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CRIMINAL PROCEDURE

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I INTRODUCTION

THE CRIMINAL justice system has been functioning with vigour during the year under survey. Some general trends which would be of interest for future studies have been noticed. For example, in *Fatima Bibi Ahmed Patel* v. *State of Gujarat*[1], the plea to apply the rule of *res judicata* in the criminal case was rejected by the Supreme Court asserting that jurisdictional issues could be permitted to be raised at any stage of the proceedings.

The use of article 32 of the Constitution even to assail the final judgment of the apex court came to be disapproved by the Supreme Court in *Shaukat Hussain Guru* v. *State (NCT) Delhi*.[2] It was a writ petition filed after dismissal of review petition and a curative petition.

The misuse of section 107 Criminal Procedure Code, 1973 (Cr PC) to settle a civil dispute was criticized and dismissed by the Delhi High Court in *Keshav Kumar* v. *State*.[3] The complainant who had a complaint against the defendant of letting out seepage of toilet to his property complained to the police which arrested and detained the defendant under section 107 Cr PC. Quashing the petition under section 482, the Delhi High Court awarded a compensation of Rs.50,000/- to the defendant for his illegal detention. The police commissioner was asked to initiate proceedings against the erring police officers.

The facts of the decision in *State of Rajasthan* v. *Lala @ Abdul Salam*,[4] show the possibilities of police manipulation of investigation records. The Supreme Court upheld the acquittal of the petitioner because it found that almost all records of the investigation were manipulated.

The Punjab and Haryana High Court had an opportunity to deal with a complaint of non-compliance of orders under section 188 IPC.[5] The

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1 2008 Cri LJ 3065 (SC).

2 2008 Cri LJ 3016 (SC). Also see *Sansheel Manoj* v. *State of Haryana*, (2008) 3 SCC (Cri) 882 in which the petitioner invoked article 13 of the Constitution to get direction from the Supreme Court for redressal of his grievances of police manipulations.

3 2008 Cri CJ 2333 (Del).

4 2008 Cri LJ 2076 (SC). (Also see *Basavaraj* v. *State of Karnataka,* (2008) 9 SCC 329 wherein the trend of casual way of charging also came to be criticized by the Supreme Court.

5 *Jiwankumar* v. *State of Punjab*, 2008 Cri LJ 3576 (Pb).

legislature had already enacted Drugs and Cosmetics Act, 1940 besides framing rules thereunder to regulate the sale and distribution of medicines. In such a situation, issuance of notification under general law was held to be void as it was encroachment of the field occupied by the special law. It was in these circumstances that the court quashed the prosecution under section 188 IPC.

The Delhi High Court took initiative in *Vimal Bhai* v. *Union of India*,[6] to issue directions to security forces to issue guidelines to personnel working under them to ensure that no untoward incident took place in course of frequent rallies and processions. It also directed them to impart training to the personnel to make them cognizant with their duties and responsibilities.

The trend of civil disputes being tried to be made subject of criminal proceedings came to be criticized by the Supreme Court in *Inder Mohan Goswami* v. *State of Uttaranchal*,[7] thus:[8]

> In *I.O.C* v. *NEPC India Ltd* (2006) 6 SCC 736 the court again cautioned about a growing tendency in business circles to convert purely civil disputes into crimes. The court noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors.

Thus, there have been decisions highlighting different aspects of criminal procedure in 2008. For facility of reference the case law is analysed hereunder different heads.

II ARREST

The decision in *Medha Patkar* v. *State of M.P.*,[9] is a very important one. The agitators who were squatting on the road raising slogans and asking land for land which was to be taken over for establishing a project came to be arrested and detained. This is the pattern followed by the administration in dealing with agitators. The M.P High Court took this case in an unusual way. It found that the agitators were only exercising their right under article 19(1) (a) and (b) of the Constitution and that they should be compensated at the rate of Rs.10,000/- per person for violation of article 21. The court also ruled that the state could recover the amount from the officers responsible for the unauthorized arrest and detention. This is a decision of far reaching consequences for the criminal justice system. An unusual one indeed.[10]

6 2008 Cri LJ 1953 (Del).
7 (2008) I SCC (Cri) 259.
8 *Id.* at 273.
9 2008 Cri LJ 47 (MP).
10 See also *Raghuvansh Devanchand Bhasin* v. *State of Maharashtra*, 2008 Cri LJ 2127 (Bom).

III REGISTRATION OF FIRST INFORMATION REPORT

Holding that the registration of FIR is the prerogative of police, the Supreme Court held that this duty does not take away the right of police officer to make preliminary inquiry before registering the FIR.[11]

The Supreme Court has also ruled in another case that the FIR need not contain every detail of the case.[12] In this case the court clarified that the witness in his statement before the police implicated more persons than named in FIR. This fact by itself could not be a ground to discredit his testimony in its entirety.

Some enquiries are indeed made before a case is registered. This information thereby collected would not, however, form part of FIR. The facts and decision in *Animireddy Venkata Ramana* v. *P.P, High Court of A.P.*[13] stands for this proposition.

The Allahabad High Court in *Ashok Kumar Tiwari* v. *State of U.P.*[14] has spelled out that if two persons give information regarding commission of two different offences which are cognizable in nature, may be in respect of the same incident, then the FIR of both the versions have to be registered. It will be for the investigation agencies to investigate and find out which version is correct. Registration of FIR cannot be refused for the reason that incident is one. What has been prohibited is registration of two FIRs for the same offence. It does not preclude from lodging of two FIRs in respect of the same incident.

The Supreme Court has had an occasion to comment upon the callous attitude of police in registering FIRs in *Lalitha Kumari* v. *State of U.P.*[15] Lamenting on the inaction of the police in tracing out a missing minor girl child, the court said:[16]

> It is a matter of experience of one of us (B.N.Agarwal J) while acting as a Judge of the Patna High Court, Chief Justice of the Orissa High Court and Judge of this court that in spite of law laid down by this court, the police authorities concerned do not register FIRs, unless some direction is given by the CJM or the High Court or this court. Further, experience shows that even after orders are passed by the courts concerned for registration of the case the police does not take the necessary steps and when matters are brought to the notice of the inspecting judges of the High Court during the course of inspection of the courts and the superintendents of police are taken to task, then only FIRs are registered. In a large

11 *Rajimer Singh Katoch* v. *Chandigarh Admn*., (2008) SCC (Cri) 572.
12 *Sreekumar Mohammed* v. *State of Rajasthan*, 2008 Cri LJ 816 (SC).
13 2008 Cri LJ 2038 (SC).
14 2008 Cri L J 4668 (All).
15 (2008) 3 SCC (Cri) 17.
16 *Id.* at 18.

> number of cases investigations do not commence even after registration of FIRs and in a case like the present one, steps are not taken for recovery of the kidnapped person or apprehending the accused person with reasonable dispatch. At times it has been found that when harsh orders are passed by the members of the judiciary in a state, the police become hostile to them, for instance in Bihar when a bail petition filed by a police personnel, who was the accused was rejected by a member of the Bihar Superior Judicial service, he was assaulted in the court room for which contempt proceeding was initiated by the Patna High Court and the erring police officials were convicted and sentenced to suffer imprisonment.

In the instant case the court reiterated that directions should be issued to the police to register FIR promptly and to give a copy to the complainants. If the police did not comply with these instructions or initiate investigation, magistrate could initiate contempt proceedings. The court issued notice to all state governments to explain as to why such directions were not issued.

IV INVESTIGATION

A petition under article 227 of the Constitution was filed by the petitioner to avoid narco analysis test and brain mapping test on the ground that the charge against him was only harbouring the accused. However, since the accused persons were charged with serious offences like rape and murder, the prayer of the petitioner was turned down by the Gujarat High Court in *Santokben Sharmanbhai Jadeja* v. *State of Gujarat*.[17]

In *Prathibha* v. *Rameshwari Devi*,[18] the Supreme Court deprecated the high court's direction to submit the investigation report to it rather than to the magistrate with a view to quashing the proceedings under section 482. The investigation report can be filed before the magistrate only under the provisions of Cr PC. The high court should not have issued such a direction.

So long as a charge sheet is not filed under section 173 (2) investigation remains pending. It, however, does not preclude an investigation officer from carrying on further investigation despite filing a police report, in terms of section.173(8) Cr PC. This position was made clear by the Supreme Court in *Dinesh Dalmia* v. *CBI*.[19]

Inquest report

Usually inquest report indicates only cause of death. Mention of names of accused and eye witnesses is not often made in inquest reports. Nor could it be inferred from the absence of such information that the FIR did not exist at the time of inquest.[20]

17 2008 Cri L J 68 (Guj).
18 2008 Cri LJ 329 (SC).
19 2008 Cri LJ 337 (SC).
20 See *Ramashankar* v. *State of U.P.,* (2008) Cri LJ 129 (All).

Search warrant

Issue of a search warrant under section 97 for the recovery of a nine year old child from the custody of his father was held to be wrong inasmuch as there was no offence of wrongful confinement.[21]

Identification parade

Holding that identification parade belongs to the stage of investigation the Supreme Court in *Mahavir* v. *State of Delhi*,[22] explained the purpose of test identification parade thus:[23]

> The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding any identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witnesses of the crime.

No fresh investigation or reinvestigation

Under the criminal procedure law there is provision for further investigation under section 173(8) and the direction for reinvestigation or fresh investigation is indefensible.[24]

Use of statements made before police

The question whether the statement made before a police officer in the course of an investigation under chapter XII could be used in any proceeding, inquiry or trial in respect of an offence other than which was under investigation at the time when such statement was made was answered in the affirmative. The bar of section 162 would not be applicable in such a case.[25]

The Supreme Court had an occasion to dwell on the purpose and object of section 157 in *Batheela Nagamalleswara Rao* v. *State of AP*.[26] The court explained thus:[27]

> The purpose and object of (S.157) is so obvious which is spelt out from the combined reading of sections 157 and 159 Cr PC. It has the dual purpose, firstly, to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by

21 See *Smt. Lily Marina* v. *W.B.*, 2008 Cr LJ 625 (Cal).
22 2008 Cri L J 3036 (SC).
23 *Id.* at 3038.
24 See *Ramachandran* v. *Udayakumar*, 2008 Cri LJ 4309 (SC).
25 *Vinay D. Nagar* v. *State of Rajasthan*, 2008 Cri LJ 1907 (SC).
26 (2008) 3 SCC (Cri) 898.
27 *Id.* at 907.

> deliberations and consultation and, secondly to enable the magistrate concerned to have a watch on the progress of the investigation.

Courts do not have jurisdiction to transfer investigation of a case from one place to another. In *Naresh Kavarchand Khatri* v. *State of Gujarat*,[28] in pursuance of the high court's order a case pertaining to Vadodara police station was got transferred and investigated in the police station at Waghodia. On a petition under article 136, the Supreme Court held that the transfer and subsequent investigation was invalid as the order of the high court was illegal. The court held that the jurisdiction of a police officer to investigate a case would depend upon a large number of factors including those contained in sections 177, 178 and 181 Cr PC.

Initiation of proceedings

It is on consideration of the final report of the police that the magistrate takes cognizance. If the magistrate decides not to take cognizance as regards some accused he is bound to inform the informant about his action. He cannot ask the police to change their opinion. This being the position with regard to initiation of proceedings the unusual order of the high court directing the informant to file protest petition and, keeping the writ petition pending till magistrate's order , was disapproved by the Supreme Court in *Sanjay Bansal* v *Jawajarla Vats*.[29]

V BAIL/ANTICIPATORY BAIL

It has been ruled by the Supreme Court that directions to return the dowry articles and to seize the passport of an applicant for anticipatory bail cannot be given by the high court in a petition under section 438 for anticipatory bail.[30]

Cancellation on non-compliance with agreement

After having obtained a bail order in a case under section 498A IPC as a result of a compromise, the petitioner in *Manish Bajaj* v. *State*,[31] backed out from the terms of agreement. The respondent then sought for the cancellation of bail order under section 439(2). The petitioner prayed for quashing this petition. Rejecting his petition under section 482 the Delhi High Court reasoned:[32]

> He used the judicial process, secured bail, on pretences, made a show of compliance with conditions, and when faced with

28 (2008) 3 SCC (Cri) 614.
29 2008 Cri LJ 428 (SC).
30 See *Mohinder Kaur* v. *State of Punjab*, 2008 Cri LJ 2623 (SC).
31 2008 Cri LJ 2635 (Del).
32 *Id.* at 2639.

> consequences of his conscious and deliberate actions, seeks intervention of this court. Exercise of inherent power in that facts of this case, can never aid the Interests of justice – it would thwart and subvert ends of justice.

Grounds for cancellation

The Gujarat High Court dwelt on the grounds for cancellation in *Dinesh MN* v. *State of Gujarat*.[33] The court observed:[34]

> As is evident from the rival stands one thing is clear that the parameters for grant of bail and cancellation of bail are different. There is no dispute to this position. But the question is if the trial court while granting bail acts on irrelevant materials whether bail can be cancelled. Though it was urged by ... counsel for the appellant that the aspects to be dealt with while considering the application for cancellation of bail and on appeal against the grant of bail it was fairly accepted that there is no scope of filing an appeal against order of grant of bail. Under the scheme of the code the application for cancellation of bail can be filed before the court granting the bail if it is a court of session, or the High Court.
>
> Even though the reappreciation of the evidence as done by the court granting bail is to be avoided, the court dealing with application for cancellation of bail under S.439(2) can consider whether irrelevant materials were taken into consideration. That is so, because it is not known as to what extent the irrelevant materials weighed with the court for accepting the prayer for bail.

In the instant case, irrelevant materials have gone into making the decision. Therefore, the bail order was cancelled.

Application for bail remitting to high courts

The Supreme Court in a case[35] wherein bail order of three persons out of the five was cancelled without adducing reasons, remitted the applications to high court for consideration afresh. The court's remarks are worth noting:[36]

> Rejection of bail stands on one footing, but cancellation of bail is a harsh order because it takes away the liberty of an individual granted and not to be lightly resorted to.

33 2008 Cri LJ 3008.
34 *Id.* at 3011, 3012.
35 *Manjith Prakash* v. *Shobha Devi*, 2008 Cri LJ 3908 (SC).
36 *Id.* at 3910.

Bail on irrelevant considerations disapproved

In another case the Supreme Court had to deal with a bail order granted by the high court in a petition under section 482 Cr PC. Factors such as the trial was in progress and there was no allegation of any misuse of liberty etc. came to be considered for grant of bail, but there was no consideration on merits, however. There was no application for bail under section 438 either. The court did not approve the grant of bail.[37]

The frivolous ground that the accused when on bail did not misuse his freedom was considered appropriate by the high court to grant bail to a murder accused who was allegedly involved in a subsequent murder. The accused was named in ten other cases out of which five cases were under section 307 IPC. Further, the accused was acquitted in most of the cases for want of sufficient evidence. In this scenario the Supreme Court found that the bail granted to the accused was not valid and the order was cancelled.[38]

Exceptional case

In a hard case wherein the accused had several cases pending against him in different courts in the country, though, under the provisions he could not be released, the Supreme Court released him on bail because he was in the prison as an undertrial for ten years.[39] His request for consolidation of different cases was, however, rejected by the court, relying on *Rajesh Syal*.[40]

Considerations for grant of bail

In *State of Maharashtra* v. *Mohammed Sayid Hussain*,[41] a girl of easy virtue who was a minor was allegedly taken away by the petitioners for flesh trade. Apprehending arrest they approached the court for anticipatory bail. While rejecting the bail the court listed the following four factors which are relevant for considering the application for grant of anticipatory bail:

(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 consideration 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.[42]

37 *Panful Nessa* v. *Mohammed Miruj Ali*, 2008 Cri LJ 4343 (SC).
38 See *Gobarbhai Singala* v. *State of Gujarat*, 2008 Cri LJ 1618 (SC).
39 *Pramod Kumar Saxena* v. *Union of India*, 2008 Cri LJ 4697 (SC).
40 *State of Punjab and Other* v. *Rajesh Syal*, (2002) 8 SCC 158.
41 (2008) I S C C (Cri) 176.
42 *Id.* at 183.

Invoking section 439

The confusion created by some decisions on grant of bail in the context of *K.L. Verma's* case [43] came to be settled by the Supreme Court in *Naresh Kumar Yadav* v. *Ravindra Kumar*.[44] The observations are self-explanatory and they run as follows:[45]

> In *Nirmaljeet Kaur* v. *State of Madhya Pradesh*, (2004) 7 SCC 558 and *Sunita Devi* v. *State of Bihar* (2005) ISCC 608, certain grey areas in *K.L.Verma* case, (1998) 9 SCC 348 were noticed. The same related to observation , " or even a few days thereafter to enable the accused persons to move the higher court, if they so desire" . It was held that the requirement of S.439 is not wiped out by the above observations. S.439 comes into operation only when 'a person is in custody'. In *K.L.Verma's* case reference was made to *Salaudin's* case, (1996) 1SCC 667. In the said case there was no such indication as given in *K.L.Verma's* case that a few days can be granted to the accused to move the higher court if they so desire. The statutory requirement of section 439 of the code cannot be said to have been rendered totally inoperative by the said observations.
> In view of the clear language of S.439 and in view of the decision of this court in *Niranjan Singh* v. *Prabhakar Rajaram Kharote* (1980) 2 SCC 559 there can not be any doubt that unless a person is in custody, an application for bail under section 439 of the code would not be maintainable.

The Supreme Court vehemently deprecated the trend of falling back on section 482 to secure bail ignoring section 439 inasmuch as for invoking section 439 one has to surrender before the court. The facts in *Hamida* v. *Rashid Rasheed*,[46] will indicate how an accused who is later charged with serious offences upon the victims succumbing to injuries frantically sought to apply for bail by moving a petition under section 482 instead of invoking section 439.

Irrelevant considerations for grant of bail

In *Sudha Varma* v. *State of UP*[47] the high court had not indicated as to what was the relevance of grant of bail to the co-accused ignoring the fact that the respondent was the alleged assailant who fired the gun and killed the deceased. The finding that there was no motive for the crime or there was a

43 *K. L. Verma* v. *State,* (1998) 9 SCC 348.
44 (2008) 1 SCC (Cri) 277.
45 *Id.* at 283.
46 (2008) 1 SCC (Cri) 234.
47 (2008) 3 SCC (Cri) 275 Also see *supra* note 35 regarding the need for adducing reasons. The likelihood of the trial being held in the near future was, however, considered relevant while taking a decision on grant of bail in *Sridhar Sumant Vagal* v. *State of Mahjarashtra*, (2008) 3SCC (Cri) 281.

sudden fight had been arrived at without any discussion of any material. In these circumstances the apex court remitted the case to the high court.

Default bail

The application of what is usually described as default bail was raised in *Dinesh Dalmia* v. *CBI*.[48]In this case it has been categorically clarified by the Supreme Court that if charge sheet is not filed, right under section 167(2) would arise. If charge sheet is filed it would cease. Such a right does not revive only because a further investigation remains pending within the meaning of sub-section(8) of section 173 of the Code.

As regards the power of court to remand an accused at different stages, the court observed:[49]

> The power of a court to direct remand of an accused either in terms of sub-section (2) of section 167 of the code or sub-section (2) of section 309 thereof will depend on the stages of the trial whereas sub-section (2) of section 167 of the code would be attracted in a case where cognizance has not been taken, sub-section (2) of section 309 of code would be attracted only after cognizance has been taken.

Bail in pending appeals

Generally speaking, the Supreme Court does not appear to be in favour of granting bail pending appeal under section 389. Likelihood of delay in hearing the appeal, gravity of the offence, sentence imposed and several other factors are taken into consideration while dealing with applications for bail under section 389. In *State of Maharashtra* v. *Madhukar Namanrao Smarth*[50] it was, however, pointed out by the Supreme Court that these parameters are applied in cases where life or death sentence is imposed. They may not be of relevance in other cases. In fact the likelihood of early hearing of appeal and gravity of the offence, made the Supreme Court to reject the appeal under section 389 in *Sidhartha Vasisht Manusharma* v. *State* (*NCT of Delhi*).[51]

VI TRIAL AND TRIAL PROCEDURE

Aquittal on non-appearance of complainant

Section 256 Cr PC stipulates that the complainant should be present in the court for prosecution. In *S. Ramakrishna* v. *Ramireddy*[52] the

48 (2008) 1SCC (Cri) 36.
49 *Id.* at 48.
50 (2008) 3 SCC (Cri) 52.
51 2008 Cri LJ 3524 (SC).
52 2008 Cri LJ 3524 (SC). Also see *Chityala Venkata Reddy* v. *State of AP*, 2008 Cri LJ 4244 (AP) ruling that if defendant is exempted by the court from appearing in the court the same may be extended to the complainant also. In yet another case viz. *S. Anand* v. *Vasumati*, 2008 Cri LJ 1943 (SC) the dismissal of case for non- appearance of the complainant at the stage of defence evidence was held invalid.

complainant was dead and his legal representatives did not turn up for 15 times whereas the defendant attended the court promptly. In these circumstances the court acquitted the defendant. The Supreme Court refused to interfere in the acquittal.

Expenses of witnesses

There is discretionary power with the trial court to require the state to pay the expenses of defence witnesses. Since the accused was in a position to bear the cost the court refused to exercise its discretion. The accused was also asked to meet the expenses of the medical experts summoned on their behalf.[53]

Examination of accused under section 313

Section 313 has been enacted to help the accused to explain the circumstances in which he came to commit the crime. He speaks direct to the court. But the examination has to be in proper form.[54] Arguing that the provisions in the Cr PC such as sections 243(1) and 247, 235(2) enabling accused's written statement to be acceptable, the Supreme Court ruled[55] that an accused can be examined through his counsel provided the following guidelines are followed:[56]

> If the accused who is already exempted from personally appearing in the court makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:
> (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.
> (b) An assurance that no prejudice would be caused to him, in any manner by dispensing with his personal presence during such questioning.
> (c) An undertaking that he would not raise any grievance on that score at any stage of the case.
> If the court is satisfied of the genuineness of the statements made by the accused the said application and affidavit, it is open to the

53 *Nand Lal* v. *State of Maharashtra*, 2008 Cri LJ (Bom).

54 See *Ashraf Ali* v. *State of Assam*, 2008 Cri LJ 4338 (SC) in which the Supreme Court disapproved the examination of the accused as he was asked to explain why the witnesses had stated that he caused severe injuries to the deceased when in fact no witness had stated so. Circumstances which were relied upon by the trial court to find the accused guilty were not specifically brought to the notice of the accused either.

55 See *Keya Mukherjee* v. *Magma Leasing Ltd*, (2008) 8 SCC 447.

56 *Id.* at 454.

court to supply the questionnaire to his advocate (containing the questions which the court might put to him under S.313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning.

Unreasonable orders not to be upheld

The Supreme Court in a number of instances remitted the case to the high court because of the failure of the latter to adduce reasons for their orders.[57]

Framing of charges

Having regard to language of sections 207 and 227 while framing charges the trial court can only look into the material produced by the prosecution while giving an opportunity to the accused to show that the said materials were insufficient for the purpose of framing charge.[58]

The words "not sufficient ground for proceeding against the accused in section 227 postulate exercise of judicial mind by judge. At this stage, he is not required to see as to whether trial will end in conviction or not.[59]

Taking cogizance

It is well settled that before a magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusation and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report as the case may be and the material filed therewith. It is only when the magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence.[60]

57 See *Hachappa Hutcha Rayappa* v. *State of Karnataka*, 2008 Cri LJ 2596 (SC) discussed *infra*.

58 *Bharat Parikh* v. *CBI,* 2008 (Cri) LJ 3540 (SC).

59 *Yogesh & Sachin Jagdish Joshi* v. *State of Maharashtra*, 2008 (Cri) LJ 3872 (SC).

60 *Fakruddin Ahmad* v. *Uttaranchal*, 2008 Cri LJ 4377 (SC).

Additional accused

The power under section 319 has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after legal evidence comes on record and from that evidence it appears that the person concerned has committed an offence. In *Kailash* v. *State of Rajasthan*[61] the Supreme Court also cautioned that the words, 'it appears' are not to be read lightly.

In *Bholu Ram* v. *State of Punjab*[62] the Supreme Court has ruled that the magistrate has power and jurisdiction to entertain applications filed by the applicant – accused under section 319 and to issue summons to the respondent by adding him as an accused. The said order could not be said to be illegal and unlawful or otherwise objectionable because section 319 nowhere states that such an application can only be filed by a person other than the accused.

Speedy trial

Reviewing the case law on speedy trial the Spreme Court rightly mentioned on the nature of this right in *Superintendent of Police, Karnataka Lokayukta* v. *B. Srinivas* [63] in the following words:[64]

> It was observed that the decision in *Antulay* (1992) 1SCC 225 still holds the field and the guidelines laid down in the said case are not exhaustive but only illustrative. They are not intended to operate as hard and fast rule or to be applied like a strait jacket formula. Their applicability would depend upon the factual situations of each case. It is difficult to foresee all situations and no generlisation can be made. It has also been held that it is neither advisable nor feasible nor judicially permissible to draw or prescribe an outerlimit for conclusion of all criminal proceedings. Whenever there is any allegation of violation of right to speedy trial the court has to perform by balancing the act by taking into consideration all attending circumstances and to decide whether the right to speedy trial has been denied in a given case.

Power of magistrate to entertain a supplementary list of witnesses

Reviewing the decisions of various high courts, the Supreme Court in *Sayeeda Farhana Shamim* v. *State of Bihar*,[65] ruled that the power of the magistrate should not be fettered either under section 244 or under sub-section (6) of section 246 Cr PC and full latitude should be given to the magistrate to exercise discretion to entertain a supplementary list. But while accepting this list the magistrate should exercise discretion judiciously for

61 2008 Cri LJ 1914 (SC).
62 (2008) 9 SCC 140,
63 (2008) 8 SCC 580.
64 *Id.* at 584.
65 (2008) 8 SCC 218.

the advancement of the cause of justice and not to give a handle to the complainant.

Prosecution

Appointments of additional public prosecutor and special public prosecutor without following the procedure laid down in the Cr PC have been held invalid by the A.P.High Court.[66]

When a case was transferred to another state it is for the transferee state to appoint a public prosecutor of its choice under section 24(8). Also it is for the transferor state to bear the cost of prosecution.[67]

VIII APPEAL / REVISION

Need for reasoned orders emphasized

It has been noticed that some high courts do not adduce reasons while disposing of appeals under section 389 Cr PC. This has made the Supreme Court to remit the appeals to the high courts. In *Hachappa & Hucha Rayappa* v. *State of Karnataka*[68] the court observed thus:[69]

> Since the High Court has not applied its mind to various contentions raised on behalf of the appellant and has in a casual manner disposed of the appeal, we have no hesitation in setting aside the impugned judgment. We remit the matter to the High Court for fresh disposal in accordance with law. Since the criminal appeal is of the year 2001 we request the High Court to dispose of the appeal as early as practicable, preferably by the end of October 2008.

The need for adducing reasons was stressed in *State of Punjab* v. *Navraj Singh*[70] also. It has also been pointed out therein that under section 389 the appellate court can suspend conviction as well as sentence depending upon the circumstances of each case.

The decision of the high courts in *B. Viswanath* v. *State of Karnataka*[71] was characteristic of the laxity with which it deals with appeals. The single judge who heard the appeal failed initially to indicate his order. He simply discussed one aspect of the evidence. So the appeal was again referred to the judge for orders on being 'spoken to'. He then confirmed the conviction and

66 See *K. Nagappa* v. *State of A.P*, (2008) Cri LJ 2147 (AP) and *Paramjit Singh Sadana* v. *State of A.P.* (2008) Cri LJ 3432 (AP).

68 See *Jayaendra Saraswathi Swamigal &Subramanian* v. *State of Tamilnadu*, (2008) Cri LJ 3877 (SC). The possibility of a lawyer belonging to Tamil Nadu getting appointed does not appear to have been adverted to by the court in the decision.

68 (2008) Cri LJ 2596 (SC) discussed in *supra* note 57. Also see *supra* notes 35 and 47.

69 *Id.* at 2597.

70 2008 Cri LJ 3864 (SC).

71 (2008) Cri LJ 1947 (SC).

sentence awarded by the sessions judge. The Supreme Court remitted it to the high court observing:[72]

> Coming to the facts of the case, the only thing that needs to be observed is that the impugned judgment and order of the High Court has one characteristic ie. brevity. It has no other characteristic. It does not even refer to the various aspects and briefly refers to the evidence of the witnesses.
> It needs no emphasis that the appellant court exercising appellate powers has not only to consider various points but objectively and critically analyse the evidence. That has not been done in the present case.

The routine manner of handling of appeals by the high courts was not found acceptance by the Supreme Court. While in *State of U.P* v. *Ajaykumar*,[73] the acquittal of the accused on the ground that he could not spell out the number of the currency was disapproved in the light of the fact that the money recovered from the accused had the stamp of the bank in question, in *Som Mittal* v. *State of Karnataka*,[74] the Supreme Court gave valid inputs for further guidance. On the application of precedents the court pointed out:[75]

> Judgments are not to be construed as statutes. No words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasizing a point or accentuating a principle or even by way of a flourish of writing style. Ratio Decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation.

The court also categorically declared that the directions issued earlier with regard to the revision to be made on anticipatory bail were not to be complied with.

In exercising revisional jurisdiction also the court insisted upon adducing of reasons as it may help appellate courts to dispose of appeals.[76]

72 *Id.* at 1948. Lack of reasons came to be commented upon in *Goyal Enterprises* v. *State of Jharkhand*, 2008 Cri LJ 1923 (SC); *State of Rajasthan* v. *Rohitas,* 2008 Cri LJ 1925 (SC); *State of Rajasthan* v. *Rajendra Prasad*, 2008 Cri LJ 1935 (SC); *Ram Singh* v. *State of Haryana,* 2008 Cri LJ 1941 (SC); *State of H.P.* v. *Sardara Singh,* (2008) 3 SCC (Cri) 780; *State of U.P* v. *Munshi*, (2008) 3 SCC (Cri) 778.

73 2008 Cr LJ 1937 (SC).

74 2008 Cri LJ 1927 (SC).

75 *Id.* at 1930.

76 See observations in *Jagatamba Devi* v. *Hem Ram*, 2008 Cri LJ 1623 (SC).

Revision against acquittal, though permitted jurisdiction, is very restricted. Acquittal cannot be converted to conviction. Interference by entering into the merits and reappreciating the evidence and then remanding it to trial court clearly amounts to reversal of finding of the trial court. Such an order is thus in excess of jurisdiction.[77]

Though the discussion in *Acharaparambath Pratapan* v. *State of Kerala*[78] is replete with court's observations on the careless attitude of the investigating agency in making the investigation defective, the Supreme Court chose to decide the appeal even mitigating the death sentence by granting the benefit of doubt to the accused. Having regard to the clear finding of the court with regard to the defective investigation, one would have expected the court to order reinvestigation and retrial.

Inherent power of courts

It is common knowledge that all the high courts and the Supreme Court have inherent powers to prevent abuse of process of court.[79] Comparing its powers and the powers of high courts the Supreme Court observed:[80]

> Though there is no provision like S.482 of the Cr PC conferring express power on the Supreme Court to quash or set aside criminal proceedings before a criminal court to prevent abuse of process of court but the inherent power of court under Article 142 coupled with the plenary powers under Articles 32 and 136 embraces power to quash criminal proceedings pending before any court to do complete justice in the matter before this court.
>
> This court's power under Article 142 (1) to do "complete justice" is entirely of different level and of a different quality. What would be the need of "complete justice" in a cause or matter would depend upon the facts and circumstances of each case while exercising that power. The court would take into consideration the express provisions of a substantive statute. Any prohibition or restriction contained in ordinary laws cannot act as limitation on the constitutional power of this court. Once this court has the seisin of a cause or a matter before it, it has power to issue any order or direction to do "complete justice" in the matter.

Many of the cases under section 482 came to be decided on the basis of the landmark decision in *State of Haryana* v. *Bhajan Lal*.[81]

77 See observations in *Johar & others* v. *Mangal Prasad*, 2008 Cri LJ 1627.

78 (2008) 1 SCC (Cri) 241.

79 See *Monica Kumar (Dr.)* v. *State of U.P.*, (2008) 8 SCC 781.

80 *Id.* at 801.

81 1992 Supp 1 SCC 335. See *Didigani Bikshapathi* v. *State of A.P,* 2008 Cri LJ 724 (SC), *C.B.I* v. *K.M. Saran*, 2008 Cri LJ, 2027 (SC); *James Sebastian* v. *State of Assam*, 2008 Cri LJ 3634 (Gau); *Reshma Bako* v. *State of U.P*, (2008) 3 SCC (Cri) 86; *Baijnath Jha* v. *Sita Ram*, (2008)

Sentencing cannot be done under section 482

A confirmed conviction and sentence cannot be interfered in a proceedings under section 482 of Cr PC as it will amount to altering or modifying the sentence. Nor can an accused claim the benfit of section 427 Cr PC in a petition under section 482.[82]

Violation of speedy trial right results in quashing

In *Pankajkumar* v. *State of Maharashtra*,[83] the inordinate delay in investigating the case was considered a ground for quashing the proceedings.

Supreme Court's interference or non-interference

The Supreme Court refused to interfere with an order of the high court under section 482 in *Southern Steel* v. *Jindal Vijayanagar Steel*,[84] whereas it did interfere with an order of the Kerala High Court ordering investigation by the police into allegations made against the petitioner in an anonymous petition.[85]

Bail cannot be granted in a petition under section 482

The high court in a petition under section 482 issued directions to the subordinate court to accept the sureties and bail bonds for the offence under section 304 IPC.[86] The accused was on bail in a case under sections 324, 352 and 506 IPC on the very day on which they were taken into custody even after the injured had succumbed to the injuries and the case had been converted into one under section 304 IPC without any examination of the case on merits. Subsequently, when the offence was converted into section 302 IPC, the high court allowed the accused to continue to be on bail which was granted earlier instead of requiring them to seek bail under section 439 Cr PC. This practice of invoking section 482 prompted the Supreme Court to comment thus:[87]

> The dockets of the High Courts are full and there is a long pendency of murder appeals in the High Court from which this case has arisen. Ends of justice would be better served if valuable time of the court is spent in hearing those appeals rather than entertaining petitions under section 482 Cr PC at an interlocutory stage which are often filed with some oblique motive in order to circumvent the

3 SCC (Cri) 428; *Riya Vrat Singh* v. *Shyanji Sahai*, (2008) 3 SCC (Cri) 463. In yet another case, *M. Saravana Porselvi* v. *A.R.Chandrasekhar*, 2008 Cri LJ 3034 (SC) involving allegation of commission of offence under s. 498A IPC levelled after 10 years of separation the court quashed the proceedings under s.482 as it was an abuse of process of the court.

82 *Sukumaran* v. *State of Kerala*, 2008 Cri LJ 2297 (Ker).

83 2008 Cri LJ 3944 (SC).

84 2008 Cri LJ 3960 (SC).

85 See *Divine Retreat Centre* v. *State of Kerala*, 2008 Cri LJ 189 (SC).

86 See *Hamida* v. *Rashida Rasheed*, (2008) 1 SCC (Cri) 234.

87 *Id.* at 241.

> prescribed procedure, as is the case here, or to delay the trial which will enable the accused to win over the witnesses by money or muscle power or they may become disinterested in giving evidence ultimately resulting in miscarriage of justice.

Quashing of proceedings involving non-compoundable offences

There have been some cases wherein the inherent power of either the Supreme Court or the high court came to be invoked for quashing unwarranted proceedings. For example, in *Arvind Barsaul (Dr)* v. *State of Madhya Pradesh*,[88] quashing of proceedings under section 498A was refused under section 482 as the offence was not compoundable. The Supreme Court on appeal quashed it under article 142.

No recall of orders of cognizance but quashing under section 482 possible

It has been reiterated by the Supreme Court in *Bholu Ram* v. *State of Punjab*[89] that no magistrate is entitled to recall orders taking cognizance. However, if this order is found defective it could be got quashed under section 482.

Repeated invocation of section 482 not approved

The Supreme Court has not appreciated the order of a judge of the high court who after rejecting the prayer of petitioner in the first instance, ordered transfer of investigation to CBI after three and a half years. It was thus an order passed in the already disposed of petition by the same judge.[90] The Supreme Court clarified the position thus:[91]

> [A]fter the final order was passed rejecting the prayer of the respondent to handover the investigation to the CBI authorities by which, the criminal petition filed under section 482 was practically rejected, it was not open to the High Court to pass a fresh order in the disposed of petition or even in the pending petition of the DSP (CBCID) Nagapatinam directing investigation to be made by the CBI Authorities.

Transfer of case

The Supreme Court in *Gurpreet Kaur & Rinky* v. *Vipin Kumar Gupta*[92] transferred the case filed at Mumbai by the respondent against the petitioner under sections 499 and 500 IPC to Delhi where the petitioner is residing because of the hardship she may suffer in travelling down to Mumbai.

88 (2008) 3 SCC Cri 88.
89 (2008) 3 SCC Cri 710.
90 *State represented by DSP, S.B, CFD, Chennai* v. *K.V.Rajendran*, (2008) 8 SCC 673.
91 *Id.* at 680.
92 (2008)1 SCC (Cri) 186.

Settling case involving non-compoundable offences

The Supreme Court allowed the petition to settle a case that involved offences under section 279 and 304A IPC though they are not compoundable under section 320 and the accompanying schedules.[93] The mother of the defendant had no complaint. The offence was rash and negligent act *simpliciter*. The accused was willing to give compensation. In these circumstances, the Supreme Court awarded compensation of Rs.1 lakh and settled the case.

In yet another case viz. *Hasi Mohan Barman* v. *State of Assam*,[94] while the accused was being tried under section 313 IPC for having caused miscarriage of first informant without her consent, they got married and sought for withdrawal of prosecution. Since the offence was not compoundable, the petitioner accused could not be acquitted. Relying on a number of its precedents, the Supreme Court reduced the sentence to the period already undergone while maintaining the conviction of the accused under section 313 IPC.

Quashing of non-compoundable offences by the Supreme court

In *Nikhil Merchant* v. *CBI*[95] the Supreme Court in view of the compromise arrived at by the parties settled the case applying the precedent in *B.S. Joshi* v. *State of Haryana*.[96]

The court's observations are pertinent:[97]

> On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this court in *B.S.Joshi's* case and the compromise arrived at between the company and the bank as also clause 11 of the consent terms in the suit filed by the bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise.

Prosecution for perjury

For exercising powers under section 344 the court has to express an opinion at the time of passing the final order, to the effect that the witness has either intentionally given false evidence or fabricated such evidence.

93 See *Manish Jalan* v. *State of Karnataka*, 2008 Cri LJ 3941 (SC). In this context it may be noted that both in *Manjo* v. *State of M.P.,* (2008) 9 SCC 116 and *Mohd. Abdul Sutan Laskar* v. *State of Assam,* (2008) 9 SCC 333 the court compounded the cases though offences were later made non-compoundable.

94 2008 1 SCC (Cri) 161.

95 2008 (3) KHC 955 (SC).

96 (2003) 4 SCC 675. See also *supra* note 88.

97 *Supra* note 95 at 961.

Secondly, the court must come to the conclusion that in the interest of justice the witness concerned should be punished summarily. Thirdly , before the summary trial for punishment the witness must be given reasonable opportunity of showing cause why he should not be so punished.The Supreme Court in *Mahila Vinod Kumari* v. *State of MP*[98] has in fact called for frequent use of this provision to contain the menace of perjury.

VIII CONCLUSION

Generally speaking, performance of the police was found lacking by the judiciary. If case law is any guide, the performance of the high courts also did not appear to make up the grade. The number of cases remitted to the high courts by the Supreme Court for want of reasoned orders signifies a disturbing trend the high courts should immediately address.

Having regard to the massive case law produced by the Supreme Court laying down the law it may be said that during 2008 also the Supreme Court played a pivotal role in making the criminal procedure law lively, dynamic and vibrant. Its contribution has been exceptionally impressive and conspicuous.

98 2008 Cri LJ 3567 (SC).