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CRIMINAL PROCEDURE

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I INTRODUCTION

THERE HAVE been a large mass of case law produced by the Indian judiciary during 2007. It is, however, difficult to examine all the decisions and indicate the trends. Since it is the Supreme Court which produces trend-setters even with reference to the powers of the various courts, it may be possible to locate the trends in the Supreme Court decisions. Only those cases which the writer considers trend-setters have been surveyed here.

II INHERENT POWER

The Criminal Procedure Code (Cr PC) lays down the procedure to be followed by each court in the hierarchy. In our scheme the Supreme Court and high courts have not only statutory powers but also writ powers under the Constitution. These courts quite often than not invoke writ power/inherent power and decide not only appeals but pass other orders also.[1] The declaration of the Supreme Court in *Suga Ram* v. *State of Rajasthan*,[2] is characteristic of its approach:[3]

> We do not have the slightest doubt that we can entertain appeals against judgments of acquittal by the High Court at the instance of interested private parties also. The circumstance that the code does not provide for an appeal to the High Court against an order of

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1 See the Supreme Court's observations in *Suga Ram* v. *State of Rajasthan*, (2007) 1 SCC (Cri) 18 wherein in para 31, the court said:
"It is to be seen whether the broad spectrum spread out of Art. 136 fills the bill from the point of view of procedure established by law. In express terms, Art. 136 does not confer a right to appeal on a party as such but it confers a wide discretionary power on this court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the court. Art. 136 is a special jurisdiction. It is residuary power, it is extraordinary in its amplitude. Its limits, when it chases injustice, is the sky, itself. This court functionally fulfill itself by reaching out to injustice. Wherever it is and this power is largely derived in the common run of cases from Art. 136."

2 (2007) 1 SCC (Cri) 18.

3 *Id.* at 23-24.

> acquittal by a subordinate court, at the instance of a private party has no relevance to the question of the power of his court under Art. 136. We may mention that in *Mohanlal* v. *Ajit Singh,* (1978) 3 SCC 279 this court interfered with a judgment of acquittal by the High Court at the instance of a private party.

In fact the Supreme Court does not show any reticence in interfering with acquittals. In *State of Rajasthan* v. *Kashi Ram*,[4] the court reversed the acquittal observing thus:[5]

> We are aware of the fact that we are dealing with an appeal against acquittal, but having appreciated the evidence on record we have come to the conclusion that the High Court has completely given a go-by to the most important incriminating circumstances which appeared against the accused respondent. In the fact and circumstances of the case the most incriminating circumstance about the respondent being seen with his wife on 3-2-98 and disappearing thereafter, and his failure to offer any explanation when arrested, has been completely ignored by the court by simply recording the finding that there was nothing unusual in the husband being found with his wife in his house. The High Court failed to appreciate the other co-related circumstances, namely his disappearance, thereafter, locking of the house and his failure to offer a satisfactory explanation in defence. Thus the High Court has ignored important clinching evidence which proved the case of the prosecution. Therefore, interference with the judgment of the High Court is warranted.

In another case viz. *Ram Singh* v. *Sonia*,[6] the Supreme Court reversed the sentence of life imprisonment and awarded death penalty to the defendant. The court justified its interference thus:[7]

> In the normal course, there would have been no need for us to go into these circumstances as elaborately as was done by the two courts below in an appeal filed under Art. 136 of the Constitution of India, especially when the finding qua conviction is concurrent. However, taking into consideration that the accused were awarded death sentence by the trial court, which has been converted into life imprisonment by the High Court and that the case in hand is one of circumstantial evidence, we think it appropriate and in the interest of justice to reappreciate the evidence.

4 (2007) 1 SCC (Cri) 688.
5 *Ibid.*
6 (2007) 2 SCC (Cri) 1.
7 *Id.* at 7.

Be that as it may in *Babibhai Udesinh Parmar* v. *State of Gujarat*,[8] the order of conviction and sentence of death was set aside because the Supreme Court noticed that the confession was not lawfully recorded and that he was not given counsel to defend him.

It is pertinent to note that this sort of power is not envisaged by the Criminal Procedure Code. Both the Supreme Court and the high court sometimes intervene even at the initial stages of investigation. The Supreme Court was, however, not happy with this kind of intervention either under writ jurisdiction or under section 482 Cr PC. In *Zakiri Vasu* v. *State of U.P.,*[9] the Supreme Court ruled that the high courts should not entertain petitions seeking intervention and observed thus:[10]

> We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154(3) and Section 36 Cr PC before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156(3).

The court has in fact been emphasizing the role played by the police and the magistrate in investigation and the trend of writ court's in making interventions. The decision in *M.C. Mehta (Taj Corridor Scam)* v. *Union of India*,[11] signifies the views of the Supreme Court on the role of magistrate in investigation. Kapadia J emphasized that although the magistrate may have certain supervisory powers under the code, it cannot be said that when the police submits a report that no case has been made out of sending the accused for trial, it is open to the magistrate to direct the police to file a charge sheet. The formation of the opinion is the culmination of investigation. S.B. Sinha J, however, responded thus:

> It is beyond any doubt or dispute that investigation of an offence is the field exclusively reserved for the police. It may be subject to supervision of higher ranking officers but the court's jurisdiction to have control in this behalf is beyond any controversy.

After referring to *Sheonandan Paswan*,[12] *S.N. Sharma*[13] and *Hemant Dasmana*,[14] he concluded thus: "In view of the aforesaid decisions, it is the magistrate alone who has the final say in the matter."[15]

8 (2007) 1 SCC (Cri) 702.
9 (2008) 2 SCC 409.
10 *Ibid.*
11 (2007) 1 SCC (Cri) 264.
12 (1987) SCC 288.
13 (1970) 1 SCC 653.
14 (2004) 7 SCC 536.
15 *Supra* note 11 at 289.

In *Prakash Singh Badal* v. *State of Punjab*,[16] the court again pointed out that the report in terms of section 173 is in the nature of information to the magistrate. In other words, what the court ruled is that the report is part of the investigation.

However, it is to be noted that as Sinha J pointed out the court's jurisdiction to control in this behalf is beyond any controversy.

III INVESTIGATION

Under section 156 Cr PC the magistrate may order investigation by any agency. In *CBI* v. *State of Gujarat*,[17] the magistrate's order was questioned by the CBI under section 397 Cr PC in the Gujarat High Court which rejecting prayer ordered the CBI to pay a cost of Rs. 1,000/- as it chose to invoke revisional jurisdiction of the high court without invoking the jurisdiction of the sessions judge first. On appeal the Supreme Court disapproved the high court's order. The decision in *CBI* v. *State of Rajasthan*,[18] was referred to and relied on.

Though the Supreme Court in *Sasi Thomas* v. *State*,[19] declared in many words that it could order investigation by CBI it refrained from ordering so. The trend seems to deny this power to both the high courts and the Supreme Court. In *State of West Bengal* v. *Committee for Protection of Democratic Rights*,[20] despite the compelling situation as explained below, the court chose to refer the question whether it can order CBI inquiry to a constitution bench. The court's observations are illustrative:[21]

> The High Court observed that in the background of the case, it has strong reservations about the impartiality and fairness in the investigation by the State of police because of the political implications and therefore in the opinion of the High Court no useful purpose would be secured in continuing the investigation by the State investigation agency and even if the investigation is made by the State agency, it would be looked at with reservation and suspicion because of the allegation that all the assailants were members of a ruling party. Therefore it was considered all the more necessary to do justice in the case and to maintain impartiality and fairness in the investigation and to uphold the rule of law the High Court thought it appropriate that the inquiry be conducted by an independent agency, that is, Central Bureau of Investigation (CBI).

16 (2007) 1 SCC (Cri) 193.
17 (2007) 3 SCC (Cri) 65.
18 (2001) 3 SCC 333.
19 (2007) 2 SCC (Cri) 72.
20 (2007) 2 SCC (Cri) 100.
21 *Ibid.*

The Supreme Court, generally speaking, does not interfere with investigation process. But there was an instance in which it prevented certain tests from being conducted by the investigating agency. In *M.P. Gopi* v. *Ranjith Varghese*,[22] the Supreme Court set aside the decision of the Kerala High Court in *Ranjith Varghese* v. *State of Kerala*[23] and ordered that the victim should not be subjected to polygraph test or brain mapping test. In this connection it may be noticed that the high court's order was a very balanced one made after considering the pros and cons of all aspects of investigation. The high court got all brain mapping test, polygraph test and narco analysis test examined by the experts as to their adverse effects and it was only after ascertaining that both the first two tests do not have adverse effect that he ordered both the victim and the accused to undergo the tests. The victim in this case was asked to undergo the tests because the accused had been alleging false implication and non commission of the crime. It was fair enough in such a situation for the high court to order so. In reversing this order the Supreme Court did not spell out any principle of law different from the one spelt out by the high court. The Supreme Court, however, said that these tests could be got done in course of trial and reversed the high court's order.

IV PRE-TRIAL PROCEDURE

Section 197 of Cr PC provides for obtaining sanction from the government before prosecution is initiated against government servants. So also section 19 of the Prevention of Corruption Act, 1988. However, the import of these provisions are distinct. In *Lalu Prasad Yadav* v. *State of Bihar*,[24] the Supreme Court examined these provisions and distinguished them. Sanction contemplated under section 197 Cr PC concerns a public servant who is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty, whereas the offences contemplated in the Prevention of Corruption Act, 1988 are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. This decision brings conceptual clarity to these provisions.

V TRIAL

In our constitution right to speedy trial is not explicitly mentioned as constitutional right though in many a case the Supreme Court declared that it is inherent in article 21 of the Constitution. *Motilal Saraf* v. *State of J&K*,[25] deals with a case in which during 26 years of its pendency not even

22 Cri App. No. 105 of 2007.
23 Revision No. 597 of 2006 (Ker).
24 (2007) 1 SCC (Cri) 241.
25 (2007) 1 SCC (Cri) 180.

a single witness was examined. The Supreme Court reiterated the availability of this right thus:[26]

> The concept of speedy trial is read into Art. 21 as an essential part of fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality can be arrested.

Despite these assertions it remains a fact that right to speedy trial is treated as a fragile one by the courts. The Supreme Court has offered explanation for the limited application thus:[27]

> This court also observed that while determining whether undue delay has in fact occurred, one must have regard to all the attendant circumstances, including the nature of offence, number of accused and witnesses, the work load of the court concerned, prevailing local conditions as so on – what is called systematic delays. The sum and substance is that it is neither advisable nor practicable to fix any time limit for trial of offence. Each case has to be decided on its own facts and circumstances.

VI TRIAL PROCEDURE

Right to private defence, generally speaking, has to be pleaded by the accused. The burden of proof is on the accused. But in a case where it becomes clear to the court that the accused acted in exercise of private defence it should give him the benefit. This has been made clear in *Krishnan* v. *State of T.N.,*[28] wherein the appellant did not mention in his statement under section 313 Cr PC that he hit back his deceased brother when he was being attacked by the deceased and his sons, the court gave the benefit of the defence observing thus:[29]

> Where the plea of the accused, when read with the evidence of the eyewitness brings out a set of facts and circumstances showing that the accused acted in exercise of the right of private defence, the fact

26 *Id.* at 190.
27 *Id.* at 189.
28 (2007) 1 SCC 437.
29 *Id.* at 440.

> that the accused in his Section 313 statement only referred to the acts of the deceased and his sons hitting him and did not admit that he hit back the deceased, is not a ground to reject the plea of private defence. The approach of the trial court to the plea of private defence was erroneous. The High Court did not go into this aspect at all.

Regarding the requirement of corroboration as early as in 1952 Vivian Bose J in *Rameshwar* v. *State of Rajasthan*,[30] declared thus:[31]

> The rule which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge.

The Supreme Court relying on this understanding, in *State of Kerala* v. *Kurissum Mootil Antony*,[32] asserted that an accused cannot cling to a fossil formula and insists on corroborative evidence, even if taken as a whole, the case spoken to by the victim (of sexual offence) strikes a judicial mind as probable.

Section 464 Cr PC enables appellate/revisional court to convict an accused for an offence for which no charge was framed unless the court is of opinion that a failure of justice would in fact occasion. In *Virendra Kumar* v. *State of U.P.*,[33] appellant was convicted under section 302. The high court converted conviction to one under section 306 IPC in terms of presumption under section 113A Evidence Act.. In this case offence was committed before section 113A was incorporated into the Statute. Reviewing all the decisions such as *Sangara*,[34] *Lakhjit Singh*,[35] and *Dalbir Singh* v. *State of U.P.*,[36] the court ruled thus:

> Even in the absence of a presumption in terms of Section 113A of the Evidence Act it is to be noted that the prosecution version was specific to the extent that the deceased was being taunted by the appellant for not bringing adequate dowry and/or being of dark complexion. The Supreme Court does not send the appeal and confirmed conviction under section 306 IPC.[37]

30 AIR 1952 SC 54.
31 *Ibid.*
32 (2007) 1 SCC (Cri) 403.
33 (2007) 3 SCC (Cri) 120.
34 (1997) 5 SCC 348.
35 1994 SCC (Cri) 235.
36 (2004) 5 SCC 334.
37 *Supra* note 33 at 125.

The question of application of section 222 Cr PC regarding conviction on a charge which has not been formed came to be examined in *Sukh Ram* v. *State of Maharashtra*.[38] In this case both the husband, and father-in-law, (A2) of the deceased woman were charged under sections 302/201/34 IPC. The trial court convicted them under sections 304B, 498A/34 IPC. The high court on appeal found them guilty under sections 302/201/34 rather than under sections 302/498A/34.

The husband did not surrender before the Supreme Court and his appeal was dismissed. The Supreme Court responded to the conviction of A2 thus:[39]

> We have perused the trial Court's record. We find that though charge for offence punishable under Section 302 IPC had been framed against appellant A no such charge was framed against appellant A2, even with the aid of Section 34 IPC. The only charge framed against appellant A2 was for an offence punishable under Section 201 read with Section 34 IPC. True that Section 222 Cr PC clothes the court with the power to convict a person of an offence which is minor in comparison to the one for which he is charged and tried, but by no stretch of imagination, offence under section 304B and 498A IPC, under which appellant A2 was convicted by the trial court, could be said to be minor offence in relation to that under Section 201 IPC, for which he was charged. In fact the three offences are distinct and belong to different categories. The ingredients of the offences under the said sections are vastly different. Therefore Section 222 Cr PC had no application on facts in hand.

Based on the facts the Supreme Court found that the high court was not justified in convicting the father, A2 for having committed a major offence punishable under section 302 IPC.[40]

Examining the evidence, the ingredients of the offence and the ingredients of the offence under section 201 IPC the court acquitted the accused of the offence under section 201 also.

Holding that the power to proceed against persons found to have involvement in the crime under section 319 Cr PC is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence, the Supreme Court observed in *Rajendra Singh* v. *State of U.P.*[41] thus:[42]

38 (2007) 3 SCC (Cri) 426.
39 *Id.* at 434.
40 See also *Kalavati* v. *State of H.P.,* AIR 1953 SC 131.
41 (2007) 3 SCC (Cri) 375.
42 *Id.* at para 21.

> Exercise of power under section 319 of the code in my view is left to the court trying the offence based on the evidence that comes before it. The court must be satisfied of the condition precedent for the exercise of power under Section 319 of the code. There is no rationale to assume that a court trained in law would not exercise the power within the confines of the provision and decide whether it may proceed against such person or not. There is no rationale in fettering that power and the discretion, either by calling it extraordinary or by stating that it will be exercised only in exceptional circumstances. It is intended to be used when the occasion envisaged by the section arises.

VII BAIL

Granting of bail is discretionary. This is signified more importantly in *Rajesh Ranjan Yadav* v. *C.B.I. through its Director*,[43] in which after noting at a stage that the accused might renew application for bail, the court had to reject and forestall further application. This was because there was an attempt on his part to delay the trial and thus to get bail on the ground of long period of pre-trial imprisonment. After noting the delaying tactics resorted to by the appellant, the court directed:[44]

> It is made clear that no further application for bail will be considered in this case by any court as already a large number of bail applications have been rejected earlier, both by the High Court and the Supreme Court.

The fact that the granting of bail should be judicious and address the consequences on the complainant and his case, came to be appreciated in *Rajanand Agarwal* v. *State of Orissa*.[45] It was a case involving death of a bride in connection with allegations of torture for dowry. After granting application for bail of two accused saying that they should not be treated as precedent the court rejected another (accused's) application with liberty to renew. The father-in-law of the deceased bride was also granted bail saying that he was aged and sick. When the court granted bail without adding reasons to the remaining accused, the appellant approached the Supreme Court which ruled that reasons should be stated for the granting of bail. The court laid down thus:[46]

> It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors before

43 (2007) 1 SCC (Cri) 254.
44 *Id.* at 260.
45 (2007) 1 SCC (Cri) 568.
46 *Ibid.*

granting bail. They are :

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant.
3. Prima facie satisfaction of the court in support of the charge.

Any order dehors of such reasons suffers from non-application of mind as was noted by this court in *Ram Goving Upadhyay* v. *Sudarshan Singh,* (2002) 3 SCC 598....

VIII SENTENCE

The high courts do not have jurisdiction to direct that its order of conviction may not affect the employment of the accused. The consequences of conviction of a government employee will be governed by the service rules applicable to him. This was reiterated by the Supreme Court in *Union of India* v. *State of Bihar*.[47]

Regarding the application of the provisions such as sections 360 and 361 Cr PC when the provisions of the Probation of Offenders Act is in operation it has been ruled by the Supreme Court that the provisions of the Probation of Offenders Act would exclude the operation of sections 360 and 34 Cr PC[48]

IX APPEAL

Though it has been stated in several decisions it is worth while to note what the appellate court could do when it examines an appeal against acquittal. In *Chandrappa* v. *State of Karnataka*,[49] the accused was acquitted of the offences under section 143, 147, 148, 302 and 324 read with section 149 IPC. The high court on appeal revised the acquittal and convicted the accused. On appeal the Supreme Court refused to intervene and observed that the following general principles will have to be followed while dealing with an appeal from acquittal:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
(2) The Cr PC 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence

47 (2007) 1 SCC (Cri) 122.
48 *Gulzar* v. *State of U.P.*, (2007) 1 SCC (Cri) 395.
49 (2007) 2 SCC (Cri) 325.

before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions such as "Substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes" etc. are not intended to curtail extreme powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable views are possible on the basis of evidence on record and one favorable to the accused has been taken by the trial court, it ought not to be disturbed by the court.[50]

The Supreme Court has since[51] 1996 been taking the position that no appeal should be dismissed for default. It has now been extended to revisions also.[52]

The question whether a person whose conviction has not been appealed against by the state could be convicted of an offence by the appellate court came to be answered in the negative by the Supreme Court in *Raju @ Raj Kumar* v. *State of Rajasthan*.[53] In this case the appellant was alleged to have in an unlawful assembly stabbed the deceased to death. He was convicted under section 148 IPC. The high court dismissed the appeal. On appeal to the Supreme Court it was argued that since there was a finding by the trial court that the appellant stabbed the deceased to death, he should be convicted under section 302 IPC by the Supreme Court. The court refused saying:[54]

> It was contended on behalf of the State that if one goes through the entire judgment of the trial court it is clear from the reasoning that the trial court had found the appellant guilty of murder under Section 302 IPC and the appellant has never made any grievance against the said finding. It is submitted on behalf of the state that even in the special leave petition, before this court, this particular ground has

50 *Id.* at 327.
51 See *Bari Singh* v. *State of U.P.,* (1996) 4 SCC 720.
52 See *Madan Lal Kapoor* v. *Rajiv Thapar,* (2007) 3 SCC (Cri) 437.
53 (2007) 3 SCC (Cri) 657.
54 *Id.* at 663.

> not been taken by the appellant. We find no merit in this contention. We cannot convict an appellant under section 302 IPC in the appeal preferred by the appellant herein. If we were to do so it would amount to travesty of justice. We cannot convict the accused under section 302 without state filing an appeal in that regard.

As a sequel to this decision *Abdul Aziz* v. *State of Rajasthan*[55] also came up before the Supreme Court. In this case the appellant was charged under sections 302, 148, 149 and 460 IPC but the trial court convicted him only under section 460 and sentenced him to 10 years rigorous imprisonment. No appeal was filed on conviction under section 302 or for enhancement of sentence. Still in the appeal filed by the appellant the high court convicted him under section 302/149 and sentenced to life imprisonment. In these circumstance the Supreme Court disapproved high court's order and refused to convict him under section 302 IPC. His sentence was also not enhanced.

The Supreme Court has had an occasion to examine the power of high court to stay conviction. When an appeal is pending under section 374, it may be possible for the high court under section 389 to stay the conviction in exceptional and rare circumstances where non-grant of stay would lead to injustice and irreversible consequences. The appellant should draw the attention of the court to the specific consequences that may arise if conviction is not stayed.[50]

X LIMITATION

Period of limitation to be counted from date of reporting of crime

In *Japani Sahoo* v. *Chandrasekhar Mohanty*[57] it has been categorically ruled by the Supreme Court that the period of limitation under section 468 may be counted from the date of filing of the complaint or initiating criminal proceedings and not the date of taking cognizance by a magistrate or issuance of process by a court.

XI CONCLUSION

The decision surveyed here have tremendous impact on our criminal justice system. The main trend they signify is the supremacy of the courts having writ jurisdiction or the litigants, inclination to get these courts involved in the process apparently for securing speedy justice. It is strongly felt that the apex court should intervene and see that the cases are dealt with at lower levels in accordance with the procedure laid down in Cr PC. The district judiciary should be encouraged to ensure speedy justice as envisaged by the Cr PC.

55 (2007) 3 SCC (Cri) 651.

56 *Ravikant S. Patil* v. *Sarvabhowna Begali*, (2007) 1 SCC (Cri) 417. See also *Navjot Sidhu* v. *State of Punjab,* (2007) 1 SCC (Cri) 627.

57 (2007) 3 SCC (Cri) 388.