).

In *Anant Prakash Sinha v. State of Haryana,*[78.] it was held that the Court can change or alter the charge if there is defect or something is left out. The test is that it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice is to say, if the Court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of s. 216 of the Cr.P.C.

B. Joinder of charges.—For every distinct offence, there is a separate charge, and every such charge is tried separately (s. 218). To this, the following are exceptions:—

(1) All or any number of charges framed against an accused can be tried together—

(a) if the accused person by an application in writing so desires; and

(b) if the Magistrate thinks that no prejudice will thereby be caused.

(2) When a person is accused of more offences than one of the same kind committed within one year, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three (s. 219).

[Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code, or of any special or local law.]

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

(4) When a person is charged with one or more offences of criminal breach of trust or dishonest misappropriation of property, he may be charged with one or more offences of falsification of accounts committed for concealing or facilitating the commission of such offence.

(5) If the acts alleged constitute an offence falling within two or more definitions of any law, the person accused of them may be charged with and tried at one trial for each of such offences.

(6) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, both the categories of

offences (s. 220). Misjoinder of charges cannot be said to be a mere irregularity but a failure of justice. It can lead to setting aside of conviction.[79.]

(7) Where it is doubtful on facts proved which offences has been committed, the accused may be charged with all or any of the offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the offences. If in such a case a person is charged with one offence, and it appears in evidence that he has committed a different offence for which he might have been charged, he can be convicted of that offence. In *Shamnsaheb M. Multiani v. State of Karnataka,*[80.] the Supreme Court explains conditions for applicability of the section (s. 221).

Charge of one offence, conviction of another.—(1) When a person is charged with an offence consisting of several particulars, and some of the particulars constitute a minor offence, he may be convicted of such minor offence.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit it (s. 222).

What persons may be charged jointly.—The following persons may be charged and tried together:—

(1) persons accused of the same offence committed in the course of the same transaction;

(2) persons accused of an offence and persons accused of abetment or an attempt to commit it;

(3) persons accused of more than one offence of the same kind committed jointly within twelve months;

(4) persons accused of different offences committed in the course of the same transaction;

(5) persons accused of theft, extortion, cheating or criminal misappropriation, and persons accused of receiving or retaining or assisting in the disposal or concealment of property obtained in the commission of these offences or abetment or attempt to commit such offence;

(6) persons accused of offences u/ss. 411 and 414 of the Penal Code;

(7) persons accused of an offence under Chapter XII, Penal Code, relating to counterfeit coin, and persons accused of any other offence relating to the same coin, or of abetment or attempt to commit such offence;

(8) A number of persons not falling within (1) to (7) charged with separate offences may if they apply in writing to be tried together be tried accordingly, provided the Magistrate or Court of Session is of opinion that they will not be prejudiced thereby. In *Balbir v. State of Haryana,* AIR 2000 SC 11 , the Supreme Court explained the circumstances of the applicability of the rule (s. 223).

In *R. Dinesh Kumar v. State,*[81.] the Supreme Court answered the question as to when a person could appear to have committed an offence be tried together with the accused already facing trial. It was held that where several persons are alleged to have committed several separate offences, which, however, are not wholly unconnected,

then there may be a joint trial unless such joint trial is likely to cause either embarrassment or difficulty to the accused in defending themselves.

Withdrawal of charges on conviction.—When a conviction takes place on one out of several heads of a charge, the complainant, or the prosecuting officer may, with the consent of the Court, withdraw the remaining charges, or the Court itself may stay inquiry into such charges. Such withdrawal has the effect of an acquittal on such charges, unless the conviction be set aside, in which case the Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry of the charges so withdrawn (s. 224).

Chapter XVIII.—Trial before a Court of Session

1. The trial is conducted by the Public Prosecutor (s. 225).

2. He opens his case by describing the charge and stating by what evidence he proposes to prove the guilt of the accused (s. 226).

3. The Judge may discharge the accused if on consideration of the record of the case and documents submitted, and hearing submissions of the accused and the prosecution, he considers there is no sufficient ground. He records his reasons for discharge. *Dilwar Babu Kurane v. State of Maharashtra,*[82.] discharge only when the court is certain that there is no prospect of conviction (s. 227).

4. If the Judge is of opinion that the case is not exclusively triable by him, he may frame a charge and 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 Judicial Magistrate of the first class on a specified date. The scope of inquiry at the time of framing of charge has been explained by the Supreme Court in *Suresh v. State of Maharashtra*.[83.]

5. Otherwise, he frames a charge against the accused which is read and explained to the accused.

6. The accused is then asked if he pleads guilty or claims trial (s. 228). If he pleads guilty, the Judge records the plea and may convict him (s. 229).

7. If he claims to be tried or refuses to plead or does not plead or he is not convicted u/s. 229, the Judge fixes a date for examination of witnesses (s. 230).

8. On the date so fixed, the Judge takes evidence produced by the prosecution (s. 231). Procedure to be followed was explained by the Supreme Court in *Bipin Shantilal Panchal v. State of Gujarat*, AIR 2001 SC 1158 .

9. If after the prosecution evidence, examination of the accused and hearing the prosecution and the defence, the Judge considers that there is no evidence that the accused committed the offence, he records an order of acquittal (s. 232).

10. If not, he calls on the accused to enter on his defence. The Judge files the written statement, if any, put in by the accused and issues process for compelling attendance of witness or production of document or thing applied for by the accused (s. 233).

11. When examination of defence witnesses is complete, the Public Prosecutor sums up his case and the defence gives its reply; if the defence raises a point of law, the prosecution may, with the permission of Court, reply thereto (s. 234).

12. After hearing the argument and points of law, the Judge delivers his judgment. If he convicts the accused, he hears him on question of sentence and passes sentence on him [unless he proceeds u/s. 360—release on probation or after admonition] (s. 235). In *State of Maharashtra v. Sukhdeo Singh,*[84.] where there were confessions and no plea for lesser sentence, no prejudice was caused by pronouncing the conviction and death sentence on the same day. Nature of function of sentencing was explained by the Supreme Court in *Dadu v. State of Maharashtra,* 2000 CrLJ 4619 (SC).

There is no mandate in s. 235(2) of Cr.P.C. to fix separate date for hearing on sentence. It depends on the facts and circumstances as to whether a separate date is required for hearing on sentence or parties feel convenient to argue on sentence on the same day. Had any party pressed for separate date for hearing on the sentence, or both of them wanted to be heard on some other date, situation could have been different. In the present case, the parties were heard on sentence by both the courts below, and finally by this Court, as is apparent from the judgment under review. As such, merely for the reason that no separate date is given for hearing on the sentence, the Review Petition cannot be allowed.[85.]

13. In case of previous conviction alleged by the prosecution and denied by the accused, the Judge, only after convicting the accused, takes evidence of such previous conviction and records his finding thereon (s. 236).

Procedure in cases of defamation of public servants.—1. The Judge taking cognizance of an offence u/s. 199(2) follows the procedure for the trial of warrant cases instituted otherwise than on a police report.

2. The person against whom the offence is alleged is examined as witness for the prosecution (unless the Court of Session for reasons recorded in writing otherwise directs).

3. The trial is held in camera if either party so desires or the Court so thinks fit.

4. If the Judge discharges or acquits the accused, the Judge asks the person (except the President, the Vice-President, the Governor of a State or the Administrator of a Union territory) against whom the offence is alleged to have been committed to show cause why he should not pay compensation to the accused.

5. If the Court is not satisfied with the cause shown, it awards compensation to the accused not exceeding Rs. 1,000.

6. The person may appeal against the order of compensation to the High Court and the compensation is not paid before the period of appeal has elapsed or appeal is decided (s. 237).

Chapter XIX.—Trial of Warrant-Cases by Magistrates

A. Cases instituted on police report.—Where a case is instituted on a police report, the Magistrate has to satisfy himself that the documents referred to in s. 207 have been furnished to the accused (s. 238). If after considering the police report, the documents referred to in s. 173 and after examining the accused and after hearing the prosecution and the accused the Magistrate considers the charge against the accused to be groundless, he shall discharge him.[86.] If the Magistrate comes to the opinion that the accused has committed an offence which he is competent to try, he shall frame a charge. The charge shall be read and explained to the accused, and he shall be asked whether he is guilty or claims to be tried (s. 240). If the accused pleads guilty, the

Magistrate shall record the plea and the accused may be convicted thereon (s. 241). If he refuses to plead, or does not plead, or claims to be tried or is not convicted by the Magistrate u/s. 241, the Magistrate shall supply in advance to the accused, the statement of witnesses recorded during investigation by the police and shall fix a date for the examination of witnesses. On that date, the Magistrate shall take evidence which may be produced by the prosecution. The Magistrate may permit cross-examination of any witness to be deferred until any other witness has been examined, or call any witness for further cross-examination (s. 242). The accused shall then be called upon to enter upon his defence and produce his evidence. If the accused puts in any written statement, the Magistrate shall file it with the record. If the accused, after entering upon his defence, applies to the Magistrate to issue any process for calling any witness for examination or cross-examination or the production of any document or thing, the Magistrate shall issue such process unless he considers that such application is made for the purpose of vexation or delay or for defeating the ends of justice. If the accused has already cross-examined any witness before entering on his defence, attendance of such witness is compelled only if the Magistrate thinks it to be in the interests of justice. The Magistrate may, before summoning any witness, require that reasonable expenses incurred by the witness in attending the Court be deposited (s. 243).

B. Cases instituted otherwise than on police report.—(1) In a case instituted otherwise than on a police report, when the accused appears or is brought before a Magistrate, the Magistrate hears the prosecution and takes evidence in support of the prosecution. The Magistrate summons witnesses (s. 244).

(2) After taking evidence if he finds that no case against the accused has been made out, he discharges him. He may discharge the accused at any previous stage, after recording his reasons, if the charge is groundless (s. 245).

(3) If he is of opinion that there is ground for presuming that the accused has committed an offence which he is competent to try and which he can adequately punish, he frames a charge against the accused.

(4) The charge is read and explained to the accused, and he is asked whether he is guilty or has any defence to make. If he pleads guilty, the Magistrate records the plea, and may convict him.

(5) If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted on his plea of guilty, he is required to state whether he wishes to cross-examine any of the witnesses for the prosecution. The witnesses named by him are recalled for cross-examination and re-examination. Any other remaining witnesses for the prosecution are also examined (s. 246).

(6) The accused is then called upon to enter upon his defence and produce his evidence. If the accused puts in any written statement, it is filed with the record. If the accused applies for process for compelling the attendance of witnesses for giving evidence or production of any document or thing, the Magistrate issues the process unless he considers that such application is made for vexation or delay or for defeating the ends of justice. Such ground is recorded in writing (s. 247).

C. Conclusion of trial.—If the Magistrate finds the accused not guilty, he records an order of acquittal and, when he finds the accused guilty, sentences him according to law after hearing the accused on the question of sentence. If a previous conviction is charged, then the Magistrate, *after convicting the accused*, takes evidence with regard to such previous conviction (s. 248).

If the complainant is absent on the day of hearing, and the offence (a) is lawfully compoundable, or (b) is not a cognizable offence, the Magistrate may, at any time

before the charge is framed, discharge the accused (s. 249).

Compensation in case of accusation without reasonable cause.—If in a case instituted upon complaint or on information given to the police officer or to the Magistrate, (1) the Magistrate discharges or acquits the accused and (2) is of opinion that there was no reasonable ground for accusation, he may either (a) call upon the complainant or the informer, if he be present, forthwith to show cause why he should not pay compensation to the accused or, (b) if he be absent, may direct issue of summons to appear before him and similarly to show cause. If the Magistrate is not satisfied with the cause shown, he orders payment of compensation not exceeding the amount of fine he is competent to impose, or, in default of payment of fine, suffer imprisonment up to 30 days. Provisions of ss. 68 and 69 of the Penal Code apply to such order. The person so ordered is, however, not exempt from civil liability, but the amount ordered to be paid is taken into consideration in the subsequent civil suit. The order of a Magistrate of the second class awarding compensation above Rs. 100 is subject to appeal, and it is not paid until appeal period has elapsed or appeal decided. These provisions apply to summons cases also.[87.]

Chapter XX.—Trial of Summons-Cases by Magistrates

Trial of summons cases.—(1) The particulars of the offence with which the accused is charged are stated to him, and he is asked whether he pleads guilty or has any cause to show. It is not necessary to frame a formal charge (s. 251).

(2) If he pleads guilty, his admission is recorded in his own words, and he may be convicted (s. 252).

(3) If a summons has been issued u/s. 206 (cases of petty offences), the accused may plead guilty and send the specified amount by post, or he may through his pleader do so. The Magistrate convicts him on his plea and adjusts fine so transmitted as fine in the case (s. 253).

(4) If the accused does not admit, or if the Magistrate does not convict, the Magistrate hears (a) the prosecution and takes evidence in support of the prosecution, and (b) hears the accused and takes evidence for the defence. The Magistrate, on the application of the prosecution or the accused, may issue a summons to any witness, and require that his expenses may be deposited in Court (s. 254).

(5) If the Magistrate, upon taking evidence referred to in s. 254 and such further evidence on his own motion, finds the accused not guilty, he records an order of acquittal.

(6) If he does not proceed u/s. 325 (for severer sentence) or s. 360 (to release on probation for good conduct), he passes sentence if he finds the accused guilty. [The Magistrate may convict the accused of the offence proved on facts to have been committed, whatever may be the complaint if the accused is not thereby prejudiced (s. 255).]

(7) If the complainant does not appear, the Magistrate acquits the accused, unless he adjourns the hearing. Where the Magistrate is of opinion that the personal attendance of a complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. These provisions may apply also in case of death of the complainant (s. 256).

(8) Before a final order is passed, the complainant may withdraw the case on satisfying the Magistrate that there are sufficient grounds for doing so. The accused is thereupon

acquitted. Prerequisites for permitting withdrawal were stated by the Supreme Court in *Provident Food Inspector v. Madhusudana Chaudhury.*[88.]

(9) In a case instituted otherwise than upon complaint, a Judicial Magistrate of the first class, or any other Judicial Magistrate with the sanction of the Chief Judicial Magistrate may, for reasons recorded, stop the proceedings at any stage without pronouncing any judgment. Where such stoppage is made after recording of evidence of the principal witnesses, a judgment of acquittal is pronounced; otherwise, the accused is released (s. 258).

Compensation.—*See* under warrant case.

Power of Court to convert summons cases into warrant cases.—In case of offence punishable with imprisonment above six months, the Magistrate may, in the interests of justice, follow the warrant case procedure and may recall any witness already examined (s. 259).

Chapter XXI.—Summary Trials

Summary trials.—The Chief Judicial Magistrate, the Metropolitan Magistrate and any Magistrate of the first class specially empowered by the High Court may try in a summary way the following offences:—

(1) offences not punishable with death, imprisonment for life, or imprisonment exceeding two years;

(2) theft (ss. 379, 380 and 381 of Penal Code) where the value of property does not exceed Rs. 2,000;

(3) receiving or retaining stolen property where its value does not exceed Rs. 2000;

(4) assisting in the concealment or disposal of stolen property where its value does not exceed Rs. 2,000;

(5) offences u/s. 454 (lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment) and s. 456 (lurking house-trespass or house-breaking by night), Penal Code;

(6) insult with intent to provoke a breach of the peace and criminal intimidation punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(7) abetment of any of the foregoing offences;

(8) attempt to commit any of the foregoing offences; and

(9) offences u/s. 20 of the Cattle Trespass Act, 1871.

In a summary trial, if it appears to the Magistrate that it is undesirable to try the case summarily, he recalls witnesses who may have been examined and proceeds to hear the case in the ordinary manner (s. 260). The High Court may confer power of summary trial on second class Magistrate in case of offences which are punishable with fine only or with imprisonment not exceeding six months with or without fine and abetment or attempt to commit any of such offences (s. 261).

The following procedure is followed in summary trials:—

(1) The procedure prescribed for summons-cases is followed.

(2) No sentence of imprisonment exceeding three months is passed (s. 262).

(3) The Magistrate enters in the prescribed form the following particulars:— (1) the serial number, (2) the date of the offence, (3) the date of the report or complaint, (4) the name of the complainant, (5) the name, parentage and residence of the accused, (6) the offence complained of and the offence proved and the value of property in cases specified in cls. (ii), (iii) and (iv) of s. 260(1), (7) the plea of the accused and his examination, (8) the finding, (9) the sentence or final order and (10) the date of the termination of the proceedings (s. 263).

(4) In every case tried summarily where the accused does not plead guilty, the Magistrate has to record the substance of the evidence and judgment containing a statement of the reasons for the finding in brief (s. 264).

(5) The record and judgment are written in the language of the Court. The High Court may authorise the Chief Judicial Magistrate to employ an officer to prepare the record or judgment; such record or judgment is signed by the Magistrate (s. 265).

Chapter XXIA.—Plea Bargaining

Plea Bargaining.—The disposal of cases by the method of 'plea bargaining' is an alternative method to deal with the huge arrears of criminal cases. "Plea-bargaining" means pre-trial negotiations between the accused and prosecution, during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution.[89.]

Application of the Chapter.—

This Chapter applies in respect of an accused against whom—

(a) the report has been forwarded by the officer-in-charge of the police station u/s. 173, alleging commission of an offence other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided; or

(b) a Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses u/s. 200, issued the process u/s. 204.

This chapter has no application where the alleged offence affects the socio-economic condition of the country or has been committed against a woman, or a child below the age of fourteen years. It is for the Central Government to determine by notification the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country (s. 265A).

A person accused of an offence can file an application for plea bargaining in the Court in which such offence is pending for trial. After receiving the application, the Court has to issue a notice to the Public Prosecutor or the complainant of the case, and to the accused to appear on the date fixed for the case. The Court has to examine the accused *in camera*, to satisfy itself that the accused has filed the application voluntarily. If the Court is satisfied that the application has been filed by the accused

voluntarily, the Court provides time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case (s. 265B). It is the duty of the Court to ensure, throughout such process of working out a satisfactory disposition of the case, that it is completed voluntarily by the parties participating in the meeting and if the victim of the case or the accused, as the case may be, so desires, he may participate in such meeting with his pleader engaged in the case (s. 265C). Where a mutually satisfactory disposition is worked out between the parties, a report of the same is to be submitted before the Court. The report is to be signed by the Presiding Officer of the Court and all the parties who participated in the meeting. If no such disposition has been worked out, then the Court has to record such observation and proceed further with the case from the stage when the application for plea bargaining was filed (s. 265D).

Where a satisfactory disposition of the case is worked out u/s. 265D, it is the duty of the Court to dispose of the case and award the compensation to the victim and hear the parties on the quantum of the punishment. If the Court finds that minimum punishment under the law has been provided for the offence committed by the accused, it may sentence the accused to half of such minimum punishment (s. 265E). The judgment delivered by court in terms of s. 265E has to be in open court and signed by the presiding officer (s. 265F). The judgment delivered by the Court in terms of disposal of case u/s. 265E is final and no appeal (except the Special Leave Petition under Art. 136 and writ petition under Arts. 226 and 227 of the Constitution) can be filed in any Court against such judgment (s. 265G). Court shall have for discharging its functions under this Chapter all the powers in respect of bail, trial of offences and other matters relating to the disposal of a case in such Court under this Code (s. 265H). The statements or facts stated by an accused in an application for plea bargaining filed u/s. 265B cannot be used for any other purpose except for the purpose of plea bargaining (s. 265K).

Chapter XXIA does not apply to any Juvenile or child as defined in sub-cl. (k) of s. 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (s. 265L).

Chapter XXII.—Attendance of Persons Confined or Detained in Prisons

If it appears to a criminal Court (a) that a person detained or confined in prison should be before the Court to answer to a charge of an offence or for proceeding against him; or (b) it is necessary for the ends of justice to examine him as witness, it requires the officer-in charge of jail to produce such person before the Court. In case such order is by a Magistrate of the second class, it requires countersignature, of the Chief Judicial Magistrate (s. 267). The State Government may order that such persons shall not be so removed having regard to the following grounds: (i) the nature of the offence and the grounds on which the order of detention has been made; (ii) the likelihood of disturbance of public order in case of such removal and (iii) the public interest generally (s. 268).

The officer-in-charge of jail may if the person (1) is unfit to be removed from jail because of sickness; (2) is under committal for trial or under remand [provided the Court is more than 25 kilometres distant from the prison]; (3) is in custody for a period which expires before compliance with the order of the Court can be had or (4) is one in respect of whom an order has been made u/s. 268, abstain from carrying out the order of the Court and send to the Court a statement of his reasons for so doing (s. 269).

Otherwise, the prisoner is brought in custody and kept in custody in or near the Court till he has been examined or till the Court authorises to take him back (s. 270).

This Chapter is without prejudice to the power of the Court to issue commission for examination as witness (s. 271).

[**Note.—**In this Chapter, "detained" means detained under any law of preventive detention, and "prison" includes a place declared by the State Government as jail and any reformatory, Borstal or other institution of like nature (s. 266).]

Chapter XXIII.—Evidence in Inquiries and Trials

Language.—The State Government determines the language of the Court, other than that of the High Court (s. 272).

A. Mode of taking and recording evidence.—Evidence is taken in presence of the accused or of his pleader (s. 273).[90.] However, when evidence of a woman below the age of eighteen years who was alleged to have been raped or subject to any other sexual offence is being recorded, then court shall take measures to ensure that the accused does not confront the woman, and at the same time, his right of cross-examination is not ignored.

(I) **Summons cases and inquiries.—**The Magistrate makes a memorandum in the language of the Court of the substance of the evidence of each witness—

(1) in all summons cases;

(2) in all inquiries u/ss. 145 to 148 (disputes as to immovable property); and

(3) in all proceedings u/s. 446, otherwise than in the course of trial.

The memorandum is written and signed by the Magistrate with his own hand. If the Magistrate is prevented from making it, he records the reason of his inability to do so and causes it to be made from his dictation in open Court and signs it (s. 274).

(II) **Warrant cases.—**In warrant cases tried before a Magistrate, the evidence of each witness is taken down in writing either by the Magistrate or from his dictation in open Court or in his presence and hearing and under his personal direction and superintendence, and is signed by him. The evidence of a witness may also be recorded by audio-video electronic means in the presence of an advocate of the accused person. Where the Magistrate does not take down the evidence in writing himself, he records a certificate of his reasons for inability. Evidence is taken down in the narrative form, but the Court may take down any particular question and answer (s. 275).

(III) **Record in trial before Court of Session.—**The evidence is taken down in writing either (1) by the Presiding Judge himself, or (2) by his dictation or under his direction and superintendence, in open Court. It is in the form of a narrative; it may, in the discretion of the Presiding Judge, be taken down in the form of narrative. It is signed by the Judge (s. 276).

Language of record of evidence.—Both in warrant cases and in trial before the Court of Session, the evidence if given in the language of the Court, it is so taken down; if given in any other language, if practicable, it is taken down in such language; if not, a true translation is prepared as the examination proceeds. If it is taken down in any language other than the language of the court, a true translation in the Court language is prepared as soon as practicable. In both cases, such translation is signed by the Magistrate or the Judge (s. 277).

Procedure when evidence completed.—Both in warrant cases and in trial before Court of Session, the evidence of each witness is read over to him in the presence of the accused or his pleader. If the witness denies the correctness of any part of the evidence, the Magistrate or Judge may correct the same or make a note of the objection adding his own remarks. If the witness does not understand the language in which the evidence is taken down, the evidence is interpreted to him (s. 278). When any evidence is given in a language not understood by the accused, or when he appears by pleader, not understood by his pleader, it is interpreted to the accused or his pleader in open Court in a language understood by him (s. 279).

Demeanour.—The Sessions Judge or a Magistrate records such remarks as he thinks material respecting the demeanour of a witness whilst under examination (s. 280).

Examination of accused.—A Metropolitan Magistrate makes a memorandum of the substance of evidence in the language of the Court and signs it. When the accused is examined by any Magistrate (other than a Metropolitan Magistrate), the whole of such examination, including every question and answer, is recorded in the language in which he is examined, or in the Court language, and such record is shown or read to him, or interpreted to him, and he is at liberty to explain or add to his answers. It is signed by the accused and by the Magistrate or Judge who certifies under his own hand that the examination was made in his presence and hearing and that the record contains a full and true account of the statement made by the accused. Where the examination is not recorded by the Magistrate or Judge himself, it may also be taken down by an officer of the Court under his direction and superintendence.

[This procedure does not apply to summary trials] (s. 281).

An interpreter is bound to state true interpretation (s. 282).

(IV) Record of evidence in High Court.—The High Court by general rule prescribes the manner in which evidence is taken down in cases coming before it (s. 283).

B. Commission for examination of witnesses.—When it appears to a Court or Magistrate that (1) the examination of a witness is necessary for the ends of justice and (2) that the attendance of such witness cannot be procured without an amount of (a) delay, (b) expense, or (c) inconvenience, which would be unreasonable, the Court or the Magistrate may dispense with such attendance and may issue a commission for the examination of such witness. Where the examination of the President, Vice-President or Governor or the Administrator of a Union Territory as a witness is necessary, a commission shall be issued for the examination of such a witness. The Court while issuing commission for examination of a prosecution witness may direct reasonable expenses including pleader's fees of the accused to be paid by the prosecution (s. 284).

(i) If the witness is within the territories to which this Code extends, the commission is directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate of the place where the witness is to be found; (ii) if the witness is in India but in a State or in an area to which this Code does not extend, the commission is directed to such Court or officer as may be specified by the Central Government; (iii) if the witness is in a country or place outside India and if arrangements have been made by the Central Government with the Government of such country or place for taking of evidence of witnesses in relation to criminal matters, the commission is directed to such Court or officer and sent to such authority as may be prescribed by the Central Government (s. 285).

The Chief Metropolitan Magistrate or the Chief Judicial Magistrate or such Metropolitan or Judicial Magistrate appointed by him in this behalf (a) proceeds to the place where the witness is or (b) summons the witness before him and takes down his evidence as in warrant cases (s. 286).

Parties may examine witness.—The parties to the proceeding in which a commission is issued may forward any interrogatories in writing which are relevant to the issue, and the Magistrate, or Court or officer examines the witness upon such interrogatories. Any such party may appear before such Magistrate, Court or officer by pleader or in person and may examine, cross-examine or re-examine the witness (s. 287).

Return of commission.—After any commission has been executed, it is returned, with the deposition of the witness, to the Court or Magistrate issuing the commission, and the commission, the return and the deposition are open to inspection of the parties and may, subject to all just exceptions, be read in evidence in the case by either party and form part of the record. The deposition, if it satisfies the conditions of s. 33, Evidence Act, may be received in evidence at any subsequent stage of the case before another Court (s. 288).

Where commission is issued, the inquiry, trial or proceeding may be adjourned till the commission is executed and returned (s. 289). The above provisions about the execution and return of commissions apply also to commissions issued by (i) Court in India in those areas to which this Code does not extend, or (ii) by Court outside India having authority under the law of their country to issue commissions for the examination of witnesses in criminal matters (s. 290).

Special rules of evidence.—1. Deposition of a medical witness.—The deposition of a Civil Surgeon or medical witness, (a) taken and attested by a Magistrate in the presence of the accused, or (b) taken on commission, may be given in evidence in any inquiry, trial or proceeding, although the deponent is not called as a witness. The Court may, if it thinks fit, and shall on application by the accused or the prosecution summon and examine the deponent (s. 291).

2. Evidence of officers of Mint.—Documents purporting to report on any matter or thing submitted to any Officer of any Mint or any Note Printing Press or any Security Printing Press or any Forensic Department or Division of Forensic Science Laboratory or any Government Examiner of Questioned Documents or any State Examiner of Questioned Documents for examination may be given in evidence in any inquiry, trial or other proceeding. The Court may summon and examine such officer, but he shall not be summoned to produce any record on which his report is based. Such officer is not permitted to give any evidence derived from unpublished official record or disclose the nature or particulars of test applied in course of examination of a document or thing except with the permission of the General Manager or any officer in charge of such Mint or Note Printing Press *etc*. Security press includes office of the Controller of Stamps and Stationery (s. 292).

3. Report of Government Scientific Experts.—The report of any Chemical or Assistant Chemical Examiner to Government, or the Chief Controller of Explosives or the Director of Finger Print Bureau or the Director, Haffkeine Institute, or the Director, Deputy Director or Assistant Director of a Central or a State Forensic Science Laboratory or the Serologist to the Government or any other specified Government scientific expert, upon any matter or thing submitted to him for examination or analysis, may be used as evidence in any inquiry, trial or proceeding. The Court may, if it thinks fit, summon and examine any person as to the subject-matter of his report but, unless the Court expressly directs personal attendance of such officer, he may depute a responsible officer working under him to attend the Court (s. 293).

4. No formal proof of certain documents.—Particulars of documents filed before the Court by the prosecution or defence shall be included by each party in a list in form prescribed by the State Government, and if the genuineness thereof is not disputed, they may be used in evidence in any inquiry, trial or other proceeding without proof of signature of the person purporting to sign the document. The Court can, in its discretion, require proof of such signature (s. 294).

Affidavit relating to conduct of public servant.—When an application is made to a Court in the course of any inquiry, trial or other proceeding, and allegations are made respecting any public servant, the applicant may give evidence of such facts by an affidavit |(s. 295).

Evidence on affidavits.—The evidence of any person which is of a formal character may be given by affidavit and may be read in any inquiry, trial or proceeding. The Court can and must, on the application of the prosecution or accused, summon and examine any person as to the facts contained in his affidavit (s. 296). When a formal witness is to be called has been explained by the Supreme Court in *State of Punjab v. Nath Din*.[91.]

Authorities before whom affidavits to be sworn.—An affidavit shall be confined to and state separately (i) facts which the deponent can prove from his own knowledge and (ii) facts which he has reasonable grounds to believe to be true, stating the grounds for his belief. It is to be sworn or affirmed before (1) any Judge or Judicial or Executive Magistrate or Magistrate; (2) any Commissioner of Oaths appointed by the High Court or Court of Session; or (3) any notary. Scandalous and irrelevant matter in an affidavit is struck out or amended by Court (s. 297).

4. Previous conviction or acquittal.—A previous conviction or acquittal may be proved —

(1) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal took place to be a copy of the sentence or order; or

(2) in case of a conviction,

(i) by a certificate signed by the officer-in-charge of the jail in which the punishment was undergone, or

(ii) by production of the warrant of commitment under which the punishment was suffered.

Evidence as to the identity of the accused with the person convicted or acquitted is essential in every case (s. 298).

5. Evidence where accused has absconded.—If an accused has absconded, and there is no immediate prospect of arresting him, the Court competent to try or commit such person may examine the prosecution witnesses and record their depositions. Such deposition may, on the arrest of the accused, be given in evidence against him in any inquiry or trial, if the deponent is (1) dead, or (2) incapable of giving evidence, or (3) cannot be found, or (4) his attendance cannot be procured without an amount of delay, expense or inconvenience which would be unreasonable (s. 299).

6. Evidence where offender is unknown.—If an offence punishable with death or imprisonment for life has been committed by some unknown person, the High Court or the Sessions Judge may direct a first-class Magistrate to hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any deposition so taken may be given in evidence against a person subsequently accused (1) if the deponent be dead, (2) incapable of giving evidence or (3) is beyond the limits of India (s. 299).

Chapter XXIV.—General Provisions as to Inquiries and Trials

Previous acquittals or convictions.—A person (1) who has once been tried for an offence, (2) by a competent Court, and (3) convicted or acquitted of such offence, (4) is

not, while the such conviction or acquittal remains in force, (5) liable to be tried again for same offence, (6) nor on the same facts for any other offence for which a different charge might have been made u/s. 221(1), or for which he might have been convicted u/s. 221(2). But

(1) a person acquitted or convicted of any offence may be tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him u/s. 220(1);

(2) a person convicted of an offence constituted by any act causing consequences which, together with such act, constituted a different offence from that for which he was convicted, may be tried for such offence if the consequences had not happened, or were not known to the Court to have happened, when he was convicted; and

(3) a person acquitted or convicted of an offence constituted by any acts, may be tried for any other offence constituted by the same acts, if the Court by which he was first tried was not competent to try the subsequent offence with which he is charged.

A person discharged u/s. 258 can be tried for the same offence only with the consent of the Court which discharged him or any other Court to which it is subordinate.

The dismissal of a complaint or discharge of an accused is not an acquittal under this section (s. 300).

Appearance by Public Prosecutors.—The Public Prosecutor or the Assistant Public Prosecutor may appear and plead without a written authority before any Court, and if any private person instructs a pleader, such pleader acts under his direction. Such pleader may, with the permission of the Court, submit written arguments (s. 301).

Permission.—Any Magistrate may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector. No person other than the Advocate General, Government Advocate, Public Prosecutor, or Assistant Public Prosecutor shall be entitled to conduct prosecution without such permission. An officer of police who has taken part in the investigation is not permitted to conduct the prosecution. A person conducting the prosecution may do so personally or by a pleader (s. 302). The scope of private person's participation in the conduct of prosecution has been explained by the Supreme Court in *J.K. International v. State (Govt. of NCT) of Delhi*.[92.]

Right to be defended by pleader.— Every accused person may, as of right, be defended by a pleader of his choice (s. 303). A total stranger to the trial cannot be permitted to question the correctness of the conviction.[93.]

Legal aid.—A Sessions Court can assign a pleader to defend an accused at State expense if (1) the accused is not represented by a pleader or (2) it appears that the accused has not sufficient means to engage a pleader. The State Government may direct the same provisions to apply to any class of trials before other Courts (s. 304).

Corporation or registered society when accused.—A Corporation may appoint a representative for the purpose of any inquiry or trial in cases where the Corporation is an accused person. Such person is appointed either by the managing director of the Corporation or any other person having the management of the affairs of the Corporation. On a statement in writing by the managing director or such person being filed, the Court presumes due appointment, but if any dispute arises in this regard, the Court determines whether the appointment is valid.

Requirements of (1) anything to be done in the presence of the accused, or (2) anything shall be read, stated or explained to the accused are complied with when they are done in respect of such representative. Similarly, the requirement that the accused should be examined is construed as such representative shall be examined (s. 305).

Pardon to accomplice.—Pardon may be tendered in two ways:

1. The Chief Judicial Magistrate, a Metropolitan Magistrate or first class Magistrate may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to any of the following offences, tender a pardon to such person on condition of his making a full and true disclosure of the circumstances relating to the offence and to every other person concerned as principal or abettor—

(1) offence triable exclusively by a Court of Session; (2) offences exclusively triable by a Special Judge appointed under the Criminal Law Amendment Act, 1952; (3) offences punishable with imprisonment of seven years or more.

The power under this section is exercised

(a) where the offence is under investigation, inquiry or trial, by the Chief Judicial Magistrate or a Metropolitan Magistrate;

(b) where it is under inquiry or trial, by the first class Magistrate inquiring into or trying the offence.

The Magistrate records his reasons for tendering pardon and also records whether such person accepted the tender. He furnishes a copy to the accused free of cost. The person accepting a tender of pardon is examined as witness in the Magistrate's Court as well as in the subsequent trial, if any. He is detained in custody, if he is not on bail, till the termination of the trial. Where a person has accepted the tender and has also been examined by the Magistrate taking cognizance, such Magistrate should, without making any further inquiry, commit the case (i) to the Court of Session, (ii) to the Court of the Special Judge or (iii) to the Chief Judicial Magistrate, as the case may be (s. 306).

2. The Court to which the commitment is made may at any time before judgment is passed, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon to such person on the above condition (s. 307).

Non-compliance with conditions of pardon.—The person accepting pardon may be tried for offence in respect of which the pardon was tendered or for any other offence of which he is guilty in respect of the same matter and also for the offence of giving false evidence, if the Public Prosecutor certifies that he has (a) by wilfully concealing any essential thing, or (b) by giving false evidence, not complied with the conditions on which the tender was made. He is not tried jointly with other accused and is entitled to plead that he has complied with the conditions. The prosecution must then prove that such conditions have not been complied with. The statement made by the accused, while accepting the tender of pardon, may be given in evidence against him. But prosecution for giving false evidence in respect of such statement is not entertained without the sanction of the High Court. The Court trying such person shall (a) in the case of a Court of Session, before the charge is read out and explained to the accused, and (b) in the case of a Magistrate, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made. If the accused so pleads, the Court records the plea and proceeds with the trial and finds whether or not the accused

has complied with the conditions of the pardon. If it is found that he has, the Court acquits him (s. 308).

Postponement.—In every inquiry or trial, the proceedings shall be continued from day to day unless the Court thinks an adjournment beyond the next day is necessary for which it should record its reasons. Where the inquiry or trial relates to an offence u/ss. 376 to 376D of IPC, it shall, as far as possible, be completed within a period of two months from the date of filing the charge-sheet. The Court has power to postpone or adjourn any inquiry or trial after taking cognizance of the offence, or commencement of trial if it is necessary and may remand the accused if in custody for fifteen days at a time. When witnesses are in attendance, no adjournment shall be granted without examining them, except for special reasons. The provision does not prohibit the Court from granting adjournments where the interests of justice so demand.[94.] No adjournment shall be granted for the purpose of enabling the accused to show cause against the proposed sentence. Similarly, no adjournment shall be granted at the request of a party, where the circumstances are not beyond the control of the party or on the ground that the pleader of the party is engaged in another Court. The Court may dispense with the examination-in-chief or cross-examination of a witness and record his statement where the witness is present in the Court, but the party or his pleader is not present or the party or his pleader, though present in the Court, is not ready to examine or cross-examine the witness. The Court may grant payment of costs by the prosecution or the accused while granting adjournment or postponement (s. 309). *Ramdeo Chauhan v. State of Assam,* AIR 2001 SC 2231 .

Remand.— Where the accused is remanded as above, the period of remand does not exceed fifteen days at a time. Remand may be made if there is evidence to raise a presumption that the accused may have committed an offence and it appears that further evidence may be obtained (s. 309). Section 309(1) of the Code of Criminal Procedure has been amended by the Criminal Law (Amendment) Act, 2018. The change has been made so as to bring the newly inserted sections 376AB, 376DA and 376DB of the Indian Penal Code within the purview of section 309.

Local inspection.—A Judge or Magistrate may, after notice to the parties, visit and inspect any place in which an offence is committed, or any place which it is necessary to view for appreciating the evidence given.

He must without delay record a memorandum of any relevant facts observed at such inspection. Such memorandum forms part of the record, and its copy is furnished free of cost to the Prosecutor, complainant, the accused or any other party to the case if he so desires (s. 310).

Power to examine witness.—Any Court may summon any person as a witness, or examine any person in attendance, or recall and re-examine any person if his evidence appears to it essential to the just decision of the case (s. 311).

Specimen signatures or handwriting.—Any Magistrate of the first class may issue an order against any person including an accused to give his specimen signatures or handwriting when the same is necessary for the purposes of any investigation or proceeding under the Code.

Expenses of a complainant or witness.—A Court may order payment, on the part of Government, of the reasonable expenses of a complainant or witness (s. 312).

Examination of the accused.—In every inquiry or trial, the Court (a) may at any stage put questions to the accused to explain any circumstances appearing in the evidence against him, and (b) it shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. If the personal attendance of an accused is dispensed with in a summons case, it may

dispense with his examination. No oath is administered to him. The accused does not render himself liable to punishment by (a) refusing to answer such questions, or (b) giving false answers to them, but the answers may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry or trial for any other offence which such answers may tend to show he has committed. The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions to be put to the accused (s. 313).

Oral arguments and memoranda thereof.—As soon as evidence is closed, each party addresses oral arguments and also submits memorandum of the arguments concisely under different heads in support of his case. The opposite party is furnished a copy of the memorandum. Unless the Court considers it necessary, no adjournment of proceedings is granted for filing such memorandum. Arguments are regulated by the Court (s. 314).

Accused a competent witness.—An accused shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him. He shall not be called as a witness except on his own request in writing, and his failure to give evidence shall not be made the subject of comment by any party or the Court or give rise to any presumption against him or any person charged with him. A person against whom proceedings u/ss. 98, 107 to 110, or under Chapter IX or Part B, C or D of Chapter X are instituted may offer himself as a witness, but the failure to do so in proceedings u/s. 108, 109 or 110 cannot be made subject of any comment by any party or the Court or raise any presumption against him (s. 315).

No Influence to be used to induce disclosures.—Except as provided in ss. 306 and 307, no influence by means of any promise or threat to an accused shall be used to induce him to disclose or withhold any matter within his knowledge (s. 316).

Trial in absence of the accused.—At any stage of an inquiry or trial, if the Judge or Magistrate is satisfied for reasons to be recorded that the personal attendance of the accused is not necessary or the accused persistently disturbs the proceedings, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with the inquiry or trial, and may subsequently direct the personal attendance of the accused. If the accused is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, after recording reasons, either adjourn such inquiry or trial, or order that such accused be tried separately (s. 317).

Accused not understanding proceedings.—If an accused though not of unsound mind cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial. If such proceedings result in a conviction, the proceedings are forwarded to the High Court, and the High Court passes thereon such order as it thinks fit (s. 318).

Power to proceed against persons appearing to be guilty of offence.—While holding an inquiry or trial if some person other than the accused seems to have committed any offence for which that person can be tried together with the accused, then the Court proceeds against such person. If he is attending the Court, he may be detained for the purpose of inquiry or trial; if not, he may be arrested or summoned. The proceedings in respect of such person shall be commenced afresh and the witnesses reheard; in other respects, the case may proceed as if the person had been an accused when the Court took cognizance (s. 319). The power to summon a person does exist with the Session Judge where his involvement in the commission of the crime *prima facie* appears from the record.[95.] The power of the Court is circumscribed by limitations.[96.]

It has been held by the Supreme Court that since after filing of the charge-sheet, the Court reaches the stage of inquiry and as soon as the Court frames the charges, the trial commences, and therefore, the power u/s. 319(1) Cr.P.C. can be exercised at any

time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of ss. 207/208 Cr.P.C., committal *etc.*, which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the pure sense for it only requires an application of mind rather than a judicial application of mind.[97.]

Compounding of offences.—There are certain offences which may be compounded by the aggrieved persons mentioned in the third column of the Table to sub-s. (1); there are other offences which cannot be so compounded except with the permission of the Court [see sub-s. (2) and Table below it].

(1) When an offence is compoundable, the abetment of or attempt to commit such offence is also compoundable.

(2) (a) When the person who can compound the offence is under eighteen years, or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.

(b) When such person is dead, his legal representative may, with the permission of the Court, compound such offence.

(3) When the accused has been (a) committed for trial, or (b) convicted and an appeal is pending, no composition is allowed without the leave of the Court (i) to which he is committed, or (ii) before which the appeal is to be heard.

(4) The High Court or Court of Session may allow any person to compound any offence which he is competent to compound.

(5) An offence cannot be compounded where the accused because of a previous conviction is liable to enhanced sentence or different kind of sentence.

(6) The composition of an offence has the effect of an acquittal of the accused with whom the offence has been compounded (s. 320).

Withdrawal from prosecution.—Any Public Prosecutor or Assistant Public Prosecutor may, with the consent of the Court, before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any offence, and upon such withdrawal—

(a) if it is made before a charge has been framed the accused is discharged in respect of such offence;

(b) if it is made after a charge has been framed, or when no charge is required, he is acquitted in respect of such offence. Prior consent of the Central Government is necessary for a Public Prosecutor (not being a Prosecutor appointed by the Central Government) in cases of offences (1) against any law relating to a matter to which the executive power of the Union extends, (2) investigated by the Delhi Special Police Establishment, (3) involving misappropriation, destruction of or damage to Central Government property or (4) committed by Central Government servant acting or purporting to act in the discharge of his official duty, for withdrawal from prosecution (s. 321). Withdrawal of prosecutions is not to be mechanically allowed on the basis of the recommendations of a review committee. The Public Prosecutor must satisfy himself that the case in question was fit for withdrawal.[98.]

Transfer of a case by a Magistrate.—If in the course of an inquiry or trial before a Magistrate in any district, it appears to him (i) that he has no jurisdiction to try the case or commit it for trial, or (ii) that the case should be tried or committed for trial by some

other Magistrate, or (iii) that the case should be tried by the Chief Judicial Magistrate, he stays proceedings and submits the case to the Chief Judicial Magistrate, or such other Magistrate as the Chief Judicial Magistrate directs. The Magistrate to whom the case is submitted may, if empowered, try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial (s. 322).

Commitment when necessary.—(1) If in any inquiry or trial it appears to a Magistrate, at any stage before signing the judgment, that the case ought to be tried by the Court of Session, he commits the accused to that Court (s. 323).

(2) When a person who has been convicted of an offence punishable under Chapter XII or XVII, Penal Code, with imprisonment for three years or upwards, is again accused of a similar offence, he may be committed to the Court of Session or sent for trial to the Chief Judicial Magistrate, if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for presuming that he had committed the offence. If the Magistrate is competent to try the case and is of opinion that he can pass an adequate sentence, he need not commit it. Any other person accused jointly with him in the same inquiry or trial is similarly committed or sent for trial unless the Magistrate discharges him (s. 324).

When a Magistrate cannot pass adequate sentence.—If a Magistrate is of opinion, after hearing the evidence, that the accused is guilty and that he ought to

(1) receive a punishment (a) different in kind from, or (b) more severe than that which he can inflict, or

(2) being a second class Magistrate is of opinion that the accused ought to execute a bond u/s. 106,

he may record his opinion and submit the proceedings and forward the accused to the Chief Judicial Magistrate to whom he is subordinate. If there are more accused than one and the Magistrate thinks it necessary to proceed in regard to any of them, then all may be forwarded together. The Chief Judicial Magistrate to whom the proceedings are submitted may examine the parties and recall and examine any witness who has already given evidence, and take further evidence, and pass judgment, sentence or order (s. 325).

Evidence recorded by different Magistrates.—When a Magistrate after hearing and recording the whole or any part of the evidence in an inquiry or trial ceases to exercise jurisdiction and is succeeded by another Magistrate, the latter Magistrate may (1) act on the evidence already recorded or (2) act on the evidence partly recorded by his predecessor and partly by himself.

If the succeeding Magistrate is of opinion that further examination of any witness is necessary, he may resummon him; after further examination, cross-examination and reexamination, the witness shall be discharged. The same provisions will apply when a case is transferred from one Magistrate to another. These provisions, however, do not apply to summary trials or cases where proceedings are stayed u/s. 322 or submitted to superior Magistrate u/s. 325 (s. 326).

Courts to be open to public.—In general, Criminal Courts are open Courts to which the public have access. However, the Presiding Judge or Magistrate may, if he thinks fit, in a particular case, order that the public shall not have access (s. 327). However, the inquiry into and trial of rape or of an offence u/s. 376, s. 376A, s. 376AB, s. 376B, s. 376C, s. 376D, s. 376DA, s. 376DB or 376E of the Penal Code shall be conducted in camera and as far as practicable, by a woman Judge or Magistrate. The Presiding Judge may, however, allow any person to remain in Court. Publication of the proceedings which are held in camera is not lawful except with the permission of the

Court. The ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties (s. 327).

Chapter XXV.—Provisions as to Accused Persons of Unsound Mind

Lunatics.—When a Magistrate holding an *inquiry* has reason to believe that the accused is of unsound mind and, consequently, incapable of making his defence, he

(1) inquires into the fact of such unsoundness,

(2) causes such person to be examined by a Civil Surgeon or a medical officer,

(3) examines the Civil Surgeon or medical officer as a witness, and

(4) reduces the examination to writing.

If the civil surgeon after examination finds the accused to be of unsound mind, he shall refer him to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation. The accused may prefer an appeal before the Medical Board if he feels aggrieved by the information given to the Magistrate by the psychiatric or clinical psychologist. Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with s. 330. If the Magistrate is informed that the accused is suffering from unsoundness of mind and on further inquiry determines that the unsoundness of mind renders the accused incapable of entering defence, he shall record a finding to that effect. The Magistrate shall discharge the accused and deal with him in accordance with s. 330 if after examining the record of evidence produced by the prosecution and after hearing the advocate of the accused, if finds that no *prima facie* case is made out against the accused (s. 328).

If at the *trial* of a person before a Magistrate or Court of Session it appears that such person is of unsound mind and incapable of making his defence, the Magistrate or the Court shall try the fact of such unsoundness and incapacity, and if the Magistrate or the Court is satisfied, the Magistrate or Judge records a finding to that effect and postpones further proceedings. If during the trial the Magistrate or Court of Sessions finds the accused to be of unsound mind, reference shall be made of such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, shall report to the Magistrate or Court whether the person is of unsound mind or not. If the accused is aggrieved by this report, he may prefer an appeal before the Medical Board consisting of head of psychiatry unit in the nearest government hospital and a faculty member in psychiatry in the nearest medical college. If the report finds the accused person to be of unsound mind, the Magistrate or Court shall determine whether unsoundness of mind renders the accused incapable of entering defence and finding to that effect shall be recorded, and the Magistrate or Court shall examine the record of evidence produced by the prosecution hear the prosecution, but without questioning the accused, if the Magistrate or Court finds that no *prima facie* case is made out against the accused, instead of postponing the trial, the accused has to be discharged and dealt with as provided u/s. 330.

However, if the Magistrate or Court finds that a *prima facie* case is made out against the accused, he shall postpone the trial for a period recommended by the psychiatrist or clinical psychologist required for the treatment of the accused.

Also, if the Magistrate or Court finds that a *prima facie* case is made out against the accused and he is incapable of entering defence, he or it shall not hold the trial and

order the accused to be dealt with in accordance with s. 330(s. 329). When an accused is found to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court shall release him on bail whether the case is bailable or not, if the unsoundness of mind or mental retardation does not mandate in patient treatment and his friend or relative undertakes:

(1) to obtain regular out-patient psychiatric treatment from the nearest medical facility and

(2) to prevent him from causing injury to himself or to any other person.

If the case is one in which bail cannot be granted or if an appropriate undertaking is not given, the Magistrate or Court shall order the accused to be kept in a place where regular psychiatric treatment can be provided and shall report the action taken to the State Government. No order for the detention of the accused in a lunatic asylum is to be made otherwise than in accordance with the rules made under the Mental Health Act, 1987. The Magistrate or Court shall further determine whether the release of the accused can be ordered where the accused is found incapable of entering defence u/s. 328 or 329 keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation (s. 330).

The Magistrate or the Court may resume the inquiry or trial if the accused has ceased to be of unsound mind. A certificate of the officer before whom the sureties produce such person to the effect that the accused is capable of making his defence is received in evidence (s. 331).

If the Magistrate or the Court when the accused appears or brought considers him capable of making his defence, the inquiry or trial proceeds; otherwise, he or it proceeds u/s. 328 or 329, and if the accused is found to be of unsound mind, deals with him according to s. 330 (s. 332).

If the accused appears to be of sound mind at the time of inquiry or trial, but the Magistrate is satisfied from the evidence that he committed an act which would be an offence if he had been of sound mind and that he was by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law when he committed it, the Magistrate proceeds with the case. If commitment to Court of Session is necessary, he may do so (s. 333).

When a person is acquitted on the ground that when he committed the offence he was by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law, the finding states specifically whether he committed the act or not (s. 334). If the finding states that he has committed the act, which would have constituted an offence but for the incapacity found, the Court (1) orders such person to be detained in safe custody; or (2) orders him to be delivered to his friend or relative. No order for the detention of the accused in a lunatic asylum is made otherwise than in accordance with the rules made under the Lunacy Act, 1912. No order for delivery of the accused to a friend or relative is made except (i) on an application made by such person and (ii) on security to the satisfaction of the Court (a) regarding proper care of the accused and preventing him from doing injury to himself or others and (b) production of the accused for inspection. The Magistrate or the Court reports to the State Government about action taken (s. 335).

If the Inspector-General of Prisons or any two visitors of a lunatic asylum certify that the person detained (either in jail or in a lunatic asylum) is capable of making his defence, he is taken before the Court and dealt with u/s. 332 (s. 337). If the Inspector-General or visitors certify that he may be released without danger of his doing injury to himself or any other person, the State Government may order him to be released or detained in custody or transferred to a public lunatic asylum (if not already sent). If it

orders the accused to be transferred to an asylum, it may appoint a Commission of a judicial and two medical officers to make an inquiry into his state of mind and report to the State Government which may order his release or detention (s. 338).

When any relative or friend of a person detained u/s. 330 or 335 applies for his delivery, the State Government may order him to be delivered after taking security that the person delivered is

(1) properly taken care of and prevented from doing injury to himself or to any other person, and

(2) produced for the inspection of an officer of Government at such time and place as Government directs, and

(3) if he is detained u/s. 330(2), he is produced when required before the Court.

If the inspecting officer certifies that such person is capable of making his defence, the Court calls upon the relative or friend to produce him before it and proceeds u/s. 332 (s. 339).

Chapter XXVI.—Provisions as to Offences Affecting the Administration of Justice

Procedure in cases mentioned in section 195.—When a Court is of opinion, upon an application made to it or otherwise, that an inquiry should be made into an offence referred to in s. 195(1)(b) (which appears to have been committed) or in respect of a document produced or given in evidence in a proceeding in that Court—

(1) it may, after preliminary inquiry, record a finding to that effect;

(2) it may make a complaint in writing signed by the presiding officer of the Court; [if the Court is a High Court, the complaint is signed by an officer appointed by it];

(3) it forwards the complaint to a first class Magistrate having jurisdiction;

(4) it may take sufficient security for the appearance of the accused before such Magistrate;

(5) if the offence is non-bailable, it may send the accused in custody to such Magistrate; and

(6) it may bind over any person to give evidence before such Magistrate.

The Court to which a civil, revenue or criminal Court is subordinate may complain if the subordinate Court has not (1) made a complaint or (2) rejected an application for the making of such complaint. For meaning of "Court", see s. 195 (s. 340).

The Supreme Court cannot itself assume criminal jurisdiction and convict the accused without trial.[99.] Any person

(1) on whose application any Court (other than a High Court) has refused to make a complaint u/s. 340(1) or s. 340(2), or

(2) against whom such a complaint has been made,

may appeal to a superior Court, and such Court may, after notice to the parties (i) direct the withdrawal of the complaint or (ii) make the complaint. An order under this section and subject to such order, an order u/s. 340 is final (s. 341).

Costs.—Any Court dealing with an application for filing a complaint u/s. 340 or appeal u/s. 341 can grant costs (s. 342).

Procedure.—A Magistrate, as far as may be, deals with a case u/s. 340 or s. 341 as if it were instituted on a police report. He may adjourn hearing, if there is an appeal against the judicial proceeding out of which the case has arisen, until the appeal is decided (s. 343).

Summary procedure in cases of false evidence.—If at the time of delivery of judgment or final order, the Court of Session or First Class Magistrate expresses an opinion that the witness had knowingly or wilfully given false evidence or fabricated false evidence and it is expedient that he should be tried summarily, the Court can take cognizance of the offence and may, after giving an opportunity to him of showing cause, try such offender summarily and sentence him to imprisonment up to three months or to a fine up to Rs. 500 or both. In every such case, procedure for summary trial is followed. Where an appeal or an application for revision is preferred against the decision in which the opinion is expressed by the Court of Session or the First Class Magistrate, the hearing of the case is adjourned until such appeal is decided and, thereupon, the trial will abide by the result of such appeal or revision. Where a Court does not proceed under this section, it can make a complaint u/s. 340 (s. 344).

Contempt cases.—When an offence of

(i) intentional omission to produce a document (s. 175, PC);

(ii) refusal to take an oath (s. 178, PC);

(iii) refusal to answer a question (s. 179, PC);

(iv) refusal to sign a statement (s. 180, PC); and

(v) intentional insult or interruption in a judicial proceeding (s. 228, PC),

is committed in the view or presence of a civil, criminal or revenue Court, the Court may (1) cause the offender to be detained in custody, and (2) before rising take cognizance of the offence and sentence him to fine not exceeding Rs. 200, and, in default, to simple imprisonment up to one month (s. 345).

The Court records the facts constituting the offence, the finding and sentence. In the case of an offence u/s. 228, Penal Code, the record must show,

(1) the nature and stage of the judicial proceeding in which the Court was sitting, and

(2) the nature of the interruption or insult (s. 345).

If the Court thinks (a) that the person committing any of the offences referred to in s. 345 and committed in its presence should be imprisoned, or (b) a fine exceeding Rs. 200 should be imposed upon him, or (c) the case should not be disposed of u/s. 345, it may, (1) after recording the facts and the statement of the accused, (2) forward the case to a Magistrate having jurisdiction to try it, (3) require security for the appearance of the accused before the Magistrate, or (4) if security is not given, forward him in custody to the Magistrate (s. 346). The Court may (1) discharge the offender, or (2) remit the punishment, on his submission to its order or requisition, or on apology being made to its satisfaction (s. 348).

Refusal to answer or produce document.—If a witness or person called to produce a document or thing refuses (1) to answer questions put to him, or (2) to produce any document or thing in his possession or power, and does not offer any reasonable excuse for such refusal, the Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or commit him to the custody of an officer of the Court for a term not exceeding seven days, unless in the meantime he consents to be examined and to answer or to produce the document or thing. If he persists in his refusal, he may be dealt with u/s. 345 or 346 (s. 349).

Summary procedure for non-attendance by a witness.—If any witness being summoned to appear before a Criminal Court at a certain place and time, without just excuse, neglects or refuses to attend or departs from the place where he has to attend before time, the Court may try such witness summarily, after giving him an opportunity of showing cause why he should not be punished, and sentence him to fine not exceeding Rs. 100. The Court shall follow the procedure prescribed for summary trial (s. 350).

Appeals from convictions.—A person sentenced by a Court u/s. 344, 345, 349 or 350 may appeal to the Court to which decrees or orders of such Court are appealable. The Appellate Court may alter or reverse the finding or reduce or reverse the sentence appealed against.

Appeal from a Court of Small Causes lies to the Court of Session.

Appeal from a Registrar or Sub-Registrar deemed to be a Civil Court lies to the Court of Session (s. 351).

Jurisdiction to try offences under section 195.—Except as provided in ss. 344, 345, 349 and 350, no Judge of a Criminal Court or Magistrate, other than a High Court Judge, shall try any person for an offence referred to in s. 195, when it is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding (s. 352).

Chapter XXVII.—The Judgment

Judgment.—The judgment is pronounced in open Court either (1) immediately after trial or (2) at some subsequent time notice whereof is given to the parties or their pleaders. It is done (a) by delivering the whole of the judgment, or (b) by reading it out wholly, or (c) (i) by reading out its operative part and (ii) explaining its substance in language understood by the accused or his pleader. If the judgment is delivered, the shorthand writer takes it down and when he makes transcript the Judge signs every page thereof with the date of delivery. In cases where the judgment or its operative part is read out, it is dated and signed by the Presiding Judge in open Court. If the judgment is not written by the Judge in his own hand, he signs every page of it. If the accused is in custody, he is brought up and if not he is required to attend to hear the judgment. But where his personal attendance has been dispensed with and (1) the sentence is of fine only or (2) he is acquitted, the accused need not be present. In cases where there are more than one accused and one or more of them do not attend the Court, the presiding officer may pronounce judgment notwithstanding their absence. The judgment does not become invalid (1) by reason of absence of a party or his pleader, or (2) any omission to serve or defect in serving either to the parties or their pleaders notice of the date and place of judgment. In cases where only the operative part of the judgment is read out, the judgment or its copy is made available to the parties or their pleaders free of cost. This section does not limit s. 465 (s. 353).

Contents of a judgment.—Except otherwise expressly provided, the judgment

(1) is written in the language of the Court;

(2) contains the points for determination;

(3) contains the decision thereon with reasons;

(4) specifies the offences and the section of law under which the conviction is made and the punishment to which the accused is sentenced;

(5) if it is of acquittal, states the offence of which the accused is acquitted and directs that he be set at liberty.

When it is doubtful under which of two sections, or two parts of the same section, the offence falls, the Court distinctly expresses the same and passes judgment in the alternative.

In the case of a sentence of death, the sentence directs that the accused be hanged by the neck till he is dead.

Where the conviction is for an offence punishable with (1) death, or, in the alternative, with (2) life imprisonment or imprisonment for a term of years, the judgment, in the case of death sentence, states the special reasons for awarding such sentence, and in other cases, the reasons for such sentence. In case of offences punishable for a term of one year or more, where the Court inflicts a sentence of less than three months, it records its reasons for so doing unless it tries the case summarily or imprisons the offender till the rising of the Court. In *Mohd. Chaman v. State (NCT) of Delhi,*[100.] standards and norms for restricting imposition of death sentence explained.

Order for giving security u/s. 117, order for removal of nuisance u/s. 138(2), final order of maintenance u/s. 125, final order u/s. 145 or s. 146 contain (a) the points for decision, (b) the decision itself and (c) the reasons for the decision (s. 354).

Metropolitan Magistrate's Judgment.—Instead of recording a judgment as in s. 354, a Metropolitan Magistrate records the following particulars:

(1) serial number of the case;

(2) date of the commission of the offence;

(3) name of the complainant;

(4) name of the accused and his parentage and residence;

(5) offence complained of or proved;

(6) plea of the accused and his examination;

(7) final order;

(8) date of such order;

(9) in all cases where appeal lies, a brief statement of the reasons for the decision (s. 355).

Previously convicted offenders.—When a person having been convicted

(I) by a Court in India of—

(1) taking gift to recover property of which a person has been deprived (s. 215, IPC),

(2) counterfeiting currency-notes or bank-notes (s. 489A, IPC),

(3) using as genuine, forged or counterfeit currency-notes or bank-notes (s. 489B, IPC),

(4) possession of forged or counterfeit currency-notes or bank-notes (s. 489C, IPC),

(5) making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes (s. 489D, IPC),

(6) Criminal intimidation punishable with imprisonment for a term which may extend to seven years or with fine or with both (s. 506, IPC),

(7) an offence punishable under Chapter XII (offences relating to Coin and Government Stamps) or Chapter XVI (offences affecting the human body)or Chapter XVII (offences against Property) of the Penal Code with imprisonment for three years or upwards, is again convicted of any such offence punishable with imprisonment for three years or upwards by any Court other than that of a Magistrate of second class, such Court may, at the time of passing sentence of imprisonment, order that his residence, and any change of, or absence from, such residence, after release, be notified for a term not exceeding five years from the expiration of the sentence. [The provisions are applicable to cases of conspiracy to commit, abetment of or attempt to commit, such offences].

If the conviction is set aside on appeal, the order becomes void. Such order may also be made by an appellate Court, or High Court or Court of Session in revision.

The State Government may make rules relating to residence of released convicts. Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated

(s. 356).

Expenses or compensation out of fine.—When a Court imposes a fine or a sentence of which fine forms a part or confirms such sentence, it may, when passing judgment, order the whole or any part of the fine to be applied—

(1) in defraying expenses properly incurred in the prosecution;

(2) in payment of compensation for any loss or injury caused by the offence to any person, when compensation is recoverable in a civil suit; [*Rachhpal Singh v. State of Punjab,* AIR 2002 SC 2710], compensation should be commensurate with the capacity of the accused to pay and also other facts and circumstances of the case like the gravity of the offence, needs of the victim's family.

(3) when any person is convicted of causing the death of another person, or abetting such offence, in paying compensation to persons entitled to recover damages under the Fatal Accidents Act, 1855;

(4) when a person is convicted of theft, criminal misappropriation, criminal breach of trust, or cheating, or having dishonestly received or retained, or having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss if such property is restored to the person entitled thereto.

No such payment is made, in a case subject to appeal, until the period of appeal has elapsed, or if an appeal is presented, till it is decided.

Even while imposing a sentence of which fine does not form a part, the Court may order the accused to pay compensation to a person who has suffered loss or injury by reason of the act for which the accused is sentenced. In a case involving abduction and suspected killing of certain persons by the police, a compensation of Rs. 1.50 lakhs were ordered to be paid to the victims' representatives within 2 weeks.[101.]

At the time of awarding compensation in a subsequent civil suit relating to the same matter, the Court takes into account any sum paid as compensation by a Criminal Court (s. 357).

Victim compensation scheme.—The State Government is required to prepare, in coordination with the Central Government, a scheme called "victim compensation scheme" for the purpose of compensation to the victim or his dependants who have suffered loss or injury as a result of the crime (s. 357A).

Compensation so payable by the State Government has to be in addition to the fine payable to the victim u/s. 326A s. 376AB, s. 376D, s. 376DA and s. 376DB of the IPC (s. 357B). It is incumbent upon any hospital whether public or private to provide first-aid or medical aid, as is required, to the victims of offences committed u/ss. 326A, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the IPC, free of cost. Further, the hospital is required to immediately inform the police about such an incident (s. 357C).

Compensation to persons groundlessly arrested.—When a person causes a police officer to arrest another and the Magistrate thinks that there was no sufficient ground for causing the arrest, he may award compensation, not exceeding Rs. 1000, to be paid by such person to the person arrested for his loss of time and expenses. If more persons than one are arrested, the Magistrate may award such compensation to each of them. The compensation may be recovered as fine, and if it is not recovered, the defaulter is sentenced to simple imprisonment up to thirty days (s. 358).[102.]

Recoupment of costs in non-cognizable cases.—In any complaint of a non-cognizable offence to the Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

(1) the cost incurred by him either in whole or in part; and

(2) may further order that, in default of payment, simple imprisonment is inflicted up to thirty days.

Costs may include process fees, expenses for witnesses and pleader's fees.

An appellate Court, or the High Court or Court of Session in revision may make an order under this section (s. 359).

First offenders.—Release of offenders on probation of good conduct.—When

(1) a person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for not more than seven years, or

(2) a person under twenty-one years of age, or a woman, is convicted of an offence not punishable with death or imprisonment for life,

and no previous conviction is proved,

the Court may, having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed,

instead of sentencing him,

direct that he be released on entering into a bond, with or without sureties, to appear and receive sentence when called upon within three years, and in the meantime to keep the peace and be of good behaviour.

When such person is convicted by a second class Magistrate not specially empowered, the Magistrate, if he is of opinion that the above provision should apply, must record his opinion and submit the proceedings to a first class Magistrate and forward the accused to, or take bail for his appearance before, such Magistrate.

Where proceedings are submitted to a first class Magistrate, such Magistrate may pass such sentence or order as he might have passed or made if the case had originally been heard by him. If he thinks further inquiry or additional evidence necessary, he may do so himself or direct it to be done (s. 360).

Release with admonition.—When a person is convicted of (1) theft, (2) theft in a building, (3) misappropriation, (4) cheating or (5) any offence under the Penal Code punishable with imprisonment up to two years or fine only,

and no previous conviction is proved against him,

the Court may, having regard to the age, character, antecedents, physical or mental condition of the offender, or trivial nature of the offence or any other extenuating circumstances,

instead of sentencing him to any punishment,

release him after admonition.

An order releasing an offender (a) on probation of good conduct, or (b) with admonition, may be made by an appellate Court or High Court or Court of Session in revision. The High Court or the Court of Session may on appeal or in revision set aside such an order and in lieu thereof pass sentence which might have been inflicted by the Court which convicted the offender.

The Court before directing the release of the offender on good conduct must be satisfied that he or his surety has a fixed place of abode or regular occupation in the place (a) for which the Court acts, or (b) in which the offender is likely to live during the period named for the observance of the conditions.

If the Court which (a) convicted the offender, or (b) could have dealt with him 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 and may remand him in custody or admit him to bail conditioned on his appearing for sentence. It may, after hearing the case, pass sentence (s. 360).

Special reasons in judgment in certain cases.—The Court, where it does not apply the provisions regarding release on good conduct or on admonition or the provisions of the Probation of Offenders Act, 1958, or the Children Act, 1960, where it could have applied them records its special reasons for not doing so (s. 361).

Court not to alter judgment.—No Court alters or reviews its judgment or final order after signing it except to correct clerical or arithmetical error (s. 362).[103.]

Copy of judgment—(1) **To accused.—**A copy of the judgment is given to an accused sentenced to imprisonment free of cost, immediately after its pronouncement. A certified copy or a translation in the language of the Court or of the accused is given to him on application; and in every case where judgment is appealable, it is given free of cost without delay. Where a sentence of death is passed or confirmed by the High Court, a certified copy of judgment is immediately given free of cost whether the

accused applies for it or not. When the accused is sentenced to death and an appeal lies therefrom as of right, the Court informs him of the period within which his appeal may be preferred.

(2) *Any person affected by the judgment or the order* shall, on application with prescribed charges, be given a copy of judgment or order or any deposition or other part of the record. For special reasons, it may be given also free of cost.

The High Court can frame rules for giving copies of judgments, or orders,

(3) *to persons not affected by them* (i) on payment of fees and (ii) subject to prescribed conditions, if any (s. 363).

Chapter XXVIII.—Submission of Death Sentences for Confirmation

Submission of sentences for confirmation.—When a sentence of death is passed by the Court of Session, the proceedings are submitted to the High Court, and the sentence is not executed unless it is confirmed. The convicted person is sent to jail custody (s. 366). If the High Court thinks that a further inquiry should be made, or additional evidence taken, it may make such inquiry or take evidence itself or direct the Sessions Court to do it. The presence of the convicted persons may be dispensed with when such inquiry is made or evidence taken, unless the High Court directs otherwise (s. 367).

The High Court may—

(1) confirm the sentence or pass any other sentence; [no order of confirmation is made until the period allowed for appeal has expired, or if there is an appeal, until it is disposed of];

(2) or annul the conviction and

(i) convict the accused of any offence of which the Sessions Court might have convicted him, or

(ii order a new trial;

(3) or acquit the accused (s. 368).

The confirmation of the sentence or any new sentence or order passed by the High Court is signed by two Judges (s. 369). When Judges forming a Bench are equally divided in opinion, the case is decided in manner provided by s. 392 (s. 370). The order of confirmation or any other order is forwarded to the Sessions Court (s. 371).

Chapter XXIX.—Appeals

Appeals.—No appeal lies from any judgment or order of a Criminal Court except as provided for by this Code or by any other law. The victim has a right to prefer an appeal against an order passed by the Court where the Court has:

(1) acquired the accused, or

(2) convicted him for a lesser offence, or

(3) imposed inadequate compensation.

Such appeal lies to the Court to which an appeal ordinarily lies against the order of conviction under the code (s. 372).

Appeals from orders.—(1) Order requiring security for keeping the peace or for good behaviour u/s. 117, or

(2) Order refusing to accept or rejecting a surety u/s. 121 [except in cases laid before Sessions Judge u/s. 122(2) or s. 122(4)]

is appealable to the Court of Session (s. 373).

There are other orders from which appeals would lie, *viz.*, order to pay compensation u/s. 250; order for disposal of property u/s. 452; order to pay innocent purchaser of property u/s. 453; order for disposal of property u/s. 458 and an order u/s. 360.

Appeals from convictions.—(1) An appeal from conviction by the High Court in its extraordinary criminal jurisdiction lies to the Supreme Court (s. 374). In section 374 of the Code of Criminal Procedure, a new sub-section (4) has been inserted by the Criminal Law (Amendment) Act, 2018. The newly inserted sub-section (4) provides that when an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.

(2) Where (a) an order of acquittal is reversed by the High Court on appeal and (b) a sentence of death, imprisonment for life or imprisonment for ten years or more is imposed by it, the accused can appeal to the Supreme Court (s. 379).

(3) An appeal from conviction by (a) a Sessions Judge, or (b) an Additional Sessions Judge, or (c) by any other Court passing a sentence of more than seven years lies to the High Court.

(4) (a) An appeal from conviction by (i) a Metropolitan Magistrate, or (ii) an Assistant Sessions Judge, or (iii) a Magistrate of first or second class; or

(b) a sentence u/s. 325; or

(c) an order or sentence u/s. 360;

lies to the Court of Session (s. 374).

When more persons than one are convicted at one trial and an appealable sentence is passed in respect of one of them, all have a right of appeal (s. 380).

Appeal how heard.—Appeals to the Court of Session are heard by the Sessions Judge or an Additional Sessions Judge, but an appeal against conviction by a second class Magistrate is heard by an Assistant Sessions Judge or a Chief Judicial Magistrate. An Additional Sessions Judge or Assistant Sessions Judge or a Chief Judicial Magistrate hears appeals which the Sessions Judge makes over to him or the High Court directs (s. 381).

Cases in which no appeal lies.— (1) No appeal lies where the accused pleads guilty and is convicted by a High Court and, where the conviction is by a Court of Session or Metropolitan Magistrate or first or second class Magistrate, an appeal lies only as to the extent or legality of the sentence (s. 375);

(2) Where a High Court passes a sentence of imprisonment not exceeding six months or fine not exceeding Rs. 1,000 or both;

(3) Where a Court of Session or Metropolitan Magistrate passes a sentence not exceeding three months or of fine not exceeding Rs. 200 or both;

(4) Where a first class Magistrate passes a sentence of fine up to Rs. 100; or

(5) Where in a summary case the sentence is of fine not exceeding Rs. 200.

[An appeal may be brought against any sentence referred to above by which any punishment is combined with any other punishment, but it will not be appealable (i) on the ground of failure to furnish security for keeping the peace; or (ii) that there is a direction for imprisonment in default of payment of fine; or (iii) that there are more than one sentence of fine inflicted provided the total of such fines does not exceed the amount shown above] (s. 376).

Appeal by State Government against sentence.—The State Government may in any case of conviction (except by High Court) direct the Public Prosecutor to appeal against the sentence on ground of its inadequacy to the Court of Session, if the sentence is passed by the Magistrate and to the High Court, if the sentence is passed by any other Court. In cases of offences investigated by the Delhi Special Police Establishment or by any other Agency under any Central Act other than the Code, the Central Government may also order similarly. The High Court or the Court of Session does not enhance sentence except after giving an opportunity to the accused to show cause. The accused may also plead for his acquittal or reduction of sentence (s. 377). In section 377 of the Code of Criminal Procedure, a new sub-section (4) has been inserted by the Criminal Law (Amendment) Act, 2018. The newly inserted sub-section (4) provides that when an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.

Appeal from acquittal.—The District Magistrate can direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate for any cognizable and non-bailable offence. The State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court except for those passed by a Magistrate or by the Court of Session in revision. The Central Government, in cases of acquittal of cases investigated by the Delhi Special Police Establishment or any other agency under any Central Act other than this Code, may direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence or to the High Court from an original or appellate order of acquittal passed by any Court other than the High Court or an order of acquittal passed by the Court of Session in revision. No such appeal to the High Court is entertained except with leave of the High Court. If an order of acquittal is passed in a case instituted upon complaint and the High Court, on an application by the complainant, grants special leave to appeal from the order of acquittal, the complainant may present an appeal to the High Court. The High Court shall not entertain such application after the expiry of six months where the complainant is a public servant and in other cases after sixty days from the date of the order of acquittal. An appeal from an order of acquittal does not lie where grant of special leave is refused (s. 378).

The power of the appellate Court to reassess evidence and reach its own conclusion in an appeal against acquittal is as extensive as in an appeal against conviction.[104.]

Scope of power of interference in acquittal explained in *Resham Singh v. State of Punjab.*[105.]

Petition of appeal.—Appeal

(1) is made in the form of a petition in writing;

(2) is presented by the appellant or his pleader; and

(3) should be accompanied by a copy of the judgment or order appealed against (s. 382).

[If the appellant is in jail, the petition is presented to the officer in charge of such jail; he forwards the same to the proper Court (s. 383)].

Powers of appellate Court in disposing of appeal.—(1) It peruses the petition, and if there is no sufficient ground for interfering, it may dismiss the appeal summarily. An appeal presented to the Court by the appellant or his pleader is not so dismissed unless he has reasonable opportunity of being heard. If the petition is presented through jail, the appellant, unless the appeal is frivolous or unless his production involves inconvenience disproportionate to the circumstances of the case, is given reasonable opportunity of being heard. An appeal in such a case is not dismissed summarily till the appeal period is over. If such an appeal filed from jail is summarily dismissed and the Court finds that an appeal u/s. 382 on behalf of the same accused has not been considered by it, the Court may hear and dispose of the same. Before dismissing an appeal under this section, the Court may call for the record, and if the Court is a Court of Session or a Chief Judicial Magistrate, it records reasons for dismissing the appeal (s. 384).

(2) If the appellate Court does not dismiss the appeal summarily, it shall give notice to the appellant or his pleader, to the proper officer of Government, to the complainant (if the case is instituted on a complaint), and to the accused if the appeal is u/s. 377 or 378 of the time and place at which it will be heard and also send a copy of the grounds of appeal. The appellate Court sends for the records of the case, unless the appeal is only as to the legality of the sentence. When the appeal is only against severity of sentence, the appellant, except by leave of Court, is not heard on any other ground (s. 385).

The appellate Court (a) after perusing the record and (b) hearing the appellant or his pleader and the Public Prosecutor and the accused (in cases of appeal by Government for enhancement of sentence and in cases of appeal from acquittal) dismisses the appeal if there is no sufficient ground for interfering.

(3) It may, in an appeal from an order of acquittal,

(a) reverse such order, and direct

  (i) further inquiry, or

  (ii) re-trial of the accused, or

  (iii) commitment for trial, or

(b) find the accused guilty and pass sentence on him.

(4) It may, in an appeal from an order of conviction,

(a) reverse the finding and sentence, and

(i) acquit or discharge the accused, or

(ii) order him to be re-tried by a Court of competent jurisdiction or committed for trial; or

(b) alter the finding, maintaining the sentence; or

(c) alter the nature and/or the extent of the sentence but not so as to enhance the same.

(5) It may, in an appeal for enhancement of sentence,

(a) reverse the finding and sentence, and

(i) acquit or discharge the accused, or

(ii) order him to be re-tried by a Court of competent jurisdiction or

(b) alter the finding, maintaining the sentence; or

(c) alter the nature and/or the extent of the sentence so as to enhance or reduce the same.

(6) It may, in an appeal from any other order, alter or reverse such order,

(7) It may make any amendment or any consequential or incidental order that may be just or proper.

(8) It may not enhance the sentence unless the accused has had an opportunity of showing cause against such enhancement.

(9) Appellate Court does not inflict greater punishment for an offence, than that which might have been inflicted by the Court from whose order or sentence the appeal has been made (s. 386).

(10) It may, after recording its reasons, take additional evidence or direct it to be taken by a Magistrate. The High Court may direct the Court of Session or a Magistrate to take it [The accused or his pleader is present when such evidence is taken] (s. 391). The judgment or order of appellate Court is final, except (1) u/s. 377, when the Government appeals for enhancement of sentence; (2) u/s. 378, when Government chooses to appeal from an order of acquittal; (3) u/s. 383(4) when a jail appeal is summarily disposed of without considering an appeal u/s. 382; and (4) in cases of revision (Chapter XXX) (s. 393).

Judgment of appellate Court.—The rules as to the judgment of a Criminal Court of original jurisdiction apply to the judgment of an appellate Court. But the accused is not brought up, or required to attend to hear judgment unless the appellate Court so directs (s. 387).

Order of High Court to be certified to lower Court.—The High Court certifies its judgment or order to the Court by which the finding, sentence or order appealed against, was passed. The certificate is sent through the Chief Judicial Magistrate to Judicial Magistrates and through the District Magistrate to the Executive Magistrates. The Court to which the High Court certifies its judgment or order makes such orders as are conformable to it (s. 388).

Suspension of sentence or arrest of accused pending appeal.—Pending any appeal by a convicted person, the Appellate Court or the High Court may, for reasons to be recorded in writing, order that the execution of the sentence or order appealed against be suspended and, if he is in confinement, that he be released on bail or on his own

bond. The Appellate Court is required to give notice to the prosecution before releasing a convicted person on bail or on his own bond, if he was convicted of an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. The Public prosecutor is permitted to move an application for cancellation of the bail granted by the Appellate Court. When a convicted person satisfies the Court that he intends to file an appeal, the Court, when such person being on bail is sentenced to imprisonment for a term not exceeding three years or where the offence is a bailable one and he is on bail, orders that he be released on bail for a period sufficient to enable him to present the appeal and obtain an order of the Appellate Court for his release on bail or on his own bond. When the appellant is ultimately sentenced to imprisonment the time during which he is so released will be excluded in computing the term of his sentence (s. 389). In *State of T.N. v. A. Jaganathan,*[106.] the Supreme Court laid down guideline to be followed in exercising the discretion for suspension of conviction and sentence during the pendency of the appeal or revision.

When an appeal is presented from an order of acquittal, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court and committed to prison pending the appeal (s. 390).

Difference among Judges.—When the Judges composing the Court of appeal in the High Court are equally divided in opinion, the appeal, with their opinions, is laid before another Judge, and such Judge, after hearing, delivers his opinion and the judgment or order follows such opinion. If one of the Judges constituting the Bench or the third Judge so desires, the appeal may be reheard or decided by a larger Bench (s. 392).

Non-appearance of appellant.—The absence of the appellant or his counsel does not entail dismissal for non-prosecution. The appellate court should decide the matter on merits. *Bani Singh v. State of U.P.,* AIR 1996 SC 2439 : (1996) 4 SCC 720 : 1996 CrLJ 3491 .

Abatement of appeals.—Appeal

(1) for enhancement of sentence or against acquittal, abates on the death of the accused;

(2) in any other case, (except appeal from fine) on the death of the appellant. [Any of the near relatives of the deceased appellant may, in case of conviction and sentence of death or imprisonment, apply within 30 days of the death of the appellant for leave to continue the appeal] (s. 394).

Chapter XXX.—Reference and Revision

Reference.—(I) By any Court.— Where any Court is satisfied (a) that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision of any Act, Ordinance or Regulation, and (b) is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor and refer the same for the decision of the High Court.

(II) By Sessions Court or Metropolitan Magistrate.—A Court of Session or a Metropolitan Magistrate may also refer for the decision of the High Court any question of law arising in a case.

Pending the decision of the High Court in reference of either of these cases, the Court may commit the accused to jail or release him on bail (s. 395).

The High Court passes such order as it thinks fit and sends a copy of it to the Court to dispose of the case conformably to it. It may also direct by whom cost is to be paid (s. 396).

Power to call for record of an inferior Court.—The High Court, or any Sessions Judge, has power—

(1) to call for and examine the record of any proceeding before an inferior Criminal Court, within its or his jurisdiction, for the purpose of satisfying itself or himself, as to

   (i) the correctness, legality, or propriety, of any finding, sentence or order;

   (ii regularity of any proceedings of such Court;

(2) to direct that the execution of any sentence be suspended, and the accused if in confinement, be released on bail or on his own bond pending the examination of the record.

The powers of revision are not exercised in any interlocutory order passed in appeal, inquiry, trial or other proceeding.

When an application is made by any person either to the High Court or the Sessions Judge, no further application is entertained from him by the other.

[Magistrates of all descriptions are deemed inferior to the Sessions Judge for purposes of this section] (s. 397).

Where any proceeding of a Metropolitan Magistrate is called for by the High Court or Court of Session, the Magistrate may submit a statement of the grounds of his decision or order and any material facts, and the Court considers such statement before setting aside his decision or order (s. 404).

Inquiry.—The High Court or the Sessions Judge, on examining the record, may direct the Chief Judicial Magistrate by himself or by any subordinate Magistrate to make, and the Chief Judicial Magistrate may himself make or direct a subordinate Magistrate to make further inquiry into

(1) any complaint which has been dismissed u/s. 203 or 204(4), or

(2) the case of any person accused of an offence who has been discharged, provided he had an opportunity of showing cause why such direction should not be made (s. 398).

Revision—High Court.—The High Court, in the case of any proceeding (a) the record of which has been called for by itself, or (b) which otherwise comes to its knowledge, may exercise the powers—

(i) of an appellate Court in disposing of an appeal (s. 386),

(ii) of suspending a sentence pending an appeal (s. 389),

(iii) of arresting the accused in an appeal from acquittal (s. 390),

(iv) of taking of further evidence (s. 391),

(v) of tendering pardon (s. 307).

If the Judges composing the Court are equally divided in opinion, the case is placed before another Judge, and the judgment or order follows his opinion (s. 392).

No order is passed unless the accused is given an opportunity of being heard personally or by pleader in his defence.

The High Court is not authorised to convert a finding of acquittal into one of conviction.

A revision is not entertained if a party who could have appealed does not appeal but comes in revision, unless the High Court is satisfied that the application is made in an erroneous belief that no appeal lies. In such a case, the application is treated as a petition of appeal (s. 401).

Sessions Judge.—When Sessions Judge calls for the record himself, he exercises all powers as are exercisable by the High Court u/ss. 386, 389, 390, 391 and, of course, s. 307. In revision proceedings commenced before him, he exercises the powers mentioned in other provisions of s. 401 as regards the High Court. A decision by Sessions Judge on a revision made by a party is final, and no further proceeding in revision is entertained by the High Court or any other Court (s. 399).

Additional Sessions Judge.—He has all the powers of a Sessions Judge in respect to cases transferred to him by the Sessions Judge (s. 400).

High Court's power to withdraw or transfer revision cases.—Whenever—

(1) one or more persons convicted at the same trial makes or make an application to the High Court for revision, and

(2) any other person convicted at the same trial makes an application to the Sessions Judge,

the High Court decides who will dispose of the revision

(a) having regard to the general convenience of the parties, and

(b) the importance of the question involved (s. 401). Explained in *Bindeshwari Prasad Singh v. State of Bihar*.[107.]

If it decides to dispose of the revision itself, it directs revision applications pending before the Sessions Judge to be transferred to itself; otherwise, it directs transfer of applications to the Sessions Judge. On such transfer, the High Court or the Court of Session deals with the same as if duly made before itself. If the application is transferred by the High Court to the Sessions Judge, no further application lies to the High Court or any other Court (s. 402).

No party has a right to be heard either personally or by pleader before a Court exercising powers of revision. But the Court may hear any party if it thinks fit (s. 403).

When a case is revised by the High Court or a Sessions Judge, it or he certifies its decision or order to the Court which recorded the finding, sentence or order, and that Court makes orders conformably to it (s. 405).

Chapter XXXI.—Transfer of Criminal Cases

Power of Supreme Court to transfer cases and appeals.—(1) The Supreme Court may for the ends of justice direct that a case or an appeal be transferred from one High

Court to another High Court, or from a Criminal Court subordinate to one High Court to a Criminal Court subordinate to another High Court.

(2) The Supreme Court will act only on the application of the Attorney-General or of a party interested, and such application shall be made by motion which shall, except when the applicant is the Attorney-General or the Advocate-General, be supported by affidavit or affirmation.

(3) Where any such application for transfer is dismissed, the Supreme Court may, if the application was frivolous or vexatious, order the applicant to pay to any person who has opposed the application a sum not exceeding Rs. 1,000 (s. 406).

Power of High Court to transfer cases and appeals.—(1) Whenever it appears to the High Court (1) on the report of the lower Court, or (2) on the application of a party interested, or (3) on its own initiative that

(a) a fair and impartial inquiry or trial cannot be had in any Criminal Court, or

(b) some question of law of unusual difficulty is likely to arise, or

(c) an order under this s. (1) is required by any provision of the Code, or

(2) will tend to the general convenience of parties or witnesses, or

(3) is expedient for ends of justice,

it may order that—

(i) any offence be inquired into or tried by any Court not empowered u/ss. 177 to 185, but in other respects competent to inquire into or try such offence;

(ii any particular case or appeal or class of cases or appeals, be transferred from a Criminal Court to any other Criminal Court of equal or superior jurisdiction;

(iii) any particular case be committed for trial to a Court of Session; or

(iv) any particular case or appeal be transferred to and tried before itself.

No application shall lie to the High Court for transferring any case from one Criminal Court to another in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

The application to the High Court for the exercise of this power is made by motion, which is, except when the applicant is the Advocate-General, supported by affidavit or affirmation.

When an accused makes an application, the High Court may direct him to execute a bond, conditioned that he will, if so ordered, pay any amount by way of compensation to the person opposing the application. He must give to the Public Prosecutor notice in writing of the application together with a copy of the grounds on which it is made; and no order is made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

When the application is for transfer of case or appeal from a subordinate Court, the High Court may order stay of proceedings in the subordinate Court.

Where the application is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of

compensation to any person who has opposed the application any sum not exceeding Rs. 1,000.

The High Court observes in a trial of case transferred before itself the same procedure which that Court would have observed.

Any order of the State Government u/s. 197 is not affected by this section (s. 407).

Power of Sessions Judge to transfer cases and appeals.—A Sessions Judge may (1) on the report of the lower Court, or (2) on the application of a party interested, or (3) on its own initiative, order transfer of any particular case from one Criminal Court to another in his Sessions division. He records his reasons for so doing. The transfer of a case from one session court to another without giving notice to the accused or affording him an opportunity to oppose was held to be not sustainable. Some of the accused showed that they had difficulties in facing trial in that other court.[108.]

The provisions as regards High Court in the previous section are applicable to the Sessions Judge except that he can order compensation up to Rs. 250 (s. 408).

Withdrawal of cases by Sessions Judge and Magistrates.—A Sessions Judge may withdraw a case or appeal from or recall a case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate. At any time before the trial of a case or hearing of an appeal has commenced before the Additional Sessions Judge, any Sessions Judge may recall any case or appeal made over to the Additional Sessions Judge. Where a Sessions Judge withdraws or recalls a case or appeal, he may either try the case in his own Court or hear the appeal himself, or make it over to another Court for trial or hearing. A Sessions Judge records his reasons for so doing (s. 409).

A Chief Judicial Magistrate may, after recording his reasons, withdraw a case from, or recall a case which he has made over to, a Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other competent Magistrate.

Any Judicial Magistrate may, after recording his reasons, recall a case made over by him, u/s. 192, sub-s. (2), to any other Magistrate, and inquire into or try it himself (s. 410).

Executive Magistrates.—A District Magistrate or Sub-Divisional Magistrate may, after recording his reasons, (a) make over a case started before him to a subordinate Magistrate; and (b) withdraw or recall a case from subordinate Magistrate and dispose of it himself (s. 411).

Chapter XXXII.—Execution, Suspension, Remission and Commutation of Sentences

Execution of order of confirmation of death sentence.—The Sessions Court carries into effect order of confirmation of sentence of death or any other order passed by the High Court by issuing a warrant or taking other steps (s. 413). The Sessions Court carries into effect the sentence of death passed by the High Court in appeal or in revision by issuing a warrant (s. 414).

Postponement of death sentence in appeal to Supreme Court.—The High Court postpones execution of sentence of death—

(a) in cases where an appeal lies to the Supreme Court under Art. 134(1)(a) or (b), until the period prescribed for preferring appeal has expired or until the appeal is disposed of by the Supreme Court;

(b) in cases where an application is made for grant of certificate under Art. 132 or Art. 134(1)(c), until such application is disposed of, or if certificate is granted, until the period allowed for appeal to Supreme Court has expired; and

(c) in cases where the High Court is satisfied that the accused intends to petition to Supreme Court for grant of Special Leave to appeal, for sufficient period to enable him to present such petition (s. 415).

If a woman sentenced to death is pregnant, the High Court shall commute the sentence to imprisonment for life (s. 416).

Removal to jail.—The State Government has power to direct in what place a person is to be kept in imprisonment or custody. If a person liable to be imprisoned or committed to custody is in confinement in a civil jail, the Court ordering the imprisonment or committal may direct that he be removed to a criminal jail. After his release from the criminal jail, he is sent back to the civil jail unless—

(i) three years have elapsed since he was removed to the criminal jail, in which case he is deemed to have been released from the civil jail; or

(ii) the Court which ordered his imprisonment in the civil jail has certified to the jailor that he is entitled to be released (s. 417).

Sentence of imprisonment.—The Court passing the sentence forwards the warrant to the jail in which the accused is, or is to be confined, and, if he is not confined, forwards him to such jail with the warrant. In cases of imprisonment till the rising of the Court, the accused is confined where the Court directs. Where the accused is not present when he is sentenced, the Court issues warrant of arrest and forwards him to jail or other place where he is to be confined (s. 418). The warrant is directed to the jailor (s. 419) and is lodged with him (s. 420), and it may be issued by the Judge or Magistrate who passed the sentence or his successor (s. 425).

Recovery of fine.—When a sentence of fine is inflicted, the Court may issue

(a) a warrant for attachment and sale of moveable property of the offender; [if the property is outside the jurisdiction of the Court, the warrant may be endorsed by the District Magistrate within whose jurisdiction the property is (s. 422)];

(b) a warrant to the Collector to realise the amount as arrears of land revenue from both moveable and immoveable property of the defaulter.

[the Collector realises the amount in accordance with law relating to recovery of such arrears, except that arrest or detention of the offender is not made].

If the offender has undergone the imprisonment inflicted in default of payment of fine, the Court does not issue such warrant unless for special reasons to be recorded in writing it deems it necessary to do so or unless the Court has ordered expenses or compensation to be paid out of fine. The State Government makes rules for execution of warrant for attachment and sale of moveable property of the offender and also for summary determination of claims of third party in the property (s. 421).

Suspension of sentence of imprisonment.—When an offender has been sentenced to fine and to imprisonment in default of fine, and the fine is not paid, the Court may

(1) order that the full fine shall be paid within thirty days; or in two or three instalments, the first of which shall be payable within thirty days and the others at an interval of not more than thirty days;

(2) suspend the execution of sentence of imprisonment and release the offender on his executing a bond for his appearance before the Court on the date on which the fine or the instalment is to be paid, and if it is not paid the Court may direct the sentence of imprisonment to be carried into effect.

The provisions apply also in cases of an order for payment of money on non-recovery of which imprisonment may be awarded; if bond is not executed by such person, he may be sentenced to imprisonment (s. 424).

Sentence on escaped convicts.—When sentence is passed on an escaped convict, such sentence (1) if of death, imprisonment for life or fine, takes effect immediately, (2) if of imprisonment, takes effect as follows:—(a) if the new sentence is severer in kind than the sentence he was undergoing, it takes effect immediately; (b) if the new sentence is not severer, it takes effect after he has suffered imprisonment which remained unexpired at the time of his escape.

A sentence of rigorous imprisonment is severer than simple imprisonment (s. 426).

Sentence on offender already sentenced.—When a person undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, the latter sentence commences at the expiration of the former sentence unless the Court directs that the subsequent sentence is to run concurrently with the previous sentence. But (1) when a person who has been sentenced to imprisonment in default of furnishing security is sentenced to imprisonment for a prior offence, the latter sentence shall commence immediately. (2) When a person undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment or imprisonment for life, the subsequent sentence shall run concurrently with the previous sentence (s. 427).

The provisions relating to passing of sentence on escaped convict or on offender already undergoing sentence for another offence do not excuse him from any part of punishment. When imprisonment in default of payment of fine is annexed to a substantive sentence of imprisonment, and subsequently another sentence of imprisonment is inflicted, the imprisonment in default of payment of fine is not given effect to till the substantive sentence is undergone (s. 429).

Detention period set-off against sentence.—Where a person on conviction is sentenced to a term of imprisonment, not being imprisonment in default of payment of fine, the period of detention undergone by him during investigation, inquiry or trial in the same case is set-off against such term his liability being restricted to the remainder. The period for which the life convict remained in detention during investigation, inquiry or trial shall be set off against the period of fourteen years of actual imprisonment prescribed in s. 433A (s. 428).

Return of warrant.—When a sentence has been executed, the officer executing it returns the warrant to the Court which issued it with an endorsement certifying the manner in which it has been executed (s. 430).

Recovery of money.—Any money (other than a fine) is recoverable as fine (s. 431).

Suspension, remission or commutation of sentence.—Powers to suspend or remit sentences.—When a person has been punished for an offence, the appropriate Government may, with or without conditions, suspend the execution of the sentence or remit the whole or any part of the punishment. When an application is made to the appropriate Government for suspension or remission of a sentence [in case of a male

person above 18 years, upon whom a sentence other than a sentence of fine is passed, the petition may be entertained only (a) if the person is in jail and (b) (i) the application is presented through the officer-in-charge of the jail, or (ii) it contains a declaration that the person sentenced is in jail], the appropriate Government may require the Judge who convicted or confirmed the sentence to state his opinion, with reasons whether the application should be granted or refused and to forward with the opinion a certified copy of the record of the trial. If any condition on which a sentence has been suspended or remitted is not fulfilled, the appropriate Government may cancel the suspension or remission, and the person in whose favour the suspension or remission was made may be arrested by any police officer without warrant and remanded to undergo the unexpired sentence. The above provisions apply to any order passed by a Criminal Court which (1) restricts the liberty of a person or (2) imposes any liability upon him or his property.

In cases of sentences relating to a matter to which the executive powers of the Union extend and in cases of orders passed by Criminal Courts restricting liberty or imposing liability, "appropriate Government" means the Central Government and in other cases the State Government (s. 432).

The exercise of power under ss. 432 and 433 of Cr.P.C. will be available to the appropriate government even if such consideration was made earlier and exercised under Art. 72 by the President or under Art. 161 by the Governor. As far as the application of Art. 32 of the Constitution by this Court is concerned, it is held that the powers under ss. 432 and 433 are to be exercised by the appropriate government statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the appropriate government. It was further held that the status of appropriate government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in s. 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the appropriate government will be the Union Government having regard to the prescription contained in the proviso to Art. 73(1)(a) of the Constitution. In other words, cases which fall within the four corners of s. 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of appropriate government. Barring cases falling under s. 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the appropriate government.[109.]

Power to commute punishment.—The appropriate Government may commute—

(a) a sentence of death to any other sentence;

(b) of imprisonment for life to imprisonment for 14 years or fine;

(c) of rigorous imprisonment to simple imprisonment or fine;

(d) of simple imprisonment to fine (s. 433). However, a person sentenced to life imprisonment for an offence punishable by death or whose death sentence has been commuted to life imprisonment will not be released unless he has completed fourteen years imprisonment (s. 433A).

The powers to suspend or remit sentences and to commute punishment conferred as above upon the State Government may, in the case of sentences of death, also be exercised by the Central Government (s. 434).

Special provisions relating to powers to suspend, remit or commute sentences.—The powers of suspension, remission or commutation in cases of offences—(1) investigated by Delhi Special Police Establishment or any other Central Government Agency, or (2) involving misappropriation, destruction or damage to Central Government property, or (3) committed by Central Government employee acting or purporting to act in discharge of his official duties, are exercised by the State Government in consultation with the Central Government.

In connection with offences some of which relate to matters to which executive power of the Union extends and for which separate terms of imprisonment to run concurrently are imposed, order for suspension, remission or commutation does not have effect unless made by the Central Government in relation to those offences (s. 435). This power can be exercised by the Government and not by the court. [110.]

In *Union of India v. Sriharan alias Murugan*,[111.] a Constitution Bench of the Supreme Court was seized of an important question that—Whether the expression 'Consultation' stipulated in Section 435(1) of the Code implied 'Concurrence'? It was held in the majority opinion of Justices Kalifulla, Dattu and Ghose that that in those situations covered by sub-cls. (a) to (c) of s. 435(1) falling within the jurisdiction of the Central Government it will assume primacy and consequently the process of "Consultation" in reality be held as the requirement of 'Concurrence'. The majority opinion also held that while interpreting s. 435(1)(a) which mandates that any State Government while acting as the 'Appropriate Government' for exercising its powers under ss. 432 and 433 of Cr.P.C and consider for remission or commutation to necessarily consult the Central Government. In this context the requirement of the implication of s. 432(7)(a) has to be kept in mind, more particularly in the light of the prescription contained in Art. 73(1)(a) and Art. 162 read along with its proviso, which asserts the status of the Central Government Authorities as possessing all pervasive right to hold the Executive Power by virtue of express conferment under the Constitution or under any law made by the Parliament though the State Legislature may also have the power to make laws on those subjects. In the concurrent opinion by Justice U.U. Lait for himself and Justice Sapre, it was also held that the expression 'consultation' ought to be read as concurrence and primacy must be accorded to the opinion of the Central Government in matters covered under cls (a), (b) and (c) of s. 435(1) of the Cr.P.C.

Chapter XXXIII.—Provisions as to Bail and Bonds

Bail.—Bailable offence.—When a person accused of a bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court, and is prepared to give bail, he is released on bail. But such officer or Court should discharge him on his executing a bond for his appearance, in case of an indigent person where he is unable to furnish surety. An indigent person shall be assumed to be one who is unable to furnish bail within one week of his arrest. If he fails to comply with the conditions of the bail bond as to time and place of attendance, the Court may, in a subsequent occasion in the same case, refuse to release him on bail and may also call upon any person bound by the bond to pay penalty u/s. 446. The provisions of s. 116(3), immediate measures for prevention of breach of the peace or disturbance to public tranquillity or s. 446A regarding the forfeiture of a bond for breach of a condition of such bond are not affected by these provisions of s. 436.

Under-trial Prisoner.—Where an under-trial prisoner other than one accused of an offence for which death has been prescribed as one of the punishments has been under detention for a period extending to one-half of the maximum period of imprisonment provided for the alleged offence, he shall be released on his personal

bond. An undertrial cannot be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence (s. 436A).

Non-bailable offence.—(1) When a person accused of or suspected of commission of a non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court (other than the High Court or Court of Session), he may be released on bail, but he is not so released if there are reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or if such an offence is a cognizable offence and he had been previously convicted of an offence punishable by death or imprisonment for life or imprisonment for more than seven years or he had been convicted in the past twice of a cognizable offence punishable with imprisonment for three years or more but not less than seven years. But the Court may direct that (1) any person under sixteen years of age, (2) any woman or (3) any sick or infirm person accused of such an offence be released on bail. That such person may be required for identification by witnesses is no ground for refusal to grant bail provided (1) that he is otherwise entitled to the grant of bail and (2) that he undertakes to comply with the directions given by the Court. A person under the allegation of committing an offence punishable with death, imprisonment for life, or imprisonment for more than seven years cannot be released on bail without giving an opportunity of hearing to the Public Prosecutor. For statement of considerations in granting bail to hawala offenders and those providing funds to militants.[112.]

(2) If it appears to the officer or Court at any stage of investigation or trial that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry, the accused is released on bail, after recording the reasons in writing, or on the execution of a bond for his appearance.

(3) The Court shall, when the offence

(a) is punishable with imprisonment for seven years or more; or

(b) is under Chapter VI (offence against the State); under Chapter XVI (offences against human body); or under Chapter XVII (offences against property); or

(c) is abetment of or conspiracy or attempt to commit any such offence,

impose conditions that (i) he shall attend in accordance with the conditions of the bond, (ii) he shall not commit similar offence, (iii) he shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and such other conditions in the interests of Justice.

(4) The Court may cause a released person to be arrested or may commit him to custody.

(5) If the trial of a person accused of a non-bailable offence is not concluded within sixty days from the first date fixed for taking evidence, such person shall, if he is in custody during the whole period, be released on bail, unless the Magistrate, for reasons to be recorded, otherwise directs.

(6) If after the conclusion of a trial and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty, it releases the accused on the execution by him of a bond for his appearance to hear judgment (s. 437).

Before conclusion of the trial and before disposal of the appeal, the Court shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court, and such bail bonds shall be in force for six months. If such accused fails to appear, the bond stand forfeited and the procedure u/s. 446 shall apply (s. 437A).

The Supreme Court has pointed out that the courts exercising bail jurisdiction should refrain from giving elaborate reasons in their orders for justifying the grant or refusal of bail.[113.] The mode of exercising discretion explained in *Ram Govind Upadhaya v. Sudarshan Singh,* (2002) 3 SCC 598 .

Anticipatory bail.—An anticipatory bail (a bail in case of a person who believes that he may be arrested on accusation of a non-bailable offence) may be granted by the High Court or a Court of Session, if necessary, on condition that (a) the accused shall make himself available for interrogation, (b) he shall not directly or indirectly give inducement or threaten any person acquainted with the facts of the case, (c) he shall not leave India without the Court's permission or (d) any other condition u/s. 437(3). If the Court of Session or the High Court does not reject the application for the grant of anticipatory bail, and makes an interim order of bail, it is required to give notice to the Public Prosecutor and Superintendent of Police, and the question of bail is re-examined in the light of respective contentions of the parties.

If such person is thereafter arrested on such accusation by Officer-in-charge of a police station, he releases him on bail; if Magistrate taking cognizance decides to issue warrants in such a case, he issues a bailable warrant (s. 438). An application for anticipatory bail filed by the accused shall not be entertained in any case where the accusation against a person is of having committed an offence under section 376(3) or section 376AB or section 376DA or Section 376DB of the Indian Penal Code, 1860 (s. 438(4).

Admission or reduction of bail.—The High Court or Court of Session may, in any case, direct that any person be admitted to bail, may impose conditions in case of offences u/s. 437(3), and may set aside or modify conditions imposed by the Magistrate. In cases triable by Court of Session or punishable with imprisonment for life, the High Court or Court of Session before giving bail issues, unless it is not practicable (reasons being recorded), notice to the Public Prosecutor. A High Court or Court of Session may cause any person who has been admitted to bail to be arrested and may commit him to custody (s. 439). Section 439 of the Code has been recently amended *vide* the Criminal Law (Amendment) Act, 2018. The 2018 Amendment has modified section 439 of the Code of Criminal Procedure, 1973 to insert a proviso therein to provide for serving of notice of application of bail relating to offences under sub-section(3) of section 376, section 376A, 376DA or section 376DB to the Public Prosecutor within a period of fifteen days. It has also inserted sub-section (1A) to make it obligatory for the informant or his authorised person to be present at the time of hearing of an application for bail for offences under sub-section (3) of section 376, section 376A, 376DA or 376DB of the Indian Penal Code.

The amount of bond is fixed with due regard to the circumstances of the case and is not excessive. The High Court or Court of Session may direct reduction of bail required by the police officer or Magistrate (s. 440).

Bond of accused and sureties.—Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court thinks sufficient is executed by him, and when he is released on bail, by one or more sureties conditioned that he attends at a particular time and place. Conditions imposed for release of the person on bail are mentioned in the bond. The bond binds him to appear before the High Court or Court of Session or other Court. For determining whether the

sureties are sufficient, the Court may accept affidavits relating to the sufficiency of the sureties or may hold inquiry (s. 441).

Any person who is standing as surety has to provide relevant details of all the people he has stood or is currently standing as surety for (s. 441A).

As soon as the bond is executed, the person is released, and if he is in jail, the Court directs the jailor to release him (s. 442).

If through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they become insufficient afterwards, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, if he fails to do so, may commit him to jail (s. 443).

Discharge.—Any surety may apply to a Magistrate to discharge the bond either wholly or so far as it relates to him. The Magistrate thereupon issues a warrant of arrest directing that the person so released be brought before him. On the appearance of such person, he directs the bond to be discharged wholly or so far as it relates to the applicant, and calls upon the person to find other sureties, and, if he fails to do so, commits him to custody (s. 444).

Deposit instead of recognizance.—When a person is required to execute a bond, he may, except in the case of a bond for good behaviour, be permitted to deposit a sum of money in Government promissory notes to such amount as the Court or officer may fix in lieu of executing the bond (s. 445).

Forfeiture of bond.—When it is proved to the satisfaction of the Court [or of a Court to which the case is transferred] that the bond for appearance or production of property or any other bond has been forfeited, the Court records the grounds of such proof, and may call upon any person bound to pay the penalty thereof or to show cause why it should not be paid. If sufficient cause is not shown and the penalty is not paid, the Court may recover it as if such penalty were a fine imposed by it. The Court may remit a portion and enforce part payment only after recording reasons for doing so. If a surety dies before the bond is forfeited, his estate is discharged from all liability. A certified copy of judgment showing that the person who furnished security has been convicted for breach of conditions of his bond can be used as evidence against sureties (s. 446). If the surety becomes insolvent or dies, or when the bond is forfeited, the Court may order the person from whom security was demanded to furnish fresh security, and, if it is not furnished, the Court may proceed as if there had been default in complying with the original order (s. 447). When a minor is required to execute a bond, the Court may accept, in lieu thereof, a bond executed by a surety or sureties (s. 448).

Orders passed by a Magistrate are appealable to the Sessions Judge, and passed by a Court of Session to the Court to which appeal ordinarily lies from its order (s. 449).

The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear or to attend before such Court (s. 450).

Chapter XXXIV.—Disposal of Property

Custody and disposal of property.—When any property is produced before a Criminal Court during an inquiry or trial, the Court may make an order for its custody, pending the conclusion of the inquiry or trial, and if it is subject to speedy or natural decay, or if it is otherwise expedient so to do, may order it to be sold or disposed of. [Property includes (a) property of any kind or document, (b) any property regarding which an offence appears to be committed, or (c) which is used for the commission of an

offence] (s. 451). After the conclusion of the inquiry, or trial, the Court may make an order for the disposal by destruction, confiscation or delivery to any person of any property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence. The Court may deliver the property to any person claiming possession without condition or on his executing a bond to restore the property to the Court if the order is modified or set aside on appeal. The order is not, except where the property is live stock or subject to speedy and natural decay or where a bond has been executed, carried out for two months or, if an appeal is presented, till it has been disposed of. The Court of Session may direct delivery of property to the Chief Judicial Magistrate who deals with it u/ss. 457 to 459. ["Property" includes any property into which the same has been converted or exchanged and anything acquired by such conversion and exchange] (s. 452).

Payment to an innocent purchaser.—When a person is convicted of theft or receiving stolen property, and any other person has bought the stolen property from him without knowing that it was stolen, and any money has on his arrest been taken out of the possession of the convicted person, the Court may order that out of such money, a sum not exceeding the price paid by the purchaser be delivered to him (s. 453).

Appeal.—An appeal lies, against an order for disposal of property and order of payment to innocent purchaser, to the Court to which the appeal from order of conviction lies. The appellate Court [Court of appeal, confirmation or revision] may stay the order or modify, alter or annul such order or make further order (s. 454).

Destruction of objectionable matter.—The Court may order the destruction of (1) all copies of the thing in respect of which conviction is made u/s. 292, 293, 501 or 502, Penal Code, or (2) food, drink or drug in respect of which conviction is made u/s. 272, 273, 274 or 275, Penal Code (s. 455).

Restoration of possession of immovable property.—When a person is convicted of an offence attended by criminal force or criminal intimidation, and any person has been dispossessed of immovable property by such criminal force or criminal intimidation, the Court may, within one month from the date of the conviction, order the person dispossessed to be restored to possession if necessary by evicting any other person in possession by force. Such order is appealable. Such order does not prejudice any right or interest to or in such immovable property which a person may establish in a civil suit. The order may be made by a Court of appeal, confirmation, reference or revision (s. 456).

Seizure of property by police.—Seizure by a police officer of property is reported to a Magistrate who orders (a) its disposal, or (b) its delivery to the person entitled, or (c) respecting its safe custody and production. If the person entitled is known, the Magistrate may order the property to be delivered to him on such conditions as the Magistrate thinks fit. If he is unknown, the Magistrate detains it and issues a proclamation specifying the articles and requiring any person having a claim thereto, to appear before him and establish his claim within six months (s. 457). If no person establishes his claim within six months, and if the person in whose possession such property was found is unable to show that it was legally acquired by him the property remains at the disposal of Government and may be sold by that Government. The proceeds are dealt with in the manner prescribed (s. 458). The Magistrate may direct it to be sold if—

(1) the person entitled to possession is unknown or absent; or

(2) the property is subject to speedy and natural decay; or

(3) its sale would be for the benefit of the owner; or

(4) its value is less than Rs. 500 (s. 459).

Chapter XXXV.—Irregular Proceedings

Irregularities which do not vitiate proceedings.—If a Magistrate, not empowered to do any of the following things, erroneously, in good faith, does it, his proceedings are not set aside:—

(1) issues a searchwarrant u/s. 94;

(2) orders, u/s. 155, the police to investigate an offence;

(3) holds an inquest u/s. 176;

(4) issues process, u/s. 187, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;

(5) takes cognizance of an offence u/s. 190, sub-s. (1), cl. (a) or cl. (b);

(6) transfers a case u/s. 192(2);

(7) tenders a pardon u/s. 306;

(8) recalls a case and tries it himself u/s. 410; or

(9) sells property u/s. 458 or s. 459 (s. 460).

Irregularities which vitiate proceedings.—If a Magistrate, not being empowered, does any of the following things, his proceedings are void:

(1) attaches and sells property u/s. 83;

(2) issues a searchwarrant for a document, parcel or other thing in the custody of post or telegraph authority;

(3) demands security to keep the peace;

(4) demands security for good behaviour;

(5) discharges a person lawfully bound to be of good behaviour;

(6) cancels a bond to keep the peace;

(7) makes an order for maintenance;

(8) makes an order u/s. 133 as to a local nuisance;

(9) prohibits, u/s. 143, the repetition or continuance of a public nuisance;

(10) makes an order under Part C or Part D of Chapter X;

(11) takes cognizance, u/s. 190, sub-s. (1), cl. (c), of an offence;

(12) tries an offender;

(13) tries an offender summarily;

(14) passes a sentence, u/s. 325, on proceedings recorded by another Magistrate;

(15) decides an appeal;

(16) calls, u/s. 397, for proceedings; or

(17) revises, an order passed u/s. 446 (s. 461).

Proceedings in wrong Court.—Proceedings of a Criminal Court are not set aside merely on the ground that they took place in a wrong place, *i.e.*, Sessions division, district or other local area, unless such error has occasioned a failure of justice (s. 462).

Non-compliance with the provisions of section 164 or 281.—If any Court, before which a confession or other statement of an accused is tendered in evidence or received, finds that any provisions of these sections have not been complied with by the Magistrate recording the statement, it may take evidence of such non-compliance; and, notwithstanding s. 91 of the Evidence Act, if satisfied that such non-compliance has not injured the accused as to his defence on the merits and he duly made such statement, admit it. This section applies to Courts of appeal, reference and revision (s. 463).

Omission to frame charge.—No finding, sentence or order is invalid merely on the ground that no charge was framed or of any error, omission or irregularity in charge unless in the opinion of the Court of appeal, confirmation or revision, a failure of justice has been occasioned. If there is a failure of justice, the Court orders (1) in the case of omission to frame a charge, that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge and (2) in the case of error, omission or irregularity in the charge, a new trial is had upon charge framed. If no charge can be framed on facts proved, the accused is discharged (s. 464).

Error or omission or irregularity in charge.—No finding, sentence or order passed by a competent Court is reversed or altered by a Court of appeal, confirmation or revision on account of—

(1) any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment, or other proceedings before or during any trial, inquiry or other proceedings; or

(2) of any error or irregularity in any sanction;

unless such error, omission or irregularity has occasioned a failure of justice. In determining this, the Court sees whether the objection could and should have been raised at an earlier stage in the proceedings (s. 465).

Defect.—No attachment is unlawful, and any person making it is not a trespasser on account of any defect or want of form in the summons, conviction, writ of attachment or other proceedings (s. 466).

Chapter XXXVI.—Limitation for Taking Cognizance of Certain Offences

Bar to take cognizance after period of limitation.—No Court takes cognizance (except where otherwise provided) (1) after six months, if the offence is punishable with fine only; (2) after 1 year if the offence is punishable with imprisonment up to 1 year; and (3) after 3 years if the offence is punishable with imprisonment above 1 year but up to 3 years (s. 468).

Commencement of period.—The period commences (1) on the date of the offence; or

(2) if the commission of it was not known to the person aggrieved or to the policeofficer, the first day on which either of them comes to know of it; or (3) where the

identity of the offender is not known, the first day on which such identity becomes known to either the person aggrieved or the police, whichever is earlier (s. 469).

Exclusion of time.—In calculating the period of limitation, the following are excluded:

(a) the period during which another prosecution was diligently prosecuted [the prosecution should be on the same facts and in good faith];

(b) the period of stay order or injunction (from the date of grant to the date of withdrawal) granted against the institution of prosecution;

(c) where notice of prosecution is to be given, the period of notice;

(d) where previous sanction or consent is necessary, the period required for obtaining such consent or sanction including the date of application for sanction and receipt thereof;

(e) the period during which offender is absent from India or from territory outside India under Central Administration; and

(f) period when the offender is absconding or concealing himself (s. 470).

If limitation expires on a day the Court is closed, cognizance can be taken on the day the Court re-opens (s. 471).

Continuing offence.—In case of continuing offence, a fresh period runs at every moment during which the offence continues (s. 472).

Extension of limitation.—The Court takes cognizance after the period of limitation if (1) the delay is properly explained or (2) it feels it necessary to do so in the interests of justice (s. 473).

Chapter XXXVII.—Miscellaneous

Trial before High Court.—In cases other than transfer of cases and appeals, the High Court observes the same procedure as a Court of Session (s. 474).

Delivery of persons to commanding officers.—The Central Government make rules consistent with the Code and the Army Act, 1950, the Navy Act, 1957, the Air Force Act, 1950, and any other law relating to armed forces as to when persons subject to such military law will be tried by a Court to which the Code applies or by the Courtmartial. The Magistrate in a proper case hands over the offender, who is triable either by himself or by a Courtmartial, with a statement of the offence of which he is accused to the Commanding Officer of his unit or to the Commanding Officer of the nearest military, naval or air force station. The Magistrate receiving a written application from the Commanding Officer apprehends persons accused of such offence. The High Court may direct a prisoner to be brought before a Courtmartial for trial or investigation of a case pending before it (s. 475).

Personal interest of a Judge or Magistrate.—A Judge or Magistrate cannot—

(1) try or commit for trial any case

  (i) to which he is a party, or

  (ii) in which he is personally interested,

except with the permission of the Court to which an appeal lies;

(2) hear an appeal from any judgment or order passed by him.

A Judge or Magistrate is not deemed a party to, or personally interested in, any case by reason only that—

(1) he is concerned therein in a public capacity, or

(2) he has viewed the place in which

(i) an offence is alleged to have been committed, or

(ii) any other transaction material to the case is alleged to have occurred, and

(3) made an inquiry in connection with the case (s. 479).

Practising pleader cannot be a Magistrate.—A pleader practising in the Court of a Magistrate cannot sit as a Magistrate in such Court or in a Court within its jurisdiction (s. 480).

Purchase of property by a public servant.—A public servant who is concerned in the sale of any property cannot purchase or bid for it (s. 481).

Inherent powers of the High Court.—The inherent powers of the High Court

(1) to make such orders as may be necessary to give effect to any order, or

(2) to prevent abuse of the process of any Court, or

(3) to secure the ends of justice

are not limited or affected by this Code (s. 482).

Superintending power.—The High Court exercises its superintendence over Judicial Magistrates to ensure (1) expeditious and (2) proper disposal of cases.

Repeal and Savings.—The Code of 1898 is repealed. But—(1) if immediately before 1-4-1974, there is any appeal, application, trial, inquiry (except inquiry under Chapter XVIII, which is dealt with under this Code) or investigation pending, it is dealt with under the old Code. (2) Notifications, proclamations, powers, forms, local jurisdictions, sentences, orders, rules and appointments (except appointments of Special Magistrates) made under the old Code and in force immediately before the commencement of this Code are deemed to be under this Code. (3) Sanctions or consent under the old Code are treated as if made under this Code where proceedings have not commenced under the old Code; they can be commenced under this Code. (4) In relation to prosecution against a Ruler (Art.363, Constitution of India), the old Code applies.

On expiration of time for an application or other proceeding under the old Code on or before the commencement of this Code, a longer period, if provided under the present Code, cannot be availed of (s. 484).

1. 13 Geo. III, c. 63.
2. By 16 and 17 Vic. c. 95.
3. Louisiana Penal Code, Art. 3.

4. *Directorate of Enforcement v Deepak Mahajan*, (1978) 2 SCC 213 : AIR 1995 SC 1775 .
5. *Dy. Chief Controller of Imports and Exports v Kishan Lal Agarwal*, AIR 2003 SC 1900 .
6. See *Harpal Singh Chauhan v State of U.P.*, 1993 SCC (3) 552 : AIR 1993 SC 2436 .
7. *Deepak Aggarwal v Keshav Kaushik,* (2013) 5 SCC 277 : 2013 (1) SCALE 564 .
8. *K. Anbazhagan v State of Karnataka*, (2015) 6 SCC 158 : 2015 (5) SCALE 125 .
9. *State of Gujarat v K.V. Joseph*, (2001) 2 Guj LR 1675; *K.I. Pavuiny v Assist Collector, Central Excise Collection,* (1997) 1 Ker LJ 489 .
10. See *Sangeeta Ramchandra Jain v S.A. Dwivedi*, 1996 CrLJ 24 (Bom).
11. *Dwarka Dass v State of Haryana*, (2003) 1 SCC 204 .
12. *State of Gujarat v Anirudhsin*, (1997) 6 SCC 514 : AIR 1997 SC 2780 .
13. *Subhash Chander v Krishan Lal,* (2001) 4 SCC 458 : AIR 2001 SC 1903 .
14. *Arnesh Kumar v State of Bihar*, AIR 2014 SC 2756 : (2014) 8 SCC 273 .
15. *Hema Mishra v State of U.P.,* AIR 2014 SC 1066 : (2014) 4 SCC 453 .
16. See *Directorate of Enforcement v Deepak Mahajan*, AIR 1994 SC 1775 : 1994 CrLJ 2269 : (1994) 3 SCC 440 .
17. *Om Prakash Sharma v CBI*, AIR 2000 SC 2335 .
18. *Govt. (NCT) of Delhi v Dellu Sunil*, 2001 CrLJ 504 .
19. *Christalin Costa v State of Goa*, 1992 CrLJ 3608 (Bom).
20. *Christalin Costa v State of Goa*, 1992 CrLJ 3608 (Bom).
21. *Rohtash Singh v Ramendri,* AIR 2000 SC 952 .
22. *Rohtash Singh v Ramendri*, AIR 2000 SC 952 .
23. *Ramesh Chandra Kaushal v Veena Kaushal*, AIR 1978 SC 1807 : (1978) 4 SCC 70 : AIR 1979 CrLJ 3 .
24. *Gautam Kundu v State of W.B.,* 1993 SCC (3) 418 : AIR 1993 SC 2295 : 1993 CrLJ 3233 .
25. *Ashok Kumar Singh v VI Addl. Session Judge, Varanasi*, 1996 SCC (1) 554 : AIR 1996 SC 333 : 1996 CrLJ 392 .
26. *Kamathan v Kannappan*, AIR 1999 SC 839 .
27. See *Chand Dhawan v Jawahar Lal Dhawan*, (1993) 3 SCC 406 : 1993 CrLJ 2930 .
28. *Basant Lal v State of U.P.*, (1998) 8 SCC 589 .
29. *K. Ramakrishnan v State of Kerala*, AIR 1999 Ker 385 .
30. *Murli S. Deora v Union of India*, (2001) 8 SCC 765 : AIR 2002 SC 40 at 41.
31. *Ashok Kumar v State of Uttarakhand*, (2013) 3 SCC 366 .
32. *Ranbir Singh v Dalbir Singh*, (2002) 3 SCC 700 .
33. *Ravi Raman Prasad v State of Bihar*, AIR 1994 SC 109 : (1993) 2 SCC 3 .
34. *Prakash Chand Sachdeva v State*, AIR 1994 SC 1436 : (1994) 1 SCC 471 : 1994 CrLJ 2117 .
35. *Dharampal v Ramshri*, AIR 1993 SC 1361 : (1993) 1 SCC 435 : 1993 CrLJ 1049 .
36. *Surinder Pal Kaur v Satpal*, (2015) 13 SCC 25 : AIR 2015 SC 2739 : 2015 CrLJ 3821 : 2015 (1) SCALE 376 .
37. *Youth Bar Association of India v Union of India,* (2016) 9 SCC 473 : AIR 2016 SC 4136 .
38. *State of A.P. v Punati Ramulu,* 1993 CrLJ 3684 : AIR 1993 SC 2644 : 1994 Supp (1) SCC 590 .
39. *State of A.P. v Punati Ramulu*, AIR 1993 SC 2644 : 1993 CrLJ 3684 : 1994 Supp (1) SCC 590 .
40. *State of W.B. v Ori Lal Jaiswal*, AIR 1994 SC 1418 : 1994 CrLJ 2104 : (1994) 1 SCC 73 ; *Ram Kumar v State of Haryana*, AIR 1995 SC 280 : 1995 Supp (1) SCC 248 ; *State of Punjab v Gurmit Singh*, AIR 1996 SC 1393 : 1996 CrLJ 1728 .
41. *State of M.P. v Surbhan*, AIR 1996 SC 3345 : 1996 CrLJ 3199 .
42. *Jayant Vitamins Ltd. v Chaitanya Kumar*, AIR 1992 SC 1930

43. *Punjab and Haryana High Court Bar Assn. v State of Punjab*, AIR 1994 SC 1023 : 1994 CrLJ 1368 : (1994) 1 SCC 616 ; *State of Bihar v Ranchi Zila Samta Party*, 1996 CrLJ 2168 : AIR 1996 SC 1515 : (1996) 3 SCC 682 ; *R.S. Sodhi v State of U.P.,* AIR 1994 SC 38 : 1994 Supp (1) SCC 143 : 1994 CrLJ 111 . Bijoy Singh v State of Bihar, AIR 2002 SC 1949 (s. 156).
44. *State of Haryana v Bhajanlal,* AIR 1992 SC 604 : 1992 Supp (1) SCC 335 : 1992 CrLJ 527 (s. 157).
45. *Priyanka Srivastava v State of U.P.,* (2015) 6 SCC 287 : AIR 2015 SC 1758 : 2015 CrLJ 2396 : 2015 (4) Scale 120 .
46. *Paresh Kalyan Das Bhavsar v Sadiq Yakubbhai,* AIR 1993 SC 1544 : 1993(3) SCC 95 : 1993 CrLJ 1857 ; *Bodhraj v State of J&K*, AIR 2002 SC 3164 (s. 161).
47. *Dhanajaya Reddy v State of Karnataka*, (2001) 4 SCC 9 : AIR 2001 SC 1512 .
48. *Directorate of Enforcement v Deepak Mahajan*, AIR 1994 SC 1775 : 1994 CrLJ 2269 : 1994 (3) SCC 440 ; *H.V. Thakur v State of Maharashtra*, AIR 1995 SC 2623 .
49. *Aslam Baba Lal Desai v State of Maharashtra*, AIR 1993 SC 1 : (1992) 4 SCC 272 : 1992 CrLJ 3712 .
50. *Uday Mohan Lal Acharya v State of Maharashtra*, AIR 2001 SC 1910 .
51. *State of Maharashtra v B.C. Varma*, AIR 2002 SC 285 .
52. *Abdul Basit @Raju v Mohd. Abdul Khader*, (2014) 10 SCC 754 : 2014 (11) SCALE 96 .
53. *Behari Prasad v State of Bihar*, AIR 1996 SC 2905 : 1996 CrLJ 1653 .
54. *Narendra Kumar Amin v CBI*, (2015) 3 SCC 417 : AIR 2015 SC 1002
55. *Vinay Tyagi v Irshad Ali*, (2013) 5 SCC 762 : 2013 CrLJ 754 : JT 2013 (1) SC 97 : 2012 (12) SCALE 343 .
56. *Kuldip Singh v State of Punjab*, AIR 1992 SC 1944 : 1992 CrLJ 3592 (s. 174(3)).
57. *Sujata Mukherjee v Prashant Kumar Mukherjee*, AIR 1997 SC 2465 .
58. *Harbans Lal v State of Haryana*, AIR 1999 SC 326 .
59. *Madhya Pradesh v Suresh Kaushal*, 2002 CrLJ 217 ; H.V. *Jayaram v ICICI*, AIR 2000 SC 579 .
60. *Ajai Agarwal v Union of India*, AIR 1993 SC 1637 : 1993 CrLJ 2516 .
61. *Ajay Agarwal v Union of India*, AIR 1993 SC 1637 : 1993 (3) SCC 609 : 1993 CrLJ 2516 .
62. *SWIL Ltd. v State of Delhi*, AIR 2001 SC 2747 .
63. *Anil Saran v State of Bihar*, AIR 1996 SC 204 : 1996 CrLJ 408 .
64. *Kishun Singh v State of Bihar*, (1993) 2 SCC 16 : 1993 CrLJ 1700 (SC) (s. 193).
65. See *Mahadev Bapuji Mahajan v State of Maharashtra*, AIR 1994 SC 1549 : 1994 Supp (3) SCC 748 : 1994 CrLJ 1389 .
66. *Gauri Shankar Prasad v State of Bihar*, AIR 2001 SC 2547 (s. 197).
67. *State of Punjab v Labh Singh*, (2014) 16 SCC 807 .
68. *Rizwan Ahmed Javed v Jamal Patel*, 2001 CrLJ 289 (SC) (s. 197).
69. *State of T.N. v T. Thulasingam*, AIR 1995 SC 1314 : 1995 CrLJ 2080 .
70. *R. D. Aherwar v Special Police Establishment*, 2003 CrLJ 2616 .
71. *Mohd. Hazi Raya v State of Bihar*, AIR 1998 SC 1945 .
72. *State of Orissa v Sharat Chandra Sahu*, AIR 1997 SC 1 . (s. 198).
73. *Subramanian Swamy v Union of India*, 2016) 7 SCC 221 : AIR 2016 SC 2728 .
74. *Mohinder Singh v Gulwant Singh*, AIR 1992 SC 1841 .
75. *Anil Saran v State of Bihar*, AIR 1996 SC 204 : 1996 CrLJ 408 (s. 204).
76. *K.M. Mathew v State of Kerala*, 1992 CrLJ 1779 (SC).
77. *Food Inspector v F.S. Sreenivsan Shenoy*, AIR 2000 SC 2577 .
78. *Anant Prakash Sinha v State of Haryana*, (2016) 6 SCC 105 : AIR 2016 SC 1197 .

79. *KTMS Mohd. v Union of India*, AIR 1992 SC 1831 ; *State of Punjab v Rajesh Syal*, (2002) 8 SCC 158 : 2003 CrLJ 60 ; *Narinderjit Singh v Union of India*, (2002) 2 SCC 210 .
80. *Shamnsaheb M. Multiani v State of Karnataka*, AIR 2001 SC 921 .
81. *R. Dineshkumar v State*, (2015) 7 SCC 497 : AIR 2015 SC 1816 .
82. *Dilwar Babu Kurane v State of Maharashtra*, AIR 2002 SC 564 .
83. *Suresh v State of Maharashtra*, AIR 2001 SC 1375 at 1377–78.
84. *State of Maharashtra v Sukhdeo Singh*, AIR 1992 SC 2100 .
85. *B A Umesh v Registrar General Karnataka High Court*, 2016 (9) SCALE 600 : 2017 CrLJ 762 .
86. *Kanti Bhadra Shah v State of W.B.*, (2000)1 SCC 72 : AIR 2000 SC 522 ; *Om Prakash Sharma v CBI*, AIR 2000 SC 2335 (s. 239).
87. *Nandkumar Krishnarao Nawgore v J. Laxman Kashalkar*, 1999 Cri LJ 5022 , an explanation of pecuniary jurisdiction (s. 250).
88. *Provident Food Inspector v Madhusudana Chaudhury*, (2000) 9 SCC 506 (s. 257).
89. *State of Gujarat v Natwar Harchandji Thakor*, 2005 CrLJ 2957 (2978, 2979) (Guj—DB).
90. *State of Maharashtra v Dr. Praful B. Desai*, AIR 2003 SC 2053 , evidence by video-conferencing.
91. *State of Punjab v Nath Din*, (2001) 8 SCC 578 .
92. *J.K. International v State (Govt. of NCT) of Delhi*, AIR 2001 SC 1142 .
93. *Simranjit Singh Mann v Union of India*, AIR 1993 SC 280 .
94. *State of Maharashtra v Sukhdeo Singh*, AIR 1992 SC 2100 .
95. *Kishan Singh v State of Bihar*, 1993 AIR SCW 774; *State of Assam v Abdul Halim*, AIR 1992 SC 2068 ; *Girish Yadav v State of M.P.*, AIR 1996 SC 3098 : 1996 CrLJ 2159 .
96. *K.M. Mathew v K.K. Abraham*, AIR 2002 SC 2989 .
97. *Hardeep Singh v State of Punjab*, AIR 2014 SC 1400 : (2014) 3 SCC 92 .
98. *R.M. Tewari v State*, (1996) 2 SCC 610 : AIR 1996 SC 2047 : 1996 CrLJ 2872 .
99. *M.S. Ahlawal v State of Haryana*, AIR 2000 SC 168 .
100. *Mohd. Chaman v State (NCT) of Delhi*, AIR 1999 SC 382 .
101. *Inder Singh v State of Punjab*, AIR 1995 SC 1949 .
102. *Dhanjay Sharma v State of Haryana*, AIR 1995 SC 1795 .
103. *Moti Lal v State of M.P.,* AIR 1994 SC 1544 .
104. *Ram Kumar v State of Haryana*, AIR 1995 SC 280 : 1994 CrLJ 3836 ; *Dhanna v M.P.*, AIR 1996 SC 2478 : (1996) 10 SCC 79 : 1996 CrLJ 3516 ; *Betal Singh v State of M.P.*, AIR 1996 SC 2770 : (1996) 8 SCC 205 : 1996 CrLJ 4006 .
105. *Resham Singh v State of Punjab*, AIR 2002 SC 2625 ; *Allarakha K. Mansuri v State of Gujarat,* AIR 2002 SC 1051 .
106. *State of T.N. v A. Jaganathan,* AIR 1996 SC 2449 : (1996) 5 SCC 329 : 1996 CrLJ 3495 .
107. *Bindeshwari Prasad Singh v State of Bihar*, AIR 2002 SC 2907 .
108. *Naib Singh Gulzar Singh v Haryana*, AIR 1996 SC 2759 : (1996) 6 SCC 126 : 1996 CrLJ 3998 .
109. *Union of India v Sriharan alias Murugan* : (2016) 7 SCC 1 [Five judge Constitution Bench].
110. *Satpal v State of Haryana*, AIR 1993 SC 1218 : (1992) 4 SCC 172 : 1993 CrLJ 314 ; *State of Punjab v Kesar Singh*, AIR 1996 SC 2512 : (1996) 5 SCC 495 : 1996 CrLJ 3586 .
111. *Union of India v Sriharan alias Murugan*, (2016) 7 SCC 1 .
112. See *Moolchand v State,* AIR 1992 SC 1618 : 1991 Supp (2) SCC 101 : 1992 CrLJ 2330 .
113. *Kashi Nath Roy v State of Bihar,* 1996 SCC (4) 539 : AIR 1996 SC 3240 : 1996 CrLJ 2469 .