10

CRIMINAL PROCEDURE

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I INTRODUCTION

WHENEVER ONE surveys the decisions on various aspects of criminal procedure in India, one is convinced about the important role being played by the appellate court judges in straightening the law. The appellate court judges are aware of it and occasionally they express the stress experienced by them eloquently. In *Himmat Sukhdeo Wahurwagh* v. *State of* Maharashtra,[1] the Supreme Court was constrained to observe thus:[2]

> Before we embark on an appreciation of the evidence some thoughts come to mind. The criminal justice system as we understand it as of today in our country is beset with major issues, sometimes unrelated to what happens in court, particularly in cases involving more than one accused. Fudged and dishonest information reports, tardy and misdirected investigations and witnesses committing perjury with not the slightest qualm or a quibble make the decision of even the most diligent and focussed of judges particularly galling and difficult. Several other factors inhibit the proper conduct of proceedings in a trial....
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> In this pernicious state of affairs, the judge gravely handicapped has to "apply his knowledge of the law and his assessment of normal human behaviour to the facts of the case, his sixth sense based on his vast experience as to what must have happened and then trust to God and good luck that he strikes home come to a right conclusion. To our mind, the last two are undoubtedly imponderables but they do come into play in negotiating the judicial minefield. This is undesirable fact whether we admit it or not.

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1 (2009) 6 SCC 712.

2 *Id.* at 718, paras 21, 26.

It is indeed a matter of regret that despite the lapse of more than six decades, we could not have a satisfactory criminal justice system which works on provisions of law though they exist in books. As rightly pointed out by the Supreme Court, it is because of the manipulation of the procedural law that our system mainly fails. Manipulation is usually done by the functionaries in the system. The police officials, prosecutors, defence attorneys, even trial judges quite often, become manipulators.

II INVESTIGATION

If investigation is tardy, it may be difficult for the court to convict the offender. If the prosecution is conducted inefficiently, unreasonable conviction or acquittal may be the result and both may adversely affect the system. Similarly, the conduct of trial, right from framing of the charge, has to be conducted in accordance with the provisions in the Code of Criminal Procedure, 1973 (Cr PC). But sometimes some courts do not conduct the trial fairly. During 2009, the Supreme Court had an occasion to touch upon these vital aspects in *Abdul Wahab Abdul Majid* v. *State of Gujarat*,[3] in which the court observed:[4]

> We have noticed as to how perfunctory the investigation has been carried on. Even in a case of this nature proper charge had also not been properly brought on record… It is a matter of serious concern that despite the recovery of weapon the appellant had not been charged for commission of offence punishable under sections 25 and 27 of the Arms Act. We have noticed hereinbefore the helplessness expressed by the … judge in this behalf. The judge who had framed charges should have been more careful.

It is disappointing that the court had to give benefit of doubt to the accused as a result of the tardy investigation and trial in this case.

It is common knowledge that in India it is usually the tardy investigation which is responsible for the disreputation of the criminal justice system as a whole. The year 2009 has its share in handling such cases compelling the courts to chide the investigating agencies. In *Sunilkumar* v. *State of Maharashtra*,[5] the Bombay High Court observed that sending such half-baked prosecutions to the court leads not only to distressing acquittals, but also avoidable trampling of liberty of individuals who eventually get acquitted and carry a feeling of hurt on being persecuted by the state.[6]

3 (2009) 3 SCC (Cri) 1507.
4 *Id.* at 1514.
5 2009 Cri LJ 2599 (Bom).
6 *Id.* at 2606.

The Supreme Court had several opportunities to comment upon the hopeless investigations. Its observations in *Asif Mamu* v. *State of MP*[7] are more caustic. It expressed its anguish thus:[8]

> We are unhappy to note that such a ghastly crime of brutal murder of three persons in broad day light in the temple of justice which the campus of the District Court in Bhopal, capital city of the state of Madhya Pradesh is going unpunished because of laches on the part of the prosecuting agency in conducting the investigations and trial, apart from uncooperative attitude of the private prosecutors, who appear to have connived with the culprits, leaving us with no other option but to painfully convert convictions of the appellants some of whom were even condemned prisoners into acquittal.

Several aspects of the power of police and magistrates in relation to investigation have come for analysis in 2009. For convenience sake the cases dealing with them are detailed under general subheads.

Warrant against person evading arrest

The Patna High Court held that the requisitions for issue of warrant under section 73 should disclose involvement of the accused in non-bailable offence. It should also state that he is evading arrest. The court should record its satisfaction of these conditions. In other words, it was ruled that orders under section 73 should not be passed casually.[9-10]

Registration of F I R

Under section 156, it is the statutory duty of the police to investigate cognizable offences. Section 156(3) empowers the magistrate to order an investigation into such offences. Quite often it is complained that the police does not register complaints which need to be investigated. There have been such cases during 2009 also. It is interesting to note that in such cases, the courts have issued directions to the police to register and investigate into the complaints. In *ICICI Bank* v. *Shanti Devi Sharma*,[11] *Amit Chourasile* v. *State of U.P.*[12] and *Lt. Shiv Singh* v. *State of MP*,[13] the courts directed registration of cases and their investigation under section 156(3). It was, however, clarified in *Babulal* v. *State of Rajasthan*[14] that when the police

7 (2009) 3 SCC (Cri) 1011.
8 *Id.* at 1013.
9 -10 *Randhir Sharma Rupesh* v. *State of Bihar*, 2009 Cri LJ 3889 (Pat).
11 (2009) Cri LJ 327.
12 (2009) Cri LJ 146 (All).
13 (2009) Cri LJ 4217.
14 (2009) Cri LJ 4362 (Raj).

orders registration of case, it is at the precognizance stage. The court said:[15]

> When an applicant desires that the magistrate should take action against the persons then it is a "complaint." But when no action is to be taken by the magistrate and the intention is for some other kind of action, such as direction to the police to take action, then it will, certainly not amount to a "complaint.'' In other words, an application with a prayer for a direction to register an FIR for investigation cannot be registered as a "complaint by the magistrate because doing so would be contrary to law.''

In *Shiv Singh* v. *State of MP*,[16] the MP High Court claimed that in case a magistrate refuses to order the police to register a complaint, the sessions court could be approached by way of revision seeking an order under section 156(3) to the police to register the complaint for investigation.

The power to direct investigation may arise in two different situations: (1) When a first information is refused to be lodged; or (2) when the statutory power of investigation for some reason or the other is not conducted. The magistrate has, however, no power to recall an investigation ordered by him.[17]

As regards the rights of the accused with regard to the investigative powers of the police, the Supreme Court in *Ramachandra Singh* v. *Superintendent, C.B.1*,[18] held that the accused was not entitled for a copy of the preliminary report prepared by the CB1 as a prelude to its inquiry into the case against him. It was clarified by the court that the purpose of the preliminary report was to ascertain the genuineness of the complaint against the accused. The Supreme Court in *Narendra G.Goel* v. *State of Maharashtra*,[19] ruled that the accused does not have right to be heard on the investigation procedures followed.

Searches

In *Surinderpal* v. *State of Punjab*,[20] the investigating officer did not get two witnesses of the locality before raid because he considered that his first

15 *Id.* at 4364.
16 (2009) Cri LJ 4217.
17 See observations in *Darmeshbhai Vasudevbhai* v. *State of Gujarat* (2009) 3 SCC (Cri) 76 wherein as a result of compromise between the parties the magistrate withdrew his direction. The Supreme Court disapproved it. See also *Chandrapal* v. *State of UP,* 2009 Cri LJ (All) wherein the court refused to direct the police under section 156(3) as there was no offence of cheating.
18 (2009) Cri LJ.3526 (SC).
19 (2009) 2 SCC (Cri) 933.
20 (2009) Cri LJ 4100 (Pb).

and foremost duty was to conduct raid so as to apprehend the culprits red-handed. He also knew that if he spent time in associating two witnesses of the locality, the possibility of leakage of secret information resulting into abscondance of the accused could not be ruled out. In these circumstances, the non-joining of two witnesses was not considered fatal by the Punjab and Haryana High Court.

Identification parade

The purpose of test identification parade came to be spelt out by the Supreme Court in *Ankush Marati Shinde* v. *State of Maharashtra*[21] thus:[22]

> The T.I. parades are not primarily for the courts. They are meant for investigating purposes. The object of conducting T.I. parade is two fold. First to enable the witnesses to satisfy themselves that the persons whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.

Investigating report

After investigation, the investing officer is required to submit a report to the magistrate under section 173(2). It is up to the magistrate to take cognisance or not. In case he decides not to take cognisance under section 190(1), he is required to issue a notice to the informant so as to enable him to be heard. However, the injured person or a relative of the deceased, who is not an informant, is not entitled to any notice. A report made within the stipulated period but returned for APP's advice is not a delayed final report.[23] The report of the police which is part of investigation is sometimes wrongly mentioned as charge-sheet even by courts. This aspect has been noted by the Supreme Court in *Chitharanjan Mirdha* v. *Dulal Ghosh* wherein the court observed:[24]

> We may add here that the expressions charge sheet or final report are not used in the code, but it is understood in police Manuals of several states containing the Rules and the Regulations to be a report by the police filed under section 170 of the code described as a 'charge sheet'. In case of reports sent under section 169 *i.e.* where there is no sufficiency of evidence to justify forwarding of

21 (2009) 3 SCC (Cri) 308.
22 *Id.* at 310.
23 *Vania Raj* v. *State*, 2009 Cri LJ 3142 (Mad).
24 2009 Cri LJ 430 at 435 (SC).

a case to a magistrate, it is termed variously ie. Referred charge, final report or summary. Section 173 in terms does not refer to any protest to the report submitted by the police. Though the notice issued under some of the police manuals states it to be a notice under section 173 of the code, there is nothing in section 173 specifically pressing for such a notice.

Purpose of maintaining a diary by police

Section 172 requires a police officer to enter his proceedings in a diary on a day by day basis. The purpose is to avoid concoction of evidence or changing chronology to suit investigation. It ensures transparency in police investigation.[25]

Further investigation

Section 173(8) of the Cr PC empowers the investigating officer for further investigation after the submission of a report under section 173(2). It need not be approved by the magistrate. It is the prerogative of the investigating officer.[26]

In *Nirmal Singh Kahlon* v. *State of Punjab*,[27] several issues on further investigation were raised. In fact, the state police investigated into the corruption case and submitted a report. It was after that that the CBI was asked by the High Court to undertake the investigation. The appellants challenged the legality of this order on several grounds. The Supreme Court upheld the power of police for further investigation and observed that an order of further investigation in terms of section 173(8) by the state in exercise of its jurisdiction under section 36 stands on a different footing. The power of the investigation officer to make further investigation in exercise of the statutory jurisdiction under section 173(8) and at the instance of the state having regard to section 36 should be considered in different contexts. Section 173(8) is an enabling provision. Only when cognizance of an offence is taken, the magistrate may have some say. But the restriction imposed by judicial legislation is merely for the purpose of upholding the independence and impartiality of the judiciary. It is one thing to say that the court will have jurisdiction to ensure a fair investigation, but quite another to say that the investigating officer will have no jurisdiction whatsoever to make any further investigation without the expression of consent of the magistrate.

The aforesaid power of the state is wholly unrestricted by section 36 of the Act or otherwise. As a logical corollary, if while making preliminary inquiry pursuant to the notification issued by the state in terms of section 6 of the Act, the CBI, comes to know of the commission of other and

25 See *State* v. *Anil Jacob*, 2009 Cri LJ 1355 (Bom).
26 *Vaniaraj* v. *State*, 2009 Cri LJ 3142 (Mad).
27 2009 Cri LJ 958 (SC).

further offence involving a larger conspiracy which required prosecution against a large number of persons who had not been proceeded against at all by the local police officers, even lodging of second FIR would not be a big bar.[28]

Further investigation can be done without permission of court

Further investigation can be carried out by the investigation agency if it comes across new material. It need not have the approval of the judiciary for exercising this power under section 173(8).[29]

Further investigation after dropping the case

In *Thomas Nontau* v. *Meghalaya*,[30] the Gauhati High Court permitted the prosecution to further investigate after the investigation officer who investigated the case first dropped it and the subsequent officer found additional for further investigation. The court ruled that it would not amount to review in violation of section 362. Similarly, in *Bank of Rajasthan* v. *Keshav* Bhangur,[31] the Supreme Court ordered further inquiry by CBI after the first investigation was closed on grounds other than on merits. Moreover, the CBI could find out other aspects left out by the first investigation.

No power for police remand during further investigation

The Supreme Court in *Mithabhai Parshabhai Patel* v. *State of Gujarat*[32] categorically ruled that there is no question of exercising power under section 167(2) during further investigation as this power ceases the time charge-sheet is filed. It has also been stated that reinvestigation without prior permission is prohibited.

Further investigation is possible at any stage

In *Kishanlal* v. *Dharmendra* Bajina,[33] the Supreme Court made it clear that an order of further investigation can be made at various stages including the stage of the trial, that is, after taking cognizance of an offence.

III INITIATION OF PROCEEDINGS

Section 202(1), Cr PC came to be amended in 2005 adding a clause to insist that in all cases, the court has to be satisfied that there is sufficient

28 *Id*. at 973.

29 *Ram Saran Varshney* v. *State of UP*, 2009 Cri LJ 1790 (All); *Java Singh* v. *CBI*, 2009 Cri LJ 3336 (Del); *Ramchowdhury* v. *State of Bihar* (2009) 28 SC 1059; *Mithabhai Peshabhai Patel* v. *State of Gujarat* (2009) 2 SCC (Cri) 1047. But in *Manojnarain Agarwal* v. *Shashi Agarwal* (2009) 2 SCC (Cri) 1096 it was stated that it was desirable to keep the court informed of further investigation.

30 2009 Cri LJ.3935 (Gau).

31 (2009) 2 SCC (Cri) 372.

32 (2009) 2 SCC (Cri) 1047; see also *Rita Nagi's* case (2009) 4 SCC (Cri) 129.

33 (2009) 7 SCC 685.

ground to proceed with the complaint. However, it has been ruled in *Muhammed Basheer* v. *State of Kerala*,[34] that notwithstanding the fact that the petitioner hailed from an area outside the jurisdiction of the magistrate, the omission to conduct an inquiry under section 202 Cr PC cannot be said to vitiate the cognizance taken and the issue of process under section 204, Cr PC by the magistrate.

Sanction to register case need not be insisted

It has been ruled by the Allahabad High Court in *Mahipal* v. *State of UP*[35] that sanction of the state government may be insisted upon before cognizance of the offence under the Prevention of Corruption Act is taken. At the time of registration of complaint, sanction may not be insisted upon.

Employee of a public corporation is a public servant for purpose of section 200. In *National Small Industries Corporation* v. *State (NCT of Delhi*),[36] the Supreme Court held that an employer of public corporation could be a public servant who could claim exemption under the proviso to section 200 Cr PC from examination for initiation of proceedings.

As early as in 2000, the Supreme Court in *Ashok Kumar* v. *State of AP*,[37] declared that the magistrate court could take cognizance of offences under the SC/ST (Prevention of Atrtocities) Act, 1989. In *Sathianathan* v. Veeramuthu,[38] the Madras High Court decided that there is no provision, not even a rule, which either expressly or by implication rules out the application of the proviso to section 200, Cr PC in SC/ST (Prevention of Atrocities) Act.

No proceeding if allegations do not make out offences

In *Gorige Pentaiah* v. *State of A.P*,[39] the Supreme Court found that the complaint alleging that the accused abused the petitioner with name of his caste in public with intention to humiliate him was not correct. The complaint did not contain the basic ingredients of the offence. The complaint was quashed.

The misuse of the provisions in the SC/ST (Prevention of Atrocities) Act came to be examined by the Jharkhand High Court in *Aparajitha Jha* v. *State of Jharkhand*, wherein the court observed thus:[40]

> Having gone through the allegations made in the FIR as well as the entire case diary, I find that the materials collected during investigations were not sufficient for framing of charge of the

34 2009 Cri.LJ 246. (Ker).
35 2009 Cri LJ 983 (All).
36 2009 Cri LJ 1299 (SC).
37 AIR 200 SC 740.
38 2009 Cri LJ 1512 (Mad).
39 2009 Cri LJ 350 (SC).
40 209 Cri LJ 3088 at 3093 (Jhar).

offence under section 3 (i), (ii) (ix) and (x) and section 3 (2) (vii) of the SC/ST (Prevention of Atrocities) Act 1989 While prosecution appear to have been lamented because of personal vengeance and therefore the prosecution of the petitioner is held to be malicious. The cognizance taken by the learned Special Judge without sanction under section 197 of Cr PC against the petitioner cannot be sustained.

In *Gautham Agarwal* v. *State of UP*[41] there were allegations of humiliating the complainant amounting to offence under section 3(1)(x) of the SC/ST (Prevention of Atrocities) Act. The allegations were duly supported by the complainant and witnesses in their statements recorded under section 161, Cr PC. The Allahabad High Court in these circumstances held that there was sufficient material to proceed against the accused.

Proceedings against offenders accused of offences affecting public justice

In *Subhkharan Singh* v. *Kishan Singh*,[42] the Rajasthan High Court found that bar against initiation of proceedings under section 195 may not be applicable to a case of forgery of documents before their submission to the civil court.

The Madras High Court was also presented with a case involving offences against public justice in *Gurvinder Kaur* v. *Surya*.[43] The court relied on the Supreme Court decision in *Pritish* v. *Mohan*[44] wherein it was held that exercise of jurisdiction under section 340 was to see whether the court could decide on the materials available that matter requires inquiry by a criminal court. It should also decide that it was expedient in the interest of justice to have it inquired into.

No action against investigation officer under section 176, IPC

In a case initiated under the Railway Protection Force Act, 1957, the investigating officer was proceeded against by the magistrate under section 176, IPC for having failed to complete the investigation within 90 days. The Allahabad High Court found that the magistrate did not have power to initiate action against the investigating officer on this ground and more so when he continued the investigation with the permission of his seniors.[45]

Magistrate's referral of complaint to police

In *Ketan Kumar Babulal Patel* v. *Kesarben Jesangji*,[46] the Supreme Court was presented with a situation wherein the magistrate referred a

41 2009 Cri LJ 4491 (All).
42 2009 Cri LJ 2298 (Raj).
43 2009 Cri LJ 3715 (Mad).
44 2002 Cri LJ 548 (SC).
45 *Manojkumar Gautam* v. *State of U.P*, 2009 Cri LJ 3176 (All).
46 (2009) 2 SCC (Cri) 840.

complaint (which was refused to be registered by the police) under section 202 to the police for inquiry and report. The court referred to its decision in *Minukumars*[47] and remanded the case to the trial court as it was not clear as to the nature of action taken by it.

Action on Second complaint on same facts

The Supreme Court disapproved proceeding with second complaint on the same facts in *Hiralal* v. *State of UP*.[48] The court reiterated its position taken in *Mahesh Chand*[49] decision wherein the court stated that second complaint on same facts could be entertained only in exceptional circumstances, namely where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd or unjust or where new facts which, with reasonable diligence, have been brought on record in the previous proceedings, could not have been adduced.

IV PROSECUTION

The legislature extends protection to public servants from prosecution for offences committed by them during the discharge of their duties. This is reflected in section 197, Cr PC and section 19 of the Prevention of Corruption Act, *etc.*

The Supreme Court in *State of M.P.* v. *Sheetla Sahai*,[50] reiterated its reasoning in *Centre for PIL* v. *Union of India*[51] that protection given under section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences, alleged to have been committed by them while they were acting or purporting to act as public servants. The policy of the legislature was to afford adequate protection to public servants to ensure that they were not prosecuted for anything done by them in the discharge of their official duties without reasonable cause. For this, the act must fall within the scope and range of official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty.

It is also to be noted that there exists a distinction between sanction for prosecution under section 19 of the Prevention of Corruption Act and section 197, Cr PC. Under the former, it is not necessary to get sanction to prosecute retired/resigned officials. On the contrary, in the case of

47 (2006) 4 SCC 359 (In fact the magistrate should have taken any of the three steps viz. (1) refer to police for investigation, (2) dismiss if it did not disclose any offence and (3) take cognizance if he concludes that there is some offence to be tried).

48 (2009) 3 SCC (Cri) 1247.

49 (2003) 1 SCC 734.

50 2009 Cri LJ 4436 (SC).

51 (2005) 8 SCC 202.

latter, one needs to obtain sanction irrespective of the ceasure or otherwise of the person as public servant.

Prosecution for falsification of records under section 218, IPC requires prior sanction

In a custodial death case, police officers were prodceeded against for offences under sections 302, 201, 21 and 120, IPC. The question was whether sanction was required under section 197 Cr PC for prosecuting the police official for offence under section 218, IPC. The Calcutta High Court answered it in the affirmative as the offence under section 218 came to be committed by them in respect of the records relating to cases against the deceased to save themselves from the criminal case. The court observed in *Jayanthlal Mukherjee* v. *State of West Bengal*,[52] that "the offence under section 218 of the IPC can only be committed in his capacity as public servant or in the colourable exercise of the act as a public servant or in the colourable exercise of the act as a public servant".[53]

Unreasoned sanction order

The sanction to prosecute the accused issued after 23 years of the refusal earlier without adducing reasons for changing the issue was disapproved by the Patna High Court as it signified non-application of mind by the government.[54]

Prosecution of offences under sections 166 and 167, IPC committed by officer of border road and task force

In *P.K.Chowdhary* v. *Commandent, Boarder Road Task* Forces,[55] it has specifically been ruled by the Supreme Court that for prosecution under sections 166 and 167, sanction under section 197 is necessary. The plea that no sanction is required under these provisions came to be rejected by the courts.

Withdrawal of prosecutions

Section 321, Cr PC empowers the prosecution to withdraw criminal cases with the permission of the court. The rationale is that the judge should have the final say as the case came to be admitted by him for trial. The avowed policy of our judiciary has been to let the public prosecutor take an independent decision. So long as the court is convinced that he is not unduly influenced, he may be given consent to withdraw. The Kerala High Court reiterated the position in *State of Kerala* v. *Varkala Radhakrishnan*.[56]

52 2009 Cri LJ 4178 (Cal).
53 *Id. at* 4190.
54 See *Madhusoodanan Mukherjee* v. *State of Bihar* (2009) Cri LJ 4691 (Pat).
55 (2009) 3 SCC (Cri) 531.
56 2009 Cri LJ 2119 (Ker).

Unreasoned withdrawal from prosecution not acceptable

In *Satyanarayana Raju* v. *Union of* India,[57] the AP High Court did not give consent to withdraw prosecution against an MLA for having obtained medical reimbursement on false documents. It was not an independent decision of the public prosecutor. Similarly, in *Balak Ram* v. *State of HP*, [58] the HP High Court did not give consent to withdraw a prosecution where no ground had been mentioned. The case was therefore remanded to the district judge.

V TRIAL PROCEDURE

There have been a large number of decisions on various aspects of trial and trial procedure. They are surveyed under different subheads for convenience.

Uninformed plea of guilty – not valid

The facts and decision in *Brijlal Amarbanshi* v. *State of Maharashtra*,[59] are interesting and relevant. When the charges were framed, the accused pleaded not guilty. However, they were told that if they plead guilty to the charges, they may get away with lighter sentence. But it turned out to be wrong. They prayed the Bombay High Court to cancel their plea. The court found that what the accused had committed was the whole parcel of charge which police had made against them, which was always an admix of imputations of facts alleged and allegations of what it means in law. The court ruled that this type of plea of guilt was not an admission of facts *simpliciter* which in law constitute offence. The court also found that the accused neithergot any legal assistance nor any specific facts were put to them. In these circumstances, the court set aside the conviction and remanded the case for fresh trial.

Unusual trial adopted by trial judge

The facts in *M.S. Chaluvariah* v. *M.C. Krishna*,[60] are characteristic of the criminal trials in India. It was a murder trial and the Karnataka High Court found six adjournments for cross-examinations and the lapse of five months between the dates had enabled the accused to make the prosecution witness hostile. The court was further handicapped as there was no other witness so that it could order retrial. There was thus an unjustified acquittal. The court observed that the procedure adopted by the session judge had really affected the trial.

57 2009 Cri LJ 3320 (AP).
58 2009 Cri LJ 2011 (HP).
59 2009 Cri LJ 87 (Bom).
60 2009 Cri LJ 219 (Kant).

Trial of Indians committing crime outside India

In a case involving an Indian accused of drug trafficking, the Supreme Court rejected his argument that since he was already convicted by the court in USA, he may not be proceeded in India.[61]

Person not charged with offences cannot be convicted for those offences

In *Sunil Kumar* v. *State of* Maharashtra,[62] the accused was charged with forging of marklist. However, he was charged neither under section 218, Cr PC nor under section 468 or 471, IPC. In these circumstances, the Bombay High Court ruled that the accused had no chance of facing these charges and hence his conviction under these sections could not be sustained.

In some cases evidence produced by defence could be considered by the court

Ordinarily, there is no scope for the accused to produce any evidence in support of the submissions made on his behalf at the stage of framing of charge and only such material as indicated in section 227 Cr PC can be taken into consideration by the magistrate at the time of framing the charge. In some very rare cases, the court would be justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version was totally absurd, preposterous or concocted.[63] It has been reiterated by the Allahabad High Court in *Munna Lal Gupta* v. *State of* UP,[64] that there is no need for the court to adduce reasons for framing charges. In fact the court may have to add reasons for discharging the accused though.

There could be no trial at the time of framing charge

In *Indu Jain* v. *State of* MP,[65] the trial court framed charges under section 304, part II, dropping charge under section 323/34 proposed by the investigating officer. The High Court revised the charges to be under section 323/34. The Supreme Court further altered it and ordered to frame charge under section 304, part II and 330, IPC observing that there was no need for a trial before framing charges.

Conviction for an inclusive offence possible on charges of a main offence

The Supreme Court has pointed out that a person could be convicted of an offence under section 498A, IPC which is an inclusive offence of the offence under section 304B, IPC. This is so because the accused gets an opportunity to defend himself against the lesser offence in the trial for the larger offence.[66]

61 See *Jithendra Panchal* v. *Intelligence Officer, Narcotics Control Bureau* (2009) 3 SCC 57.
62 2009 Cri LJ 2599 (Bom).
63 See *Narvekar* v. *Vijaya Sadavekar* (2009) Cri LJ 822 (SC).
64 2009 Cri LJ 2659 (All).
65 (2009) 3 SCC (Cri) 996.
66 *Dinesh Seth* v. *State of NCT Delhi* (2009) 2 SCC (Cri) 783.

Invoking power under section 319 Cr PC

Section 319 empowers the trial court to summon persons that came to be accused of crime during the course of trial. In fact, several issues on the exercise of this power came to be addressed by the Supreme Court. In *Hardeep Singh* v. *State of Punjab*,[67] the following questions were referred to a larger bench:

> (1) When the power under sub section (1) of section 319 of the Code of addition of accused can be exercised by a court? Whether application under section 319 of the Code of addition of accused can be exercised by a court? Whether application under section 319 is not maintainable unless the cross examination of the witness is complete?
>
> (2) What is the test and what are the guidelines of exercising power under sub section (1) of section 319 of the Code? Whether such power can be exercised only if the court is satisfied that the accused summoned in all likelihood would be convicted?

These questions were referred to because the bench in *Mohd. Hafi*[68] had decided that section 319 could be invoked only after cross-examination of the witnesses.

Be that as it may, the Supreme Court in *Harbhajan Singh* v. *State of Punjab*,[69] clarified that it is not necessary for the court to wait for cross-examination to be over. The court reasoned that in all cases the court may not wait till cross-examination is over for the purpose of exercising its jurisdiction. *Sarabjit Singh* v. *State of Punjab*,[70] seems to emphasize on a higher standard for the purpose of forming an opinion to invoke section 319. In *Ram Pal Singh* v. *State of UP*,[71] however, the Supreme Court okayed the order of the High Court to summon the additional accused under section 319 on the mentioning of their names by prosecution witness 1 during the course of taking evidence.

Revision to be disposed of even if there is no counsel

In *Mithaeelal* v. *State of UP*,[72] it has been ruled by the Allahabad High Court that even if the petitioner is not represented by accused, revision petition has to be disposed of on merits. In a revision, at the instance of a

67 JT 2008 (12) SC 7.
68 (2007) 4 SCR 1023.
69 2009 Cri LJ 4429.
70 2009 Cri LJ 3978 (P&H).
71 (2009) 4 SCC 423 (In *Ramakanth Tripathi* v. *State of UP*, 2009 Cri LJ 459, the Allahabad High Court summoned additional accused on the trial judge's satisfaction of *prima facie* case against him after inquiry.)
72 2009 Cri LJ 612 (All).

private party, the court exercises only a limited jurisdiction. It cannot act as an appellate court.[73]

The Kerala High Court ruled that the statements of witnesses in the court should be read over to them before they are asked to affix their signature.[74] The MP High Court did not approve of the trial court's refusal to take signed written statement of the accused under section 233.[75]

Approver

In a case to be tried by the sessions judge, it is for him to tender pardon to the accused. The Guahati High Court in *Mohd. Maintaqi Ali* v. *State of Assam* [76] observed: "The interpretation of section 306 and 307 of the code amply clarified that after criminal proceedings committed to the court of sessions which has the jurisdiction to tender pardon to an accused and Chief Judicial Magistrate/Judicial Magistrate does not possess any such jurisdiction."[77]

Importance of cross-examination

The importance and relevance of cross-examination to elicit truth in criminal trials came to be reiterated by the AP High Court in *Gangula Venkateswara Reddy* v. *State of A.P.*,[78] thus: "It is well settled that (Sic) cross-examination is undoubtedly the greatest legal engine ever invented for discovery of truth. Denial of an opportunity for cross-examination on the earlier statements would result in a fatal blow and also an infraction of fair trial under article 21 of the Constitution."[79]

There is no right for accused to get copy of his confession before charge sheet

When an accused's statements was played up by the media, affecting her rights, she wanted to get a copy of her confession given earlier. In *Monica Susairaj* v. *State of Maharashtra*,[80] the Bombay High Court held that she was not entitled to a copy of her confession before the charge sheet was submitted. It was for the investigating officer to decide at what stage it should be given.

Part-heard cases

The provisions of section 126(3), Cr PC bar the use of pre-recorded evidence by a successor judge only when the trial has to be conducted according to the provisions of sections 262-265 of the Code. It is not that it is merely a prohibition, rather the provision of section 326(3) creates a

73 See *Dharmajit Singh* v. *State of Haryana*, 2009 Cri LJ 641 (P&H).
74 *G-Bhagawat Singh* v. *State of Kerala*, 2009 Cri LJ 1375 (Ker).
75 See *Shivacharan* v. *State of MP*, 2009 Cri LJ 1291 (MP).
76 2009 Cri LJ 508 (Gau).
77 *Id.* at 1510.
78 2009 Cri LJ 1958 (AP).
79 *Id.* at 1965.
80 2009 Cri LJ 2075 (Bom).

complete bar on the jurisdiction of a judge who proceeds further in a case without starting the trial afresh, if his predecessor had recorded the evidence of any witness of the case.[81]

Hearing of accused

The whole object of section 313(1)(b) is to afford the accused a fair and proper opportunity of explaining the circumstances which appear against him and that the questions must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand.[82]

In *State of Punjab* v. *Hari Singh*,[83] the Supreme Court categorically held that examination under section 313 should be properly done. Its observations are self-explanatory. When the accused was examined under section 313, Cr PC the essence of accusation was not brought to his notice, more particularly that possession aspect, as was observed by this court in *Avtar Singh* v. *State of Punjab*.[84] The effect of such omission virtually affects the prosecution case.[84a]

Procedure to be followed by sessions court under sections 232 and 233, Cr PC

The procedure laid down in sections 232 and 233 are mandatory and their compliance should be reflected in the proceedings. If non-compliance of these provisions has affected seriously and prejudiced the interest of the accused, it may vitiate the trial. In such cases, the Supreme Court may stop the trial and ask the trial court to continue from that stage afresh. However, mere non-compliance of these provisions *ipso facto* does not vitiate the trial.

It has also been clearly clarified by the court that mere omission to record application of mind under section 233 may not vitiate the trial. It could be cured under section 465 Cr PC.[85]

Stay of criminal proceedings not necessary

When there were criminal proceedings and civil proceedings on the allegations of defamatory statements, the accused made a prayer for staying criminal proceedings. It was rejected by the Gauhati High Court in *Subal Kumar Dey* v. *Public Prosecutor, West Tripura*,[86] as the proof required in the proceedings were different. The decision of civil court may not have any impact on the criminal proceedings either. The accused may not be prejudiced if both the proceedings were allowed.

81 See *Ajaykumar Poddar* v. *State of Bihar*, 2009 Cri LJ 2044- 2047 at (Pat).
82 *Ranvir Yadav* v. *State of state of Bihar*, 2009 Cri LJ 2962 (SC); see also *Inspector of Customs Lakhoor* v. *Yashpal*, (2009) 4 SCC 769 holding that non-examination of accused under section 313 is irregular. It may vitiate the trial and accused may be acquitted.
83 (2009) 4 SCC 200.
84 (2002) 7 SCC 419
84a. *Supra* note 83 at 211.
85 See *K.M.Moideen* v. *State of Kerala*, 2009 Cri LJ 4045 (Ker).
86 2009 Cri LJ 4838 (Gau).

Legal Aid

The Government of Kerala has introduced a scheme for giving legal aid to the persons accused of crimes. Section 304, Cr PC and rule 34 of Legal Aid to Accused Rules, 1992 enable the court to engage a lawyer to render necessary help to the accused. In *Abdul Razak* v. *State of* Kerala,[87] the Kerala High Court reversed the order of conviction and remanded the case to the trial court as it concluded that the accused got only a junior lawyer to defend him.

Witnesses under section 311

In *Godrej Pacific Tech Ltd.* v. *Computer Joint India Ltd*,[88] the request of an appellant to recall a witness who was already examined under section 311 was rejected both by the trial court and the High Court. The Supreme Court directed the lower court to reconsider it.

In *Umar Mohammed* v. *State of Rajathan* with *Jamalu* v. Rajasthan,[89] the request of the appellant to get re-examined under section 311 after nine months of his first deposition was declined by the Supreme Court as it was indicative of the fact that he must have been won over by the defendant. The court rejected his prayer.

VI INHERENT POWERS OF HIGH COURTS

Section 482, Cr PC inheres the inherent power of the High Courts. This is to be exercised to achieve justice. Though the Code contains several provisions enabling securing of justice, a citizen can invoke this power independently of proceedings in other courts. Under this jurisdiction, the High Courts sometimes quash the proceedings which are even at the initial stages if they are convinced that there is abuse of process of courts. During 2009, there were decisions by various High Courts under this provision. Some important decisions are analysed under sub-heads for convenience of reference.

Availability of revisional/appellate remedies no ground to refuse to act on section 482

When it was pointed out in *C.M. Ibrahim* v. *Tata Sons Ltd*,[90] that availability of revisional and appellate jurisdiction should restrict use of inherent power, the court responded that the existence of these remedies would not affect the jurisdiction under section 482, Cr PC. The case was not quashed by the Karnataka High Court on merits though.

87 2009 Cri LJ 4705 (Ker).
88 (2009) 2 SCC (Cri) 455.
89 (2009) 8 SCC (Cri) 244.
90 2009 Cri LJ 228 (Kant).

Courts refusing to invoke inherent powers

The courts, generally speaking, showed the tendency of not interfering with the proceedings. In *Jagdish* v. *State of AP*,[91] the Supreme Court upheld the High Court's order of not exercising power under section 482. The court felt that the trial judge should take a decision as to whether there was a case to be tried.[92] In *Babeesh & Babin Kumar* v. *S.I of Police Payyoli*,[93] the Kerala High Court refused to quash a prosecution under section 326, IPC on the ground of compounding of the offence. In *Raja Doseiwala & Nagaraja* v. *State of Karnataka*,[94] the High Court refused to review under section 482 a decision taken by the courts not to give the benefit of section 427 to him. However, in *Mithaeelal* v. *State of U*.P,[95] the Allahabad High Court under section 482 recalled an order dismissing a revision for want of the presence of the counsel.

No compensation can be ordered under section 482

The Punjab and Haryana High Court refused an unusual prayer under section 482 in *Anil Kumar* v. *Vijay Kumar*.[96] In this case the petitioner's father was murdered and the accused was sentenced to life imprisonment. When the petitioner became major he moved the court under section 482 for compensation. The High Court responded: "Taking support from the above proposition of law as settled by the Hon'ble Supreme Court and following the same, it is held that the compensation under section 357 of the Cr PC can be granted only by the trial court, revisional court or the appellate court and beyond no other court. Thus, his petition under section 482 is not maintainable."[97]

Inherent power cannot be used to quash registration of case under section 156(3)

In *Abdul Aziz* v. *State of (UP)*,[98] it was clarified by the Allahabad High Court that the registration of a case under section 156(3) against the petitioner or the request of another to the magistrate cannot be quashed under section 482 as the petitioner has no right till he is summoned by the court.

91 2009 Cri LJ 828 (SC).

92 See *Senti Ramakrishna* v. *Senti Senti Sree* (2009) I SCC (Cri) 578; *Harmara Preeth Ahluwalia* v. *State of Punjab* (2009) 3 SCC (Cri) 620; *Pankaj Kumar* v. *State*, 2009 Cri LJ 1576 (Del); *V.X. Jose* v. *State of Gujarat* (2009) 3 SCC 78; *S.L. Constructions* v. *Alappate Srinivas* (2009) 1 SCC (Cri) 558; *State of A.P.* v. *Bijori Kanthah* (2009) 1 SCC (Cri) 481.

93 2009 Cri LJ 517 (Ker).

94 2009 Cri LJ 638 (Kant).

95 *Supra* note 78, 2009 Cri LJ 612 (All); see also *Abdul Rasheed* v. *State of Kerala*, 2009 Cri LJ 527 (Ker). An ex parte order under section 125 Cr PC though reversible and quashable was not quashed in the circumstances of the case.

96 2009 Cri LJ 802.

97 *Id.* at 803.

98 2009 Cri LJ 1683 (All).

Order of taking cognizance cannot be quashed under section 482

Order of taking cognizance being a final one could be got revised under section 397. When the petitioner has thus a specific provision for this, power under section 482 should not be exercised to quash it.[99]

Inherent power may be exercised to give effect to compromise

In *Deepak Chowudhury* v. *Tripura*,[100] after serving a portion of the sentence imposed on him under section 498 IPC, the husband patched up with his wife and wanted to live peacefully. The case was permitted to be quashed under the inherent powers of the High Court invoking section 482.

The period of payment of fine cannot be extended under section 482

The M.P High Court did not permit the extension of time for making payment of the amount of fine under section 482. The court pointed out that instead of section 482 of the Code, section 68 IPC could be invoked.[101]

Quashing under section 482 when trial is at advanced stage and initiated as counter blast

In *CBI* v. *A Ravishankar Prasad*,[102] the Supreme Court noted that the case involved defrauding the bank and that the quashing of cases at the advanced stage may have adverse repercussions on pending cases. The Supreme Court did not approve the quashing of the case under section 482.

In *M.S. Ojha* v. *Alok Kumar* Srivastava,[103] the Supreme Court okayed quashing the proceedings inasmuch as they were initiated by the guarantors of loanees of the bank as a counterblast to their recovering of loans from the guarantors.

Quashing proceedings of framing charges

The Supreme Court disapproved quashing a proceeding of framing charge in *Pollution Control Board* v. *D. Bhujendra Kumar Modi*,[104] on the ground that there was material to constitute a *prima facie* case.

Inherent power to be used to quash proceedings involving crime against society

In *Rumi Dhar (Smt*) v. *State of West Bengal*,[105] the Supreme Court ruled that when settlement is reached between debtors and the bank, the offence does not come to an end. Decisions of tribunal on civil disputes may not be relevant for criminal prosecutions. Since *prima facie* case was found, the

99 *Sanjay Bhandari* v. *State of Rajasthan*, 2009 Cri LJ 2291 (Raj). See also *Rajat Kumar Bhandopadyay* v. *State of West Bengal*, 2009 Cri LJ 3360 (Cal) wherein the order taking cognizance in the absence of offence came to be quashed under section 482.

100 2009 Cri LJ 2912 (Gau).

101 See *Prahlad Singh* v. *State of MP*, 2009 Cri LJ 3161 (MP).

102 2009 Cri LJ 437 (SC).

103 2009 Cri LJ 4672 (SC).

104 (2009) 1 SCC (Cri) 679.

105 (2009) 2 SCC (Cri) 1074.

order of refusal to quash the proceedings passed by the High Court was right.

The Supreme Court in *Jagdish Chanana* v. *State of Haryana*,[106] ruled that quashing of criminal proceedings as a result of compromise in dispute of purely personal nature arising out of commercial transactions not involving any public consequences could, however, be ordered. In this case, the disputes were purely personal and no public policy was involved in the transactions.

It is interesting to note that the apex court discussed the ramifications of the inherent power encased in articles 136 and 142 of the Constitution and section 482, Cr PC. It was reiterated in *Rumi Dhar* that exercise of this power would depend on facts and circumstances of each case. The courts would not exercise this power for quashing a case involving crime against society.

In conclusion, one could perhaps say that the High Courts were conscious about the extraordinary nature of this power while dealing with requests for quashing the criminal proceedings. They were very discreet in exercising this discretionary power.

VII REVISION AND APPEAL

Under the Code, there are provisions enabling revision and appeal. The jurisdiction of the revisional court is limited whereas the appellate courts have enough powers as the whole file will be open before them.

Whether a person who had not filed an application under section 340 of the Code could file appeal

The question whether a person who had not filed complaint and the proceedings were initiated *suo motu* by the court could file an appeal came to be answered in the negative by the Kerala High Court and the Supreme Court. But it was held that in such a situation, a revision petition was maintainable.[107]

Case where both revision and appeal were available

The decision in *K. Ramachandran* v. *V.N. Raju*,[108] presented a piquant situation where the revision became impossible. In this case, against the order of acquittal the complainant filed a revision. While this was pending, a division bench of the High Court refused condonation of delay in the application for leave to appeal filed by the government after 801 days. In this situation, the effect was the attaining of finality of the trial court's order of acquittal and the dismissal of revision.

106 (2009) 3 SCC (Cri) 1157.
107 See *K.Sudhakaran* v. *State of Kerala*, 2009 Cri LJ 1757 (SC).
108 2009 Cri LJ 4413 (SC).

Non-examination of appeals on merits

The Supreme Court disapproved the non-examination of appeals on merit by the High Court in *Rameshwar Prasad* v. *State of Rajasthan.*[109] Remitting the appeal to the High Court for consideration on merits, the court observed: "It is to be noted that neither in appeal before the learned sessions judge nor in the revision before the High Court was there any examination of appeal on merits. The first appellate court as rightly noted by the High Court remanded the matter to the trial court for consideration of various aspects which in essence were to fill the lacunae in the prosecution version. The High Court noted that this was impermissible in law".[110]

Unreasoned disposal of appeal is not proper

The number of unreasoned orders passed by the High Court is on the increase. This kind of disposal quite often takes place while dealing with appeals. The Supreme Court in *Prasad @ Hariprasad Acharya* v. *State of Karnataka,*[111] criticised the act of the High Court by observing that "we are dismayed at the casual manner in which the criminal appeal has been disposed of. In this circumstance we set aside the impugned judgment and remit the matter to the High Court for fresh consideration in accordance with law."[112]

Acquittal on merits not interfered with in revision

The order of acquittal registered by the magistrate in *Ambujam* v. *Ayyasamy*[113] on the basis of his conclusion that the complainant was frivolous and false was not interfered with by the Madras High Court in revision.

Interference by appellate courts in appeals – general grounds

In many a decisions, the Supreme Court has detailed the grounds on which it may interfere with lower court decisions. Its observations in *State of UP* v. *Banne @ Baijnath*,[114] are relevant. The court observed:[114a]

> Following are some of the circumstances in which perhaps this court would be justified in interfering with the judgment of the High Court, but these are illustrative and not exhaustive.
>
> i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position.

109 (2009) 4 SCC 471.
110 *Id.* at 472.
111 2009 Cri LJ 1761 (SC).
112 *Id.* at 1762.
113 2009 Cri LJ 3872 (Mad).
114 (2009) 4 SCC 271.

ii) The High Court's conclusions are contrary to evidence and documents on record

iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice.

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This court must always give proper weight and consideration to the finding of the High Court;

(vi) This court would be extremely reluctant in interfering with a case when both the Sessions court and the High Court have recorded an order of acquittal.[115]

During 2009, there have been a large number of cases where the High Court or the Supreme Court interfered with the decision on the basis of these considerations. While the Supreme Court and High Courts upheld the decisions of the High Courts in *Launnam* v. *Bharat Singh*,[116] and *Ramjit* v. *State of Haryana*.[117] In *Rattanlal* v. *State of J&K*,[118] *Jagdish* v. *State of MP*,[119] *Satyapal* v. *State of Haryana*,[120] and *State of H.P.* v. *Ramakrishna*,[121] the trial courts' orders have been restored. Several decisions came to be remitted to the High Court for reconsideration.[122]

Going by the policy spelt out by the Supreme Court, the decision in *Bimla Devi* v. *State of J&K*[123] should have been remitted to the High Court as the appellant was not given the benefit of hearing. However, in view of the lapse of 20 years, the Supreme Court allowed the appeal.

Prejudice of the High Court

The Supreme Court decision in *Gowrisankara Swamigalu* v. *State of Karnataka*,[124] is a sad commentary on the appellate powers exercised by the High Court of Karnataka. There was a dispute between the petitioner and the senior *swamiji* of the *ashram*. It appears that a false criminal case was

115 *Id.* at 286.
116 2009 Cri LJ 899 (SC).
117 (2009) 3 SCC (Cri) 488.
118 (2009) 2 SCC 349.
119 (2009) 2 SCC (Cri) 344.
120 (2009) 3 SCC (Cri) 108.
121 (2009) 3 SCC (Cri) 347.
122 See *Rameshwar Prasad* v. *State of Rajasthan* (2009) 4 SCC at 471; *Syed Peda Aowlia* v. *P.P High Court A.P. State* (2009) 2 SCC (Cri) 499; *State represented by Tahsildar cum Sale officer* v. *Janaki Raman*, (2009) 2 SCC (Cri) 520, *State of MP* v. *Ramesh & Chhinge* (2009) 3 SCC (Cri) 1349; *Naresh Kumar* v. *Kalavati* (2009) 3 SCC (Cri) 1470).
123 (2009) 3 SCC (Cri) 103.
124 (2009) 2 SCC (Cri) 813.

foisted against him. The High Court always sided with the prosecution. His presence on all days was insisted. It was alleged that the public prosecutor told the court of the appellant's coming in air conditioned car and holding press conference. But the he denied it. Ultimately, the High Court reversed his acquittal and imposed a heavy punishment. It may be pertinent to note that medical evidence did not support the charges of sodomy, *etc*. framed against him. A disturbed Supreme Court decried thus:[125]

> A large number of irrelevant factors including the state of conviction, legislation of sodomy in other countries had been taken into consideration of the high Court. The appellant for no reason was condemned in the clearest possible terms. He was accused to be coming to the high Court in an air conditioned car and holding press conference which was denied and disputed by the P.P. He was also branded as a habitual offender. Taking of such irrelevant factors clearly demonstrates how the mind of the learned judges of the High Court stood influenced not only for the purpose of reversing a judgment of acquittal but also for imposition of sentence. If the High Court was clear in its mind that it was dealing with a criminal case and that too the offence is a serious one, we fail to understand why it had made endeavours to mediate in the internal disputes of the matter and for that purpose held sittings in chamber. We also fail to understand as to why the presence of the appellant on each day of hearing was insisted upon and his absence had been adversely commented upon.
>
> The court allowed the appeal.

VIII BAIL

The Supreme Court had an occasion to reiterate the importance of bail in *Vaman Narain Ghiya* v. *State of Rajasthan*[126] thus:

> Bail may thus be regarded as a mechanism whereby the state devolutes upon the community the functions of securing the presence of the prisoners and at the same time involves participation of the community in administration of Justice.[127]

The law of bail like any other branch of law has its own philosophy and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict

125 *Id.* at 823.
126 (2009) 1 SCC (Cri) 745.
127 *Id.* at 749.

liberty of a man who is alleged to have committed a crime, and the presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of the guilt.[128] The court in this case, dealt with the difference between bail under sections 438 and 439 pointing out that section 439 can be invoked only when the accused is in custody.

No bail on parity of reasoning

Both, in *Shahnawaz* v. *State of UP*,[129] and *Shyamlal* v. *State of UP*,[130] it has been categorically ruled by the Allahabad High Court that no bail could be granted on the basis of parity of reasoning despite the Supreme Court decision in *Izrahul I Hacq Abdul Hamid Sheikh* v. *State of Gujarat*.[131] The following observations of the court are self-explanatory:

> Although the … apex court has granted bail recently on the ground of parity in Izrahul …but this case cannot be said to be the authority to hold that parity is a sole ground for granting bail. It is nowhere held as a binding precedent in this case that if bail has been granted by a bench to any accused, then another Bench is bound to grant bail to other similarly placed accused ….[132]

Court entitled to refuse bail even in case of non-submission of charge sheet

The court has authority to refuse bail if it apprehends that the accused may not be available for trial. This is so even when the accused is entitled for bail on the ground of non-submission of charge-sheet within the statutory period.[133]

Right of complainant to question bail order

In *Brij Nandan Jaiswal* v. *Meena Jaiswal*,[134] the petitioner was charged with murder. He was refused bail by the sessions court. However, the High Court granted him bail under section 437, Cr PC. It was questioned by the complainant. Upholding the right of the complainant, the Supreme Court declared that "it is now a settled law that the complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misuse. The bail order can be tested on merits

128 *Ibid*.
129 2009 Cri LJ 3839 (All).
130 2009 Cri LJ 4486 (All).
131 (2009) 3 JT 385.
132 *Supra* note 129 at 3842.
133 See *Mittan Hagjer* & *Action Dimasa* v. *State of Assam*, 2009 Cri LJ 4370 (Gau); *Prasant Kumar* v. *C.I. of Police, Hill Palace*, 2009 Cri LJ 4793 on proviso to section 167(2) Cr PC.
134 (2009) 1 SCC (Cri) 594.

also."[135] In this case the court found that the High Court granted bail mechanically and hence it was reversed by the Supreme Court.

Unreasoned orders granting bail

The Supreme Court has set aside the order granting bail in *State of Maharashtra* v. *Dharmedndra Sriram Bhurte* [136] because the High Court did not keep in view the relevant things.[137]

Anticipatory bail

Anticipatory bail as universally known cannot be granted in cases where only bailable offences are involved even if the accused apprehends arrest. Considerations for granting anticipatory bail are different from those for granting bail under sections 437 or 439.[138] It has been pointed out by the Kerala High Court that *Lok Adalats* cannot grant anticipatory bail as they are engaged in "compromise" or "conciliation" and not adjudication.[139] If a person who was granted anticipatory bail does not appear before the court, he can be recalled by a non-bailable warrant.[140]

The Bombay High Court in *Mahesh Sakharam Patole* v. *State of Maharashtra*, [141] ordered granting of anticipatory bail to the petitioner who was implicated in a prosecution under the SC/ST (Prevention of Atrocities) Act, 1989. The court found that no offence was made out of the complaint.

In *Ravi @ Ravi Prakash* v. *State*,[142] the Madras High Court pointed out that the incorporation of sub-section (1B) to section 438 makes it obligatory for the applicant to be present before the court dealing with his application if such a direction would be issued on application made to the court by the public prosecutor.

Conditions

The Supreme Court also had an occasion to make it clear that conditions beyond what has been mentioned under section 438(2) may not be imposed on the applicant.[143] In *Lal Kamlendra Pratap Singh* v. *State*,[144] the petitioner approached him under sections 467, 468, 471, 420 409 and 218, 212. The High Court refused to quash but directed that if the accused surrenders within 10 days, his application for bail will be considered. By an

135 *Id.* at 596.
136 (2009) 3 SCC (Cri) 1480.
137 See also *Subash Chawan Singh* v. *Dheemant Singh* (2009) 3 SCC (Cri) 1284 where in a similar situation the apex court remitted the case to the High Court for reconsideration.
138 See *Rajeevan S/o late Balasubramanian* v. *State of Kerala*, 2009 Cri L.J 1031 (Ker).
139 See *Sreedharan* v. *S.I. of Police, Balussery*, 2009 Cri LJ 1249 (Ker).
140 See *Bhimsingh Bhaddredya* v. *State of MP*, 2009 Cri LJ 3697 (MP).
141 2009 Cri LJ 3831 (Bom).
142 2009 Cri LJ 457 (Mad).
143 See *Dhanish Bhasin* v. *State of (NCT) Delhi* (2009) 4 SCC 45; *MM Cooperative Bank* v. *J.P. Bhimani* (2009) 3 SCC (Cri) 937.
144 (2009) 2 SCC (Cri) 330.

interim order, the Supreme Court ordered not to arrest him. In the meanwhile, the charge was filed. The state prayed that the cases may not be quashed under article 146. As against this, the petitioner in the absence of an order of anticipatory bail may be arrested. In this context, the Supreme Court referred to the Allahabad High Court decision in *Amaravati* v. *State of UP*,[145] and directed it to be followed by the courts in UP. The present case, in which charge-sheet had already been submitted, the accused could approach the court for regular bail rather than anticipatory bail. It is common knowledge that bail cannot be rejected on the ground of possible threat to the life of the accused. Article 21 of the Constitution of India becomes quite relevant in the context of granting bail.[146]

Release of appellant on bail

There have been a few decisions on the operation of section 389 providing for the release of the appellants on bail after suspension of sentence. The conduct of the appellant during the trial was no ground for getting bail under section 389. In *Masood Alikhan* v. *State of UP*,[147] the public prosecutor was not heard. Nor was there any reason mentioned. The order was, therefore, set aside by the High Court. However, in *Angana* v. *State of Rajasthan*,[148] the Supreme Court considered this among other circumstances relevant in granting bail after suspending sentence invoking article 136 of the Constitution. The Kerala High Court in *Shefiq Youseph* v. *State of Kerala*[149] ruled that the only consideration while dealing with a prayer for release on bail by a convicted person is seriousness of the offence and the manner of commission.

The Supreme Court disapproved the Rajasthan High Court's granting of bail to the accused in *Suzanne Louis Martin* v. *State of Rajasthan*,[150] on an unreasonable ground. It set aside the orders of the High Court. The Supreme Court in *Dinesh Kumar Sinha* v. *State of Jharkhand*,[151] ordered grant of interim bail to the appellant as his appeal was not likely to be heard immediately. It also granted bail to the appellant in *Bakshish Ram* v. *State of Punjab*[152] as he was the sole bread winner of the family. The co-accused who was 80 years old was also granted bail.[153] In *Gajraj Yadav* v. *Rajendra Singh Deena*,[154] the Supreme Court was not happy that the High Court did

145 2005 Cri LJ 755 (All).
146 See *Atul Rao* v. *Karnataka*, 2009 Cri LJ 634 (Knt). But it can be rejected on valid grounds (*State of Maharashtra* v. *Dharmendram Shriram Bhunel*, 2009 Cri L.J. 1546 (SC) and *Jagdishbhai Bhapatbhai Kokhani* v. *State of Gujarat*, 2009 Cri L.J 1272 (Guj).
147 2009 Cri LJ 1322 (All).
148 2009 Cri LJ 1538 (SC).
149 2009 Cri LJ 3148 (Ker).
150 (2009) 4 SCC (Cri) 376.
151 (2009) 3 SCC (Cri) 102.
152 (2009) 3 SCC (Cri) 64.
153 See *Ani Ari* v. *State of W.B.* (2009) 3 SCC (Cri) 1377.
154 (2009) 3 SCC (Cri) 1120.

not consider relevant material for granting suspension of sentence. It ordered that if application was made, the High Court should re-consider.

Re-arrest of acquitted defendant under section 390

Section 390 envisages arrest of persons whose acquittal is in appeal. The Supreme Court in *Amin Khan* v. *State of Rajasthan*,[155] has held that it is permissible for the High Court to order re-arrest of the acquitted defendant.

Cancellation of bail orders

For cancellation of bail orders (whether anticipatory bail or regular bail), the courts may require stronger grounds. The conduct subsequent to the grant of bail such as not breaking the conditions or cooperating with investigation, *etc*. may be relevant in cancelling or not cancelling the bail.[156]

Application for grant of bail under section 436A

In *Md. Shahabuddin* v. *State of* Bihar,[157] the Patna High Court described the theoretical foundation of section 436A, part I and ruled that it should be enforced in the light of the facts of each case. Noting that it represents balancing of individual liberty and societal protection, if the circumstances demand societal protection to be given importance, it should be so given and bail should be refused.

Cancellation of bail

It has been the attitude of the Indian courts not to order cancellation of bail as a matter of routine. If the person has not breached the conditions imposed on him at the time of grant and if no offence has been committed by him since the grant of bail, the order of bail is not to be cancelled.[158]

The Supreme Court has had an opportunity to examine the question of cancellation of bail granted in a case involving bailable offences. In *Rasiklal* v. *Kishore S/o Khanchand Wadhwani*,[159] the Supreme Court invoked article 136 and set aside the cancellation of bail ordered by the High Court. The court said that a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial. And this forfeiture can be made effective by invoking the inherent

155 (2009) 2 SCC (Cri) 749. Also see Bombay High Court Decision in *Good Value Marketing Co*. v. *Montax Corporation*, 2009 Cri LJ 3209 (Bom) describing it as of drastic consequences.

156 See *Madhugarj* v. *State* , 2009 Cri LJ 1067 (Del); *Savitri Agarwal* v. *State of Maharashtra*, 2009 Cri LJ 4290 (SC); *Khilari* v. *U.P*. (2009) 4 SCC 23; *Fida Hussain Bahira* v. *Maharashtra* (2009) 2 SCC (Cri) LJ 24; *Narendra K. Andu* v. *Gujarat* (2009) 3 SCC (Cri) 813).

157 2009 Cri LJ 3877 (Pat).

158 *Manubhai Bhikabhai Voland* v. *State of Gujarat*, 2009 Cri LJ 1275 (Guj).

159 (2009) 4 SCC 446.

powers of the High Court under section 482. Bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity; (2) interferes with the course of investigation; (3) attempts to tamper with evidence of witnesses; (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation; (5) attempts to flee to another country; (6) attempts to make himself scarce by going underground; (7) attempts to place himself "beyond the reach of his surety, *etc*. The court also said that these grounds are only illustrative and not exhaustive. In fact, in this case, the High Court had cancelled[160] the bail. It also ruled that the complainant was not entitled for a hearing before the accused was granted bail. [161] The Supreme Court also pointed out that the principles of natural justice are not required to be complied with when it will lead to an empty formality.

Parameters for grant and cancellation of bail are different. The court considering the cancellation application has to examine whether irrelevant material of substantial nature was taken into account or relevant factors were omitted from consideration while granting bail. If the court has omitted, the order granting bail is to be cancelled. The court in any case should resort to re-appreciation of evidence while considering cancellation. While holding as above, the Supreme Court in *Narsudra K. Amin* v. *State of Gujarat*, [162] also reiterated that an application for cancellation of bail may be filed before the court which passed the bail order.

Transfer of cases

The Supreme Court reiterated that before an order of transfer is effected, the convenience not only of the petitioner but also of the prosecution, other accused and witnesses including the larger interests of the society should also be taken into consideration under section 406 Cr PC. [163] Emphasizing the importance of having fair trial in sustaining the system, the Supreme Court in *Capt. Amarinder Singh* v. *Prakash Singh Badal*[164] pointed out that the apprehension of not getting a fair and impartial trial is required to be reasonable and not imaginary.

Non-reasoned orders acquittal on abrupt conclusions without proper reasoning

While in *State of Orissa* v. *Sikhar Jena*,[165] the Supreme Court found the High Court's acquittal order unreasoned, in *S. Raghu Ramiah* v. *State of A.P*,[166] the court found the appeal against conviction was disposed of by

160 *Rasik Lal Kishore Khanichand Wadhwani* v. *State of U.P*, 2009 Cri LJ 1887 (All).
161 *Id.* at 1890.
162 (2009) 3 SCC (Cri) 813.
163 See *Baidyanath Ayurved Bhawan* v. *State of Punjab* (2009) 3 SCC (Cri) 884; *Abdul Madani* v. *State of T.N.* (2009) 6 SCC 204).
164 (2009) 2 SCC (Cri) 971.
165 2009 Cri LJ 980 (SC). See also *State of H.P* v. *Manokumar* (2009) 3 SCC (Cri) 821.
166 (2009) Cri LJ 33 (SC). See also *G.Vivekanand* v. *Sriramulu* (2009) 3 SCC (Cri) 1326.

the High Court with a cryptic order. In both the decisions, the Supreme Court remitted the cases for fresh consideration.[167] The application for leave to appeal an order of acquittal was rejected by the High Court in *Mahindra Hire Purchasing (Regd.)* v. *Jarnail Singh*,[168] without assigning any reason. This was also returned to the High Courts for consideration on merits.

Unreasoned order granting bail in criminal appeal

Section 389 envisages suspension of sentence and grant of bail pending hearing of appeal. As the hearing may be scheduled very late, having regard to the seriousness of the case, the appellate court either grant bail or hear the appeal. In *Khilari* v. S*tate of* UP,[169] the Supreme Court set aside the order of bail as it was not reasoned indicating non-application of mind.

Unreasoned order disposing revision

In *State Represented by Tahsildar cum Sales Officer* v. *Janakiraman*,[170] an order of conviction was set aside and acquittal recorded by the High Court without adducing reasons. The matter was, therefore, remitted to the High Court for disposal. In another case, the High Court upheld the conviction recorded by the trial court. On appeal, the Supreme Court found that the High Court had disposed of the petition without giving any reason. It was, therefore, sent back to the High Court for disposal.[171]

Compensation

It is interesting to survey the two cases in which the Supreme Court ruled that if compensation ordered by the court could not be recovered, the offender could be ordered to undergo default sentence. In *Ahammedkutty* v. *Abdulla Koya*,[172] the court said that while exercising power under section 357, Cr PC, no direction could be issued to the effect that in default to pay the amount of compensation, the accused shall suffer simple imprisonment. Such an order could be issued only under section 357(1) inasmuch as it alone empowers the court to order fine. But the court ruled that if the compensation ordered in terms of section 357(3) is not paid, it could be ordered to be paid as fine under section 421 Cr PC. The Supreme Court in *Vijayan* v. *Sadanandan*,[173] however, reasoned that an amount ordered under section 357(3) could be realised as fine in terms of section 431 read with section 64, IPC. The court's observations are self-explanatory.[174]

167 See *Karnataka* v. *Mugappa & Byrappa* (2009) 3 SCC (Cri) 2252.
168 2009 Cri LJ 1161 (SC).
169 (2009) Cri LJ 1740 (SC).
170 (2009) 4 SCC 504. See also *Goverdhan* v. *State* (2009) 2 SCC (Cri) 848.
171 See *Prasad @ Hari Prasad Acharya* v. *State of Karnataka* (2009) 3 SCC 174.
172 (2009) 3 SCC (Cri) 302.
173 (2009) 3 SCC 296.
174 *Id*. at 301

> In addition sub-section (3) provides that when a sentence is imposed by the court, of which fine does not form a part, the court may, while 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 suffers only loss or injury by reason of the act for which the accused person has been so sentenced…. Section 431 makes it clear that any money other than a fine payable on account of an order passed under the code shall be recoverable as if it were a fine which takes us to section 64 IPC. Section 64 IPC makes it clear that while imposing a sentence of fine, the court would be competent to include a default sentence to ensure payment of the same.

In this view of things, the court can order default sentence in case of non-payment of compensation ordered under section 357(3), Cr PC.

Compounding of offences

Section 320 has been enacted to enable the criminal justice system to avoid trial and punishment in the case of certain offences which may not have much public impact. In course of time, it has become clear that in order to enhance the cause of peace in society this has to be extended to other areas also. In *Puttaswamy* v. *State of Karnataka*,[175] the Supreme Court resorted to its extraordinary jurisdiction under article 142 of the Constitution to avoid the sentence awarded to the appellant and to increase the fine from Rs.2000/- to Rs.20,000/- in its place. The appellant was convicted of the offence under section 279 read with section 304-A, IPC which is not a compoundable offence under section 320, Cr PC.[176]

Compounding of offences involved in matrimonial disputes

Following the *ratio* of *B.S Joshi* v. *State of Haryana*, [177] the Supreme Court in *Narendra Kumar Singh* v. *State of Jharkhand*[178] compounded the offences under sections 498A, 406 and 307/34, IPC exercising its inherent power under section 482, Cr PC.[179] It is interesting to note that this philosophy was extended by the court even in the realm of civil disputes such as those between a bank and a customer in cases like *Pawan Jaggi* v. *CBI*,[180] and *Nikhil Merchant* v. *CBI*. [181]

175 (2009) I SCC (Cri) 607. Also see *Ishwar Singh* v. *State of MP* (2009) 3 SCC (Cri) 1153; and *Ishwarlal* v. *State of MP* (2009) 3 SCC (Cri) 1156 wherein the sentence awarded was reduced to the period already undergone as a result of compromise between the parties.

176 Also see, *Ishwarlal* v. *State of MP* (2009) 3 SCC (Cri) 1156; *Ishwar Singh* v. *State of MP* (2009) 3 SCC (Cri) 1153 wherein the sentence awarded was reduced to the period already undergone as a result of compromise between the parties.

177 (2009) 4 SCC 675.

178 (2009 Cri LJ 1020 (Jhar).

179 See, *Dipak Chowdhury* v. *State of Tripura* 2009 Cri LJ 2912 (Gau).

180 2009 Cri LJ 4569 (Del).

181 (2008) 9 SCC 677.

IX CONCLUSION

The above analysis of the case law reveals the significant contributions made by Indian judiciary to the development of law of criminal procedure during 2009. There have indeed been instances where the High Courts came to be criticised by the Supreme Court in their dealing with the cases. Being a vibrant branch which is closely associated with the Constitution and human rights discourse with international dimensions, criminal procedure law in India today assumes much importance. It is a matter of satisfaction that the hierarchy of appellate courts with writ powers ensures proper enforcement of the criminal procedural law in the country.