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SOCIO ECONOMIC CRIMES

*Anurag Deep**

I INTRODUCTION

THE SURVEY of 2019 covers the cases on socio-economic crimes decided by the Supreme Court of India. It contains a critical and comprehensive evaluation of the judicial pronouncements on various aspects of the Prevention of Corruption Act, 1988 (PCA); the Prevention of Money Laundering Act, 2002 (PMLA); the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS); Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 (PCPNDT); and various provisions of dowry related laws. The survey revolves round the fresh jurisprudential developments, law laid down, delay in and abuse of the judicial process, lessons for courts, reforms in law *etc*.

II THE PREVENTION OF CORRUPTION ACT, 1988

The United Nations Convention against Corruption, 2003 has acknowledged the menace of corruption as under:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

The UN statement reflects the wide destructive repercussions of corrupt practices. The Supreme Court in the case of *Manohar Lal Sharma* v. *Narendra Damodardas Modi*[1] (*Rafale II*) has also rippled similar sentiment which is as under:

> ...some of the poorest countries in the world, poverty is rightfully intricately associated with corruption. In fact, human rights violations are very often the off springs of corruption. However, the law giver has indeed dealt with corruption and human rights separately.

It is natural that the opposition, media and enlightened citizens are alert and alarmed whenever there is some murmurings of favouritism in commercial contracts of the government involving thousands of crores. However, a political allegation cannot

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1 (2019) 3 SCC 25.

take the place of a legal allegation because political allegations are addressed to the political institutions like the legislature, the media and the mass while legal allegations are addressed to the court. The courts do not have formal democratic legitimacy because they are unelected bodies hardly accountable to any democratic institutions for their judicial process. However, the courts have earned greater credibility in the eye of the public and they rely on their objectivity, independence and power to rectify wrongs. This makes them more responsible in the judicial process. Therefore, a political allegation and a legal allegation must be seen as "distinction with difference". A political allegation can rely on hearsay, anecdotes, inconsistent statements and inferences whereas a legal allegation needs some basis even for a preliminary inquiry.

Rafale defence deal: Political allegation *vis-a-vis* legal allegation

Corrupt practices in defence deals are no secret to the world. Many such cases are decided in the apex seat of justice. In recent years, one of the most highlighted defence disputes was those of Rafale defence agreement. The Government of India entered into a multi-crore Rafale aircraft deal with Dassault (a French company). There was a complaint made to CBI regarding Rafale deal that the Government of India has favoured one Indian Business Group. It was alleged that such favour discloses cognizable offence under section 7(a), 7(b) and 7(c) read with explanation 2 of section 7 of the amended (in 2018) Prevention of Corruption Act, and section 7, 13 (1) (d) (ii) and 13 (1) (d) (iii) of unamended Prevention of Corruption Act, 1988. This complaint led to three cases which are referred as *Rafale* case I, *Rafale* case II and *Rafale* case III.

***Rafale* case I**

Manohar Lal Sharma[2] was one of those cases where high stakes were involved. A complaint was made to CBI (as submitted above) which received no action and response from the CBI. The complainant filed a writ petition in public interest under article 32 in the Supreme Court to direct the CBI to register FIR. Three reasons were provided to doubt the deal, (i) The Reliance Aerostructure Ltd. was a beneficiary with the French manufacturer. Reliance was a new company with no experience in the field. (ii) Former French President (Rafale jets are French products) suggested that it was the Indian Government which insisted to have a deal with Reliance Aerostructure Ltd. and "it had given no option to the French Government in the matter". (iii) The Hindustan Aeronautics Limited, which was set up for these purposes, was side-lined in the procurement of 36 Rafale aircrafts.

Limitation of judicial review[3]

The scope and limitation of judicial review was the first concern for the judiciary because the Rafale deal was a contractual matter with national security dimensions.

2 *Ibid.* It was a full bench opinion.

3 This part (judicial review) is a modified version of a previously published case comment by this author in the newsletter of the Indian Law Institute. (kindly mention newsletter issue and vol. no. details).

The full bench traced the dictum of *Jagdish Mandal* v. *State of Orissa*[4] and *Maa Binda Express Carrier* v. *North-East Frontier Railway*[5] (both on the issue of construction contract). The Supreme Court recalled that in commercial transactions, the principle of judicial review is confined on the parameters of unreasonableness and *mala fides*. Unless it is found that the transactions have been tailor- made to benefit any particular tenderer, the court cannot interfere. The Supreme Court also took support from a full bench opinion in *Tata Cellular* v. *Union of India*,[6] where it was observed that a judicial scrutiny should be limited to the Wednesbury Principle of Reasonableness[7] and absence of *mala fides* or favouritism.

The court also reminded that the contractual issue involved in this tender is special in nature because it deals with defence and national security. The tender is not for construction of roads, bridges, *etc*. "The parameter of scrutiny would give far more leeway to the Government." The only foreign judgement referred by the court was *Council of Civil Service Unions* v. *Minister for the Civil Service*[8] where the House of Lords held that if a royal prerogative (it enables Ministers to take executive decisions in certain cases like national interest, international treaties, grant honour *etc.*) is in context of national security, the power of court to interfere is very limited, *though a royal prerogative can be judicially reviewed*. Based on this decision the Supreme Court of India held that as the subject of the procurement is crucial to the nation's sovereignty, the scope of judicial intervention is limited. Only a deferential, restricted level of judicial scrutiny is permissible because of two reasons, (i) it was a matter of contractual transactions (ii) Rafale jet deal is a matter of defence needs of the country. The contractual transaction as well as matters of defence and national security is an area where the judiciary is inexperienced, less equipped and has little expertise. It cannot make a fishing inquiry. With limited mandate to review, the Supreme Court answered the queries as under:

> Clause (4.3) of the Offset Clause of the Rafale deal provided that OEM/ Vendor, Tier-1 Sub-Vendor will be free to select the Indian Offset Partner for implementing the offset obligation provided it has not been barred from doing business with the Ministry of Defence.

On the role of Government of India to pressure the government of France the Court noted as under:

> There has been a categorical denial, from every side, of the interview given by the former French President. ... On the basis of materials available before us, this appears contrary to the clause in DPP 2013 dealing with IOPs which has been extracted above. Thus, the commercial arrangement, in our view, itself does not assign any role to the Indian Government, at this stage, with respect to the engagement of IOP. Such matters are seemingly left to the commercial decision of

4 (2007) 14 SCC 517.

5 (2014) 3 SCC 760.

6 (1994) 6 SCC 651.

> Dassault. That is the reason why it has been stated that the role of the Indian Government would start only when the vendor/OEM submits a formal proposal, in the prescribed manner, indicating details of IOPs and products for offset discharge. As far as the role of HAL, insofar as the procurement of 36 aircrafts is concerned, there is no specific role envisaged. In fact, the suggestion of the Government seems to be that there were some contractual problems and Dassault was circumspect about HAL carrying out the contractual obligation, which is also stated to be responsible for the non-conclusion of the earlier contract.

The full bench of the Supreme Court unanimously held that the petition is a product of "perception". There is lack of sufficient material to direct CBI to register FIR under the Prevention of Corruption Act, 1988.

***Rafale* case II : RTI and privileged documents**

Can a government document procured without authority be used in a petition? This was an issue of maintainability raised in the review petition filed against original writ petition and judgement (*Rafale I*). The review petition also based its argument on certain government documents published in a newspaper. The Government of India argued that "three documents unauthorizedly removed from the office of the Ministry of Defence, Government of India, have been appended to the review petition and relied upon by the review petitioners." This was in violation of section 3 and 5 of the Official Secrets Act, 1923. The government also relied upon section 8(1)(a) and 8(2) of the Right to Information Act, 2005 and section 123 of the Indian Evidence Act, 1872. The Supreme Court in the case of *Yashwant Sinha* v. *CBI*,[9] (*Rafale II*) held that the review petition is maintainable because the petition relies on the news report published by a couple of newspapers. The documents are already in the public domain now. In the course of judgement the Supreme Court made a few passing observations which is relevant for this work. The Supreme Court observed that the "transparency of information is vital in curbing corruption." The court referred the first proviso to section 24 of the Right To Information Act, 2005 which "marks a paradigm shift, in the perspective of the body polity through its elected representatives that corruption and human rights violations are completely incompatible and hence anathema to the very basic principles of democracy, the rule of law and constitutional morality". "Section 24 of the Act also highlights the importance attached to the unrelenting crusade against corruption and violation of human rights". As the Government of India claimed privilege to the documents the court reminded that the claim of privilege is one of the interests of the state. Presentation of such privileged information to

7 When a statute gives discretion to an administrator to take a decision, the scope of judicial review would remain limited and interference would be permissible only if the order is contrary to law; or relevant factors were not considered; or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These are known as the Wednesbury principles, *Ravi Bajaj* v. *State of Punjab* decided on January 12, 2021 by High Court of Punjab and Haryana.

8 1985 AC 374.

9 2019 SCC OnLine SC 517; (2019) 6 SCC 1.

disclose chances of corruption is another interest of the State. Between these two competing claims "greater good should prevail though at the cost of lesser harm" and the judiciary has to balance the competing interest. The complaint alleges grave wrongdoing in the highest echelons of power and the petitioners seek action *inter alia* under the provisions of the Prevention of Corruption Act, 1988. The judiciary should be able to examine all connected documents. Therefore, the Court rejected the question of maintainability and allowed the official documents, though procured without authority.

Rafale III: Scope of preliminary enquiry, Prevention of Corruption (Amendment) Act, 2018

Once the maintainability issue was decided in *Rafale II*, the review petition against *Rafale I* verdict came for consideration in the case of *Yashwant Sinha* v. *Central Bureau of Investigation.*[10] The review petition, like the original writ petition was dismissed unanimously.[11] KM Joseph, J. who silently agreed in *Rafale I* was vocal in *Rafale II.* He "agreed with the final decision" but placed detailed separate opinions and reasons on certain aspects. His opinion has a few significant points on the investigation of corruption cases, reference of the pronouncement of the Constitution Bench in the case of *Lalita Kumari*[12] and the impact of the Prevention of Corruption (Amendment) Act, 2018.

KM Joseph, J. agreed that the Supreme Court cannot make a fishing inquiry into the deal to unearth the truth, if any because "it is neither appropriate nor within the Court's experience to step into what is technically feasible or not." Judiciary cannot be investigator and arbitrator both. However, he insisted that this restricted review is a limitation only on the judiciary and not on the investigative body like CBI. CBI can make an in depth inquiry to disclose the matter.

Rafale I went in favour of the Central Government. *Rafale* II went against the government. *Rafale* III also went in favour of the Central Government with the indication (by Joseph, J.) that CBI ought to take some initiative. The public interest litigation (PIL) in *Rafale* case has elements of misuse of judicial process where political issues and policy matters were raised at legal forum. Such PIL dilutes the credibility of public interest lawyering.

Demand of bribe and quality of evidence : _Neeraj Dutta_ case

Perspective

In a trial for the offence of "illegal gratification" under section 7 or "Criminal misconduct" under section 13 of the PC Act, there are three significant pieces of evidence, *viz.,* demand of bribe by the accused (public servant), receipt of bribe by the accused and recovery of bribe from the accused. The statutory definition of the

10 (2020) 2 SCC 338. Detailed examination will be made in the *Annual Survey* of 2020.

11 It was authored by SK Kaul, J. and Ranjan Gogoi, CJ. KM Joseph, J. concurred with the outcome but differed on reasoning and finding of the court.

12 *Lalita Kumari* v. *Govt. of UP* (2014) 2 SCC 1. It was a unanimous opinion of the Constitution Bench. *Hereinafter* referred as *Lalita Kumari.*

offence of bribe under section 7 or 13 requires the *actus reus* of "accepts or obtains or agrees to accept or attempts to obtain". It does not expressly require the "demand" of illegal gratification or bribe as an essential element. But the judicial definition does require additional *actus reus* of "demand". There is a judicial consensus that if the prosecution fails to establish "demand" beyond reasonable doubts, mere proof of receipt and recovery cannot lead to conviction.

Issue

What is the impact on trial under PC Act when the complainant, who is himself a victim, dies before the trial? In cases where the demand of illegal gratification was made only to him and there is no other witness to corroborate it, the evidence of demand can be proved only by his statement before the trial court. He presents direct evidence and is a primary witness of the incident of such demand. When such direct evidence or the primary witness is not available because he is dead (or is hostile), the case under section 7 of the Prevention of Corruption Act, 1988 becomes weak because there was no one to prove demand of bribe and there is a void. Can other witnesses or evidence fill the void of direct evidence? Can demand be established by inferences drawn from foundational facts and can circumstantial evidence be replaced by direct evidence? Is it essential that such demand be proved only by direct evidence? If so, what will happen in those cases where the complainant dies? Will such cases necessary "wreck the conviction" and lead or acquittal? These are some of the issues raised in the case of. *Neeraj Dutta* v. *State (Govt. of N.C.T. of Delhi)*.[13]

The judicial answer is still not out because there are conflicting precedents of the Supreme Court on the matter. In *Neeraj Dutta* the division bench has noticed the problem of inconsistency in two groups of precedents. They are *M Narsinga Rao* v. *State of A.P.*,[14] *vis-a-vis* and *P Satyanarayana Murthy*.[15] *M Narsinga Rao* says that the demand of bribe can be proved by inferential evidence also while *Satyanarayana Murthy* states that it cannot be proved by inferences and original evidence is *sine qua non*. The conflict is placed before a bench of three judges, which has referred it to five judges. Hope the bench would "dissolve scepticism and build up credence" by relying on the rule that demand of bribe can be established by inferences if original evidence is not available.

Consensus and conflict

The precedential attention on the issue of "illegal gratification" has two lines of thought. One is the consensus model on the *mandatory requirement* of proof of "demand" of bribe. Another is the conflict model on the *mode* of proof.

The "proof of demand" was read into the PC Act. It was judicially invented to safeguard the interest of the accused against false implication. There are two ways to

13 (2019) 14 SCC 311, *hereinafter* referred as *Neeraj Dutta*.

14 (2001) 1 SCC 691. It was a unanimous and full bench opinion, *hereinafter* referred as *M Narsinga Rao.*

15 (2015) 10 SCC 152, *hereinafter* referred as *Satyanarayana Murthy.*

prove demand for bribes: (i) direct or original evidence (ii) indirect evidence or inferential evidence. The conflicting opinion is on the mode of proof of demand. There are precedents of full bench which makes *direct* evidence of demand as *sine qua non*. In other words, if the complainant dies (or becomes hostile) before trial the primary evidence is lost forever. The judicial dedication to this primary evidence goes to the extent that the proof of demand cannot be established by circumstantial evidence. In other words, the accused has a guaranteed acquittal in such cases. There are two full bench authorities for this. In the case of *B. Jayaraj*[16] followed by *Satyanarayana Murthy*,[17] the accused was acquitted because the complainant to whom the demand of bribe was made, could not corroborate their own complaint before the trial court though there was clinching evidence of receipt and recovery of money. These judgements seem to rely on section 60 of the Indian evidence act, 1872 that "Oral evidence must, in all cases whatever, be direct." If the complainant is not available because he is dead or he is not reliable because he is hostile, the primary evidence of "demand of bribe" remains unsatisfied. Different benches of the Supreme Court have treated both cases as equal and the accused gets the benefit of doubt. This is another level to safeguard in the interest of the accused under the PC Act.

Two safeguards to accused

In other words, there are two safeguards that the accused has been granted. Both are the creation of the judiciary. The idea behind both safeguards is to follow the doctrine of innocence (presumption of innocence) in word and spirit. The first safeguard *i.e.,* proof of demand is very well established and followed without question. The second safeguard *i.e.,* proof of demand by direct or original evidence of the complainant is comparatively new creation by the judiciary and has presented unnecessary hindrance in meeting the ends of justice. *Neeraj Dutta,*[18] therefore, does not agree (and rightly so) with this second safeguard which is an accused oriented interpretation. It is submitted that there is a substantial difference between reliability and availability of a primary witness which the Supreme Court ought to take note of.

Reliability vis-a-vis availability of complainant

The original evidence of a hostile complainant and a dead complainant cannot be treated by the same brush. The reliability of the complainant and availability of complainant present two different things.

Jayaraj-complainant turns hostile

In *B. Jayaraj*[19] the complainant was a key witness because the demand of bribe was made to him only. However, in the trial court he turned hostile and was no more reliable. He did not support his complaint. He even went to the extent of denying his

16 *B. Jayaraj* v. *State of Andhra Pradesh* (2014) 13 SCC 55. It was a full bench decision, *hereinafter* referred as *B. Jayaraj.*

17 *Supra* note 15.

18 *Supra* note 13.

19 *Supra* note 16.

signature on the complaint.[20] Indeed, he supported the version of the accused and was declared hostile. Secondly, another key witness, K. Narasinga Rao, Deputy Superintendent of Police, ACB, Hyderabad died before trial. He could not be examined by the trial court. His witness was also crucial because (i) he was the one to whom the complainant approached. (ii) The Deputy Superintendent of Police (DSP) received the complaint. (iii) He got the contents of the complaint verified, registered the case, issued FIR (iv) He directed the complainant to come with the proposed bribe amount after four days. (v) complainant appeared before the DSP with the proposed bribe amount of Rs.250/- on the decided date. (vi) The DSP summoned two persons as *panch* witnesses. He explained the contents of the complaint. (vii) The DSP got the currency notes treated with phenolphthalein powder and he explained the significance of sodium carbonate solution test to the *panch* witnesses. A pre-trap *panchanama* came to be drafted. (viii) He, as the trap laying officer accompanied by his staff and one inspector went to the office of the accused. (ix) He instructed the complainant to handover the tainted currency notes to the accused on his demand only. (x) When the complainant gave a signal the DSP accompanied by his staff including the inspector rushed into the office of the accused, conducted various sodium carbonate solution tests which came positive. As the DSP died before trial, at least ten facts as enumerated above could not be corroborated in the trial court.

***P. Satyanarayana Murthy* - complainant is dead**

In the case of *Satyanarayana Murthy*,[21] the complainant died before the trial and thus could not be examined by the prosecution. A *panch* witness was examined. The DSP, who received a complaint from the complainant, issued FIR, planned trap, arranged *panch* witness, accompanied the complainant, conducted the chemical test, and did testify during the trial. The *panch* witness accompanied the complainant to the place where the bribe was given who testified that "when the complainant did hand over to the appellant the renewal application, the latter enquired from the complainant as to *whether he had brought the amount which he directed him to bring on the previous day*". Unfortunately the Supreme Court held that "on the demise of the complainant, primary evidence of the demand is not forthcoming and inferential deduction of demand is impermissible in law." The court relying on *B. Jayaraj*[22] rejected the spirited endeavour of the prosecution that the recovery of tainted money and other evidence would entail his conviction. The court insisted on the "indispensability of the proof of demand of illegal gratification". The court required direct proof and not the collective inferential proof of demand. A comparative view of both cases make us understand how the two cases are materially different. In *B. Jayaraj* the complainant turned hostile. The DSP, who first received the complaint, arranged witnesses, planned a trap, treated the money chemically, and caught the accused with money was dead. Both prime witnesses were not available to support the prosecution. In *Satyanarayana Murthy* the complainant died. The DSP was present to witness everything. Both the

20 *B. Jayaraj* v. *State of A.P.*, Criminal Appeal No.99 of 2005, decided by single judge, B. Seshasayana Reddy (decided on Apr. 25, 2011).

21 *Supra* note 15 .

cases are different. *Satyanarayana Murthy* relied on *B. Jayaraj* which is not correct. Even if we accept that the reliance was correct, has *B. Jayaraj* and *Satyanarayana Murthy* which insists on primary evidence for demand of bribe laid down any principle of law? The answer is no because there are many precedents of the Supreme Court which do not insist on the production of primary evidence for the element of "demand for bribe" and are satisfied with circumstantial evidence.

Demand of bribe: primary evidence not essential

B. Jayaraj and *Satyanarayana Murthy* have not considered these precedents which hold different views, *viz., Hazari Lal* v. *State (Delhi Administration)*,[23] *Kishan Chand Mangal* v. *State of Rajasthan*[24] and *N. Narsinga Rao* v. *State of A.P.*[25]

***Hazari Lal*-complainant turned hostile**

In *Hazari Lal* ,[26] the complainant was declared hostile. With other witnesses (the Inspector to whom the deceased made a complaint and another witness who has supported the prosecution case in some particulars only) the accused taking bribe was punished. It was also held that it was not necessary that the passing of money should be proved by direct evidence which is as under:[27]

> ……It is not necessary that the passing of money should be proved by direct evidence. It may also be proved by circumstantial evidence. The events which followed in quick succession in the present case lead to the only inference that the money was obtained by the accused from PW 3.

For such inference *Hazari Lal* refers to the presumption of fact prescribed under illustrations to section 114 of the Evidence Act which is under:

> the court may presume that a person who is in possession of the stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

Hazari Lal applies the rule and principles extracted from the presumption under section 114 of the Evidence Act on the fact situation and draws another presumption under the Prevention of Corruption Act, 1988. This can be reproduced as under:

> So too, in the facts and circumstances of the present case the court may presume that the accused who took out the currency notes from his pocket and flung them across the wall had obtained them from PW3, who a few minutes earlier was shown to have been in possession of the notes. Once we arrive at the finding that the accused had obtained the money from PW3, the presumption under of the Prevention of Corruption Act is immediately attracted. The presumption is of course

22 *Supra* note 19.

23 (1980) 2 SCC 390, *hereinafter* referred as *Hazari Lal.*

24 (1982) 3 SCC 466, *hereinafter* referred as *Kishan Chand.*

25 *Supra* note 14.

26 *Supra* note 23.

27 *Id.*, para 10.

> rebuttable but in the present case there is no material to rebut the presumption. The accused was, therefore, rightly convicted by the courts below.

This importation of section 114 sounds logical but there is one limitation that *Neeraj Dutta*[28] needs to address. *Hazari Lal* has not used the illustration (a) in its totality. The illustration (a) does come with a tail piece which can be reproduced as under :

> But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:— As to illustration (a) A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, *but is continually receiving rupees in the course of his business*;

The court can presume under the following conditions (i) there was a theft of money reported (ii) stolen money was found in the till (iii) it was found soon after the theft [section 114 illustration (a) first part] (iv) he is "continually receiving rupees" [marked rupees] during his business. (illustration (a) second part). The second part *continually receiving rupees* is a part of *actus reus* and establishes the *mens rea* (guilty mind) of the accused. This last part is for the protection of a chance receiver from an accomplice receiver of money. The drafters of the Indian Evidence Act, 1872 were concerned that such receiving must be voluntary with the knowledge that the rupee is dirty money and someone is not framing the receiver of stolen rupee because of any grudge.

In *Kishan Chand Mangal*,[29] the complainant died. Based on other witnesses the court held that "…..the tell-tale circumstances which do indicate that there must have been a demand…"

***N. Narsinga Rao* - complainant turned hostile**

N. Narsinga Rao is very crucial to current discussion because it is an opinion of full bench. *Neeraj Dutta* takes support from *N. Narsinga Rao*.[30] which is not a case where complainants died before trial but turned hostile. However, the Supreme Court has dissected the provision of presumption clause which is significant for discussion. The question was when can the presumption under section 20 of the PC Act could be drawn? Is it essential to establish the foundational fact through direct evidence? The foundational facts are the demand or acceptance of something in cash or kind *i.e.,* illegal gratification. It was argued that the prosecution has legal burden to establish the demand by adducing direct evidence. Only then the prosecution can succeed in proving the foundational facts beyond reasonable doubts. The demand or acceptance of gratification by the delinquent public servant "cannot depend on an inference for affording foundation for the legal presumption envisaged in of the

28 *Supra* note 13.

29 *Supra* note 24.

30 *Supra* note 14.

Act." The Supreme Court in *N. Narsinga Rao* rejected this contention of monopoly of direct evidence in the context of "shall presume" employed in section 20(1) of the Act. It was held as under:

When the sub-section deals with legal presumption it is to be understood as *in terrorem i.e.* in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act *etc.*, if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under section 20 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. Direct evidence is one of the modes through which a fact can be proved. But that is not the only mode envisaged in the Evidence Act.

N. Narsinga Rao states that the recovery of chemically treated money from the pocket of a public servant can be one reason to infer that the money was demanded as illegal gratification. As such recovery can be planted or money can be stuffed, therefore mere recovery cannot be a ground for such inference under section 114 illustration (a).[31] With other evidences and witnesses the fact of demand or acceptance of bribe can be corroborated or denied.

Direct evidence and demand of bribe

The requirement of direct proof of demand for bribes is unreasonable and arbitrary because in various situations primary evidence cannot be possible. *Neeraj Dutta*[32] identifies at least three such situations-

i. where the complainant is dead and could not be examined;

ii. complainant turned hostile; and

iii. complainant could not be examined either due to non-availability or other reasons.

In these instances proof of demand may be inferred from carefully examining the evidence of *panch* witness, acceptance of money, Phenolphthalein Test and by raising presumption under section 20 of the PC Act. Therefore, there are two contradictory views on how to establish the demand of the bribe. *Satyanarayana* and *B jayaraj*[33] declares a rule of exclusion of inferences and insists that only 'direct' evidence of demand of bribe is permissible under law. If the complainant himself dies, even if there are statements of other witnesses (like one present at the time of delivery bribe) who support that the demand was made, it falls short of the quality and decisiveness of the proof of demand of illegal gratification. On the other hand,

31 "a man who is in the possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession".

32 *Supra* note 13.

33 *Supra* note 20.

Kishan Chand Mangal,[34] *Hazari Lal*[35] and *N. Narsinga Rao*[36] states that direct evidence of demand for bribe is not essential because it is not possible in certain cases. Inferences of demand for bribes can be drawn if an accused is caught red handed, there is recovery of pre-planned money, supported by reliable witnesses. *N. Narsinga Rao* is the pronouncement of full bench which is as under:

The word proof need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word proved in the Evidence Act. What is required is production of such materials on which the court can reasonably act to reach the supposition that a fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him.

N. Narsinga Rao has correctly explained the statutory meaning of the word "proved". This description can be used to suggest that an oral evidence of the complainant (who is a primary witness) can be dispensed with if through other evidence the complaint can be proved. But this proposition has a few limitations: (i) section 60 is the first limitation on this description of "proved." Section 60 says that "Oral evidence must, in all cases whatever, be direct." (ii) section 60 can be avoided under certain exceptions. The situations when can an oral evidence (or original evidence) be proved by other evidence is provided under statute (like dying declaration). (iii) The secondary evidence can be produced under section 63 of the Indian Evidence Act, 1872 but it is restricted to documents only and not to oral evidence. In other words, the drafters did not want to dilute the evidentiary norms for a primary oral evidence. Under section 63 the contents of a document can be proved by oral evidence. Under section 65 if the original document is not available it can be proved by the content can be proved by oral evidence. But section 63 and 65 are not helpful because they come in picture when a document is in question and original is not available? Here the complaint is in documentary form and it is available (the application for FIR as well as the FIR). ***N.*** *Narsinga Rao* takes support from common law precedent of Fletcher Moulton L.J. in *Hawkins* v. *Powells Tillery Steam Coal Company, Ltd.*[37] where it was observed that:

> Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion.

This is a good support. The evidence need not be mathematical but can it replace an original oral evidence? The answer is yes. It can be done through the interpretative tool of the judiciary for which *Neeraj Dutta* is a good opportunity.

34 *Supra* note 29.

35 *Supra* note 28.

36 *Supra* note 14.

37 1911 (1) K.B. 988.

Article 136 and concurrent finding of courts below under the PC Act

In this context *Raghubir Singh* v. *State of Haryana*[38] can lend some support not on the central issue of original *vis-a-vis* inferential evidence of demand of bribe but on the judicial process to be followed by the apex judiciary. *Raghubir Singh* was on the PC Act, where bribe was demanded, received and recovered. It was opinion of the full bench. The observation of V.R. Krishna Iyer, J. can be reproduced as under:

> At the threshold we must remind ourselves that the special jurisdiction under article 136 of the Constitution cannot be diluted into a second appeal on facts. The end of the appellate journey is normally the High Court and exceptional circumstances alone can justify the exercise of the extraordinary power of the Supreme Court to review the evidence. The strange and expensive spectacle of multi-tiered appeals built into the system does more injury than justice and strictness in this regard brings finality to litigation early instead of holding out illusory hopes to one who would not have ventured on this costly project had he known the limitations on the jurisdiction under article 136, more so when the findings are concurrent.

Interference can be made only if there is glaring defects in the finding. Just because another view is more plausible cannot be a ground for interference under article 136 especially when there is concurrent finding of the courts below. In the case of *B. Jayaraj*[39] and *Satyanarayana Murthy*,[40] the trial court and the high court had concurrent finding of conviction. The rule to be followed was not to interfere unless it is essential.

Prior to these two pronouncements, the law laid down was by a full bench in *N. Narsinga Rao*.[41] The full bench held that the demand of bribe could be proved by inferential evidence in case the evidence of the complainant did not support the complaint during trial. In other words, *B. Jayaraj* and *Satyanarayana Murthy* have committed a second mistake *i.e.,* not referring to the doctrine of precedent *i.e., N. Narsinga Rao*. If they wanted to differ with *N. Narsinga Rao*, they were required to distinguish why this precedent was not applicable. Indeed the precedent of *Hazari Lal* and *N. Narsinga Rao* was applicable with greater force in the case of *B. Jayaraj* because in both cases the witness turned hostile. If in case of a hostile witness circumstantial evidence can be used, there is greater force to use circumstantial evidence if the witness is dead because there is no contradiction in the statement of complainant though there is no direct corroboration. *N. Narsinga Rao* has rightly held that the requirement of direct evidence of demand of bribe is only a rule of prudence and not rule of law. *B. Jayaraj* and *Satyanarayana Murthy* has elevated a rule of prudence to rule of law which is neither wise for corruption crimes nor

38 1974 AIR 1516; 1974 SCR (2) 799, hereinafter referred as *Raghubir Singh.*

39 *Supra* note 16.

40 *Supra* note 15.

41 *Supra* note 14.

permissible because of doctrine of precedent. These two decisions have brought in "rigidity and legalism". They have weakened the purpose of the PC Act. It is useful to quote from *Shivaji Sahebrao Bobade* v. *State of Maharashtra*[42] where V. R. Krishna Iyer, J. has warned four decades back as under:[43]

> The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to *embrace every hunch, hesitancy and degree of doubt*. *The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma*. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community.

Iyer, J. also referred from Glanville Williams, *Proof of the Guilt* and observed:[44]

> The evil of acquitting a guilty person light heartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished.

The great risk of classical way of looking into penal interpretation is also predicted (and rightly so) as under: [45]

> If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say', with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent."

If the above observation is relevant for a case under classical criminal jurisprudence and parent penal law (IPC), it is applicable with greater force for modern criminal jurisprudence and socio economic crime like corruption. It is relevant to refer the United Nations Convention Against Corruption, 2003 where article 28 also acknowledges the role of inferences as under:

42 (1973) 2 SCC 793. It was a full bench opinion. The appellants were given benefit of doubt under s. 302 read with s. 34 of the Indian Penal Code. The high court convicted them. The Supreme Court also upheld the conviction.

43 *Id.*, para 6.

44 *Ibid.*

45 *Ibid.*

Article 28. Knowledge, intent and purpose as elements of an offence

— Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

Hope *Neeraj Dutta* will be decided in the line of purposive interpretation and "should not be an umbrella for protection of corrupt officers but a shield against reckless or malevolent harassment of officials whose upright discharge of duties may provoke unpleasantness and hostility."[46]

The significance of *Neeraj Dutta* has enhanced because there are similar cases on the same issue of quality of evidence and they are now tagged with this case, for example *Vinita* v. *State of Madhya Pradesh*[47] and *D. Chellaiah* v. *State by the Inspector of Police DVCA, Trichy*.[48] It is essential that the case be decided as early as possible.

Delay

In *Neeraj Dutta* the demand for bribes was made in 1996. Trial court convicted in 2007 (as it was appealed in the high court as Criminal Appeal Nos.15 and 4 of 2007). The High Court of Delhi upheld the conviction in 2009. 2009 to 2019, it remained in the Supreme Court and the Supreme Court referred the matter to a larger bench. The division bench of *Neeraj Dutta* had mentioned that the controversy came because of the conflicting decisions of the full benches. When *Neeraj Dutta* was referred to a larger bench the case was first posted to a full bench. It should have been posted before five judges instead of three judges. The division bench referred the matter in February, 2019 and the full bench referred for another larger bench in August, 2019. We lost six months in deciding which bench is an appropriate bench while it was pretty clear from the order of the division bench in February itself. Last hearing of this case was in January, 2021. In 2020 the case was listed and heard on 10 dates. In 2019- 13 dates, in 2018- 2 dates, in 2014-3 dates, in 2012-2 dates, 2010-9 dates, 2009-3 dates. From the incident of bribery (1996) to conviction (2007) the trial court took 11 years. The high court was swift as it upheld the conviction within 2 years *i.e.,* in 2009. In the Supreme Court the matter was first given serious note in 2019 *i.e.,* after 10 years. It is still undecided in January, 2021. 1996-2021, 25 years have gone. 11 years in trial court, 2 in high court and 12 years in Supreme Court. Out of total time this case has taken, around 45% is spent in the SC. This is "symptomatic of a deeper systemic malady" and it cannot be treated "as an isolated aberration of a" case.

III THE PREVENTION OF MONEY LAUNDERING ACT, 2002

One of the tests of rule of law is the enforcement of penal laws when high and mighty are involved *P. Chidambaram* v. *Directorate of Enforcement*[49] establishes that

46 Law Commission of India, "47th Report on the Trial and Punishment of Social and Economic Offences", (1972). Also referred in *Raghubir Singh* case.

47 Special Leave Petition (Criminal) No. 11339 / 2019 (Arising out of impugned final judgment and order dated July5,2019 in CRA No.7336/2018 passed by the High Court of M.P.at t Indore).

48 Special Leave Petition (Criminal) Diary No(s).27232/2019 (Arising out of impugned final judgment and order dated Apr.25,2019 in CRLA No.1021/2005 passed by the High Court of Judicature At Madras). This is the only available references for now.

49 2019 SCC OnLine SC 1143.

Indian democracy with all its frailties has strong foundations of rule of law and independence of judiciary. Former finance minister and home minister, senior lawyer and the Member of Parliament P. Chidambaram approached the Supreme Court for grant of anticipatory bail in a case registered under the PC Act and the Prevention of Money Laundering Act, 2002 (PMLA). His bail was rejected by High Court of Delhi where the court passed strict remarks against the accused.

Urgent listing

In the Supreme Court the accused P. Chidambaram wanted urgent hearing (same day or next day) after the high court declined to grant relief. But the Supreme Court rejected any immediate hearing. As P. Chidambaram is in the top list of "who is who", a group of intellectuals, politicians, media people came in support of the accused under the guise of liberty. Around 140 lawyers including many senior lawyers criticised the Supreme Court as under:[50]

> The Founders of the Constitution could never have imagined that the Supreme Court could deny urgent and immediate listing upon mentioning of a matter relating to the most senior member of the bar with 40 years of experience, 35 years out of which he has been a Senior Advocate.

The content of such a protest letter indicates that the status of a person and his personality should be a relevant factor rather than principles of jurisprudence. P. Chidambaram was represented by two senior lawyers one of whom was a former cabinet minister and another was a highly influential person. This reminds of what Sutherland observed "because of their social status they have a loud voice in determining what goes into the statutes and how the criminal law as it affects themselves is implemented and administered."[51] P. Chidambaram's status gave him a loud voice in the court, media, civil society. But many like him also went to jail which reinforces faith in the judicial system.

According to this researcher, urgent hearing by the Supreme Court may be granted in cases of: (i) personal liberty (ii) if the petitioner approaches the Supreme Court first time in that case (iii) he is an accused because of his use/abuse of free speech (iv) the FIR or arrest seems to be an abuse of process of law or a part of suppression of dissent (v) the state seems to be following vendetta politics or witch hunt, (vi) the applicable provision of bail (or anticipatory bail) is of Cr PC and not of special laws like the Unlawful Activities (Prevention) Act, 1967 (UAPA), the Prevention of Money Laundering Act, 2002 (PMLA), the Narcotic Drugs and Psychotropic Substances Act,

50 Live Law, "'Rule Of Law In Peril' : SC Lawyers Protest Against Denial Of Urgent Hearing For Chidambaram's Bail Application", *Livelaw News Network*, Aug. 22, 2019, *available at :* https://www.livelaw.in/top-stories/sc-lawyers-protest-against-denial-of-urgent-hearing-for-chidambarams-bail-application-147380 (last visited on Jan 3, 2021) and TQ Correspondent, "Lawyers Protest SC Denial of Urgent Hearing on Chidambaram's Plea", *The Quint*, Aug. 22, 2019, *available at :* https://www.thequint.com/news/india/democracy-in-peril-lawyers-protest-against-sc-denial-of-urgent-hearing-in-chidambaram-case (last visited on Jan 3, 2021).

51 Edwin H. Sutherland, "White-Collar Criminality" 5(1) *American Sociological Review* (1940).

1985 (NDPS), Protection of Children from Sexual Offences Act, 2012 (POCSO), *etc.* which does not follow the doctrine of "bail is rule and jail is exception" very strictly.

In this case P. Chidambaram was a suspect not under general criminal law but under special laws dealing with white collar crimes like PCA and PMLA. The charges were not of free speech, or dissent but involved accumulation of wealth by allegedly criminal means using the influence of ministerial status. The charges were not *prima facie* manufactured or motivated by political reasons. P. Chidambaram had already approached forums of the judiciary to get protection but it was refused which indicated that the judiciary found the case had some weight. The court has rightly rejected the prayer of urgent listing. It would have opened the floodgate for many such cases and made the task of the Supreme Court very difficult.

Anticipatory bail not a part of article 21

R. Banumathi, J. upheld the decision of the high court of Delhi and rejected his bail. Some of the significant observations are the reiteration that anticipatory bail under section 438 of Cr PC is not part of article 21. The power to grant bail or anticipatory bail ought to be applied sparingly and this rule is applied more strongly in economic offences cases. The words of the Supreme Court deserve reproduction as under:

> …there are sufficient safeguards enshrined in the PMLA to ensure proper exercise of power of arrest; grant of anticipatory bail is not to be done as a matter of rule, especially in matters of economic offences which constitute a class apart. Regard must be had to the fact that grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting useful information and also materials which might have been concealed.

The pronouncement followed the *dictum* of *CBI* v. *Anil Sharma* [52] that a protective order of anticipatory bail under section 438 "makes it difficult to elicit information from accused." Economic offences constitute a class apart and need to be visited with different approach in the matter of bail and the case of *Y.S. Jagan Mohan Reddy* v. *CBI*[53] was relied upon. The court observed as under:

> Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. *Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation.* Having regard to the materials said to have been collected by the respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail.

52 (1997) 7 SCC 187.

53 (2013) 7 SCC 439.

After a few months P. Chidambaram was granted bail on the ground that time for custodial interrogation was good enough for investigation and further investigation can be done even if he would be on bail.

Independence of judiciary

The case also throws light on the structural independence of the judiciary. If the political executives are granted any material role in the process of appointment of judges, will the high courts and the Supreme Court remain as independent, uninfluenced and objective as they are now when only a collegium of judges appoints them. In this case a former union home/finance minister (P Chidambaram) was in the courts as suspect, another former union minister (Kapil Sibal) with someone who has chances of becoming minister (Abhishek Manu Singhavi) as lawyers in the court. Minister could be in the appointment committee for judges had the previous system (pre 1993) of appointment of judges prevailed or had the law on National Judicial Appointment Commission sustained. This is not a hypothetical situation.

IV THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

***Jaswant Singh* case[54]: Retrospective application of beneficial penal laws**

If punishment under a penal law is reduced by legislative enactment as a part of reformative theory, should it be given a retrospective effect? *Jaswant Singh* v. *State of Punjab* answered this question and declined to grant the benefit of leniency in punishment. It also highlights the human rights issue of an addict *vis-a-vis* convict of drug abuse. The punishments under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) was considered harsh and disproportionate. It did not discriminate between a drug addict (who is indeed a victim) and a greedy drug peddler (who is a part of a well organised professional criminal gang). Under section 18 the punishment for using or possessing opium of a very small quantity was minimum 10 years. As the minimum punishment was 10 years, bail used to be very difficult for someone who possesses or takes drugs not to mint money but out of compulsion as drug addict. This used to lead to long incarnations in jail. For a habitual drug dealer of an organised gang the minimum punishment was 10 years and maximum was 20 years. In other words, even if a judge was convinced that the person is a poor victim of drug menace, his judicial hands were tied because a minimum punishment of 10 years had to be given. One can imagine the consequence. The temple of justice was a compelling source of injustice, consequence was the failure of reformation theory and the casualty was rehabilitation policy. Therefore, a 1998 amendment Bill was referred to the Parliamentary Standing Committee on Finance.

It resulted into the NDPS Amendment Act, 2001. Various amendments were incorporated. Section 18 did recognise the difference between "small quantity" often possessed or used by victims and "commercial quantity" which is used for huge gains by corrupting the young generation and risking economic security of the nation. Such

54 *Jaswant Singh* v. *State of Punjab, hereinafter* referred as *Jaswant Singh*. Criminal Appeal No. 579 / 2013 decided on May, 15 2019

commercial transactions have close links with money laundering, terrorism, *etc*. It is natural that both, a drug addict and a drug convict form two distinctly identifiable groups. One does it out of compulsion and other does it out of choice. Treating both on similar footings was not only treating unequals as equals but was also unjust, unfair and unreasonable.

The amendment of 2001 in NDPS, Act was "a milestone in the progress of the modern liberal trend of reform in the field of penology."[55] It was the reflection of the doctrine that the primary purpose of criminal law is to reform the individual offender. Punishment is secondary punitive means of regulating human conduct. Fortunately the Parliament rationalised the sentencing structure. For small quantities the punishment range prior to 2001 was 10-20 years. After 2001 the punishment reduced very significantly *i.e.,* it ranges between fine to one year. The accused can be punished by mere fine. The reduction in punishment for small quantities was less than 10% of the punishment that was prescribed prior to 2001. One could expect that the Parliament would grant this benefit retrospectively. If it could not expressly make it retrospective, it would leave it to the judiciary to decide. However, it blocked any benefit of leniency incorporated under section 18 from back date to those already convicted. The law makers expressly provided a few provisions to stop retrospective application like (i) the notification specifying small quantity and commercial quantity clearly made an exception as respects things done or omitted to be done before the notification. (ii) section 41 of the Amendment Act gives benefit of the provision for pending cases but through a proviso expressly prohibited the benefit of cases which are pending in appeal.[56]

In *Jaswant Singh*[57] opium of 2kgs was found with the accused in 1998. The special court convicted the accused in 2001. After his conviction, the NDPS Amendment Act was implemented.[58] Small quantities included less than 2.5 Kgs.[59] Commercial quantity being 2.5 kgs.

The accused prayed for beneficial enforcement as his case was in appeal. The Supreme Court declined to make a beneficial interpretation and refused to give a

55 *Rattan Lal Alias Ram Rattan* v. *State of Punjab*, AIR 1965 SC 444. Though the case was on the Probation of Offenders Act, 1958 but the statements are relevant and fitting.

56 Application of this Act to pending cases.- (1) Notwithstanding anything contained in sub-s. (2) of s. 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence: Provided that nothing in this section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force."

57 *Supra* note 54.

58 By a Notification published in the Gazette of India, Extra., Pt. II, s. 3(ii), dated Oct. 19, 2001.

59 Commercial quantity being 2.5 kgs. in terms of Entry 92 of the Sch. to the NDPS Act.

retrospective operation to the amendment. A beneficial and retrospective operation of a penal law can be given if the law makes express provision for it. In case the law is silent the judiciary can supply the lapse. It is correct when the law expressly prohibits retrospective operation the Supreme Court cannot go against the intention of the Parliament. However, the Supreme Court has avoided this rule many times for the advancement of justice and human rights.

Why did the Parliament expressly prohibited the retrospective application of law? It is understandable that a retrospective operation could have opened numerous cases. It could have created confusion in the implementation and added to the workload of the prosecution and judiciary. *Firstly,* is it a legitimate *alibi* for the Parliament which rests on the edifice of welfare state, especially when the beneficial provision has been made to rationalise a punishment which was grossly disproportionate and violative of the principle of equality? *Secondly,* can the lack of resources of state (work load) be a ground for beneficial application of a law? *Thirdly,* such beneficial applications from retrospective date could have released many prisoners under the NDPS Act, many of whom could be under trial prisoners having possession in small amounts. *Fourthly,* a retrospective operation could have advanced the purpose of reformative jurisprudence in penal laws in the time when the trend is towards a crime control model. *Fifthly,* a beneficial implementation is also as per the command of human rights treaties to which India is a party which is discussed under a separate head.

Judicial denial of beneficial interpretation

The judiciary while declining to give a beneficial interpretation, has taken resort to the intention of the Parliament and it rightly read the intention. However, a more sensitive judiciary could have explored the possibility of a beneficial interpretation rather than taking a refuge to a literal interpretation of law. The interpretation could have benefitted many victims who were drug addicts. These victims were vulnerable because they are a matter of disrespect and considered as responsible for their own perils. The observation of *Rattan Lal* v. *State of Punjab*,[60] are also relevant for academic significance which is as under:[61]

> If the Act will apply only to convictions made by the trial court after the Act came into force, be accepted, it would lead to several anomalies; it would mean that the Act would apply to a conviction made by a trial court after the Act came into force, but would not apply to an accused, though his appeal was pending after the Act came into force; it would apply to the accused if the appellate court set aside the conviction and sent back the case to the trial court for fresh disposal, but would not, if the appellate court itself convicted him. On the other hand, if the expression "found guilty" was given the natural meaning, it would take in the finding of guilty made by any court in a pending criminal proceeding in the hierarchy of tribunals after the Act came into force.

60 *Supra* note 55.

61 *Id.*, para 6.

In case the judiciary wishes to make a beneficial interpretation, *Rattan Lal* can be a useful precedent. A beneficial construction is also a command of international law jurisprudence discussed below.

International law and retrospective application of beneficial provision

The International Covenant on Civil and Political Rights (ICCPR) makes a mandatory provision for beneficial implementation of penal law. Article 15(1) has three sentences.[62] The last sentence is extremely relevant which states that "*if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*" The use of the word "shall" directs that this part of article 15 (1) of ICCPR creates a human rights obligation on India as India is a party to ICCPR.

In the case of *Jaswant Singh*[63] the offence was committed in 1998. Through the amendment of 2001 the "provision is made by law for the imposition of the lighter penalty." Punishment of 10-20 years was replaced by punishment of fine to 6 months imprisonment. Article 15 further says that "the offender shall benefit thereby". It seems the Parliament did not notice it. The provision was not brought to the notice of the judiciary also. "India is a State Party to foundational human rights treaties" like ICCPR. It has acceded to ICCPR in 1979.[64] Upholding human rights obligations under ICCPR is a commitment of India. Another international law document, *i.e.*, the Vienna Convention on the Law of Treaties, 1969 also codifies *Pacta Sunt Servanda* under article 26 that "in good faith,"[65] every treaty has to be performed by state parties. Similarly, article 27 of the Vienna Treaties states that the parties may not invoke "the provisions of its internal law as justification for its failure to perform a

62 The International Covenant on Civil and Political Rights (ICCPR), 1966, art. 15 (1) - No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. *If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby* [emphasis added].

63 *Supra* note 54.

64 ICCPR, 1979, *available at:* https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec (last visited on Jan 13 2021). India has not signed the first protocol to ICCPR. https://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf

65 The Vienna Convention on the Law of Treaties, 1969, art. 26. "Pacta Sunt Servanda" Every treaty in force is binding upon the parties to it and must be performed by them in good faith. *Available at :* https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-i-18232-english.pdf (last visited on Jan 14, 2021).

treaty."[66] The American Convention on Human Rights, 1969[67] or the Charter of Fundamental Rights of the European Union, 2000 also makes mandatory application of lenient punishment.[68]

Retrospective application of beneficial penal laws and ECHR

Article 7 of the European Convention on Human Rights (ECHR) does not make any such provision of beneficial application. Indeed it has declined giving retrospective application in one case.[69] Even then ECHR has improved its approach and a convict friendly interpretation has been made to provide retrospective application of beneficial law. Professor Susana Sanz-Caballero in his research article[70] has addressed the issue in detail under the sub-head "A Case about the Principle of Retrospectiveness of the More Lenient Criminal Law." It can be reproduced as under:[71]

> In this respect, the Grand Chamber[72] has cited the precedent of the Court of Justice of the European Union in the case of *Berlusconi*[73] to

66 Vienna Convention on the Law of Treaties, art. 27. Internal Law And Observance Of Treaties A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46. [Art. 46. Provisions of Internal Law Regarding Competence To Conclude Treaties 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.]

67 American Convention, art. 9 reads: Freedom from Ex Post Facto Laws No one shall be convicted of any act or omission that did not constitute a criminal offense, under the was he applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that applicable at the time the criminal offense was committed. *If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.*

68 European Union Charter, 2000, art. 49 reads: Principles of legality and proportionality of criminal offences and penalties 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. *If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. If subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.*

69 European Commission on Human Rights, *X*. v. *Germany*, Appl. no. 7900/77, Judgment of Mar. 6, 1978, paras 70–72. The law was decriminalised but the benefit of decriminalisation was not granted by the judiciary.

70 *Susana Sanz-Caballero,* "The Principle of *Nulla Poena Sine Lege* Revisited: The Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights" 28 *The European Journal of International Law* (2017), *available at:* http://www.ejil.org/pdfs/28/3/2801.pdf (last visited on Jan 14, 2021.)

71 *Available at* : http://www.ejil.org/pdfs/28/3/2801.pdf (last visited on Jan 14, 2021)

72 ECtHR was considering the case of *Scoppola* v. *Italy* (No. 2), Appl. no. 10249/03, Sep.17, 2009. "The Grand Chamber unanimously said that Italy was to ensure that the sentence of life imprisonment accorded to the applicant was replaced by a penalty consistent with the more lenient principles established in this ECtHR's judgment."

73 Case 387/02, 391/02 and 403/02, *Berlusconi*, [2005] ECR I-3565.

> maintain that the a*pplication of a criminal law providing for a more lenient penalty, even if enacted after the commission of the offence, is a principle that has become fundamental in criminal law.* As a result, even if not expressly mentioned in article 7, the Court has departed from the previous case law[74] and considers that it is consistent with the principle of the rule of law, of which article 7 is an essential part, to expect a trial court to apply to punishable acts the penalty that is more proportionate. With this judgment, the ECtHR has established that article 7 grants not only the principle of the non-retroactivity of more stringent criminal norms but also, implicitly, the principle of the retroactivity of the more lenient criminal law. If the criminal law in force at the time of the commission of the offence and the criminal law enacted after the adoption of the verdict are different, the judge will apply the most favourable law for the individual.

The Supreme Court of India is said to be the most powerful court of the world because it has preserved, protected and promoted human rights by invoking article 142 and resorting to judicial legislation. The beneficial interpretation of the NDPS Amendment Act, 2001 could have benefitted many victims who became drug addicts or were first time offenders with "small quantities". However, the Supreme Court took a formalistic approach. There is no doubt that the Parliament as well as the judiciary failed to notice the mandate of international law documents to which India is a party. In the words of Cardozo, the judiciary had the opportunity to "supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision — '*libre recherche scientifique*'[75]" and he considers "judge-made law as one of the existing realities of life".[76] This line of thinking makes a review of *Jaswant Singh* desirable. Hope the Parliament makes necessary amendments or the judiciary steps in to develop the criminal jurisprudence of beneficial and retrospective interpretation of penal laws.

Delay

Delay is another point that deserves a few lines. Section 36 of the NDPS Act, 1985 provides for the "constitution of Special Court". One of the purposes of a special court is to finish cases in a reasonable period. In *Jaswant Singh* case, the opium was obtained in 1998, the special court convicted the accused in 2001. The High Court of Punjab and Haryana upheld conviction in 2012. And the Supreme Court upheld the conviction in 2019. The trial court took three years, the high court took 11 years and the Supreme Court took seven years. The journey of the case is 21 years (1998-2019) out of which the subordinate judiciary took three years (15%) and higher judiciary took 18 years (85%). Higher judiciary ought to look into the delay issue on an urgent basis.

74 *Supra* note 69.

75 It means 'free scientific research'.

76 Benjamin N. Cardozo, *The Nature of The Judicial Process* (Yale University Press, 1921).

Applicability of section 50 on search of vehicles : *Baljinder Singh case*

Section 50 of the NDPS, 1985 makes provision for "conditions under which search of persons shall be conducted". Is it applicable to personal search only or is it also applicable to search of a bag, vehicle, premises, *etc.*? This issue is resolved conclusively in the case of *State of Punjab* v. *Baljinder Singh.*[77] As per section 50 the personal search has to be conducted before a gazetted officer. If there is any non-compliance, the search is illegal. The contraband recovered is also of no use because that is inadmissible in evidence. In this case the accused were searched and nothing was found. But the search of their vehicle led to the recovery of seven bags of poppy husk. The accused argued contravention of section 50. The issue before the court was, if there is a search of the vehicle of the accused and any contraband is found, will section 50 be attracted? The Supreme Court held that section 50 cannot be extended to the search of any other things except personal search. In *State of Punjab* v. *Baldev Singh*[78] a Constitution Bench of this court issued various directions. Following direction is relevant for this case:

> (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, *recovered from his person*, during a search conducted in violation of the provisions of the Act. [emphasis added]

Besides direction 3, direction 7 is also significant here :

> (7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused *though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.* [emphasis added]

The court held that other material recovered can be relied upon. There is another precedent from another constitution bench decision, *i.e.*, *Vijaysinh Chandubha Jadeja* v. *State of Gujarat*[79] the relevant part of which is as under:

> Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the *illicit article from the person of the accused during such search*. [emphasis added]

77 2019 (10) SCC 473. .

78 (1999) 6 SCC 172.

79 (2011) 1 SCC 609.

This also makes it clear that illicit articles from personal search attract section 50. The case which was more direct to the issue is *Madan Lal* v. *State of H.P*.[80] The court has observed that "a bare reading of section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises."

Ajmer Singh v. *State of Haryana*[81] also reiterated the same position as under:

> It requires to be noticed that the question of compliance or non-compliance with section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. *Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of* section 50 *of the NDPS Act*, because firstly, section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more *res integra* in view of the observations made by this Court in *Madan Lal* v. *State of H.P.*

***Dilip Kumar* judgement-not good law**

In the case of *Dilip* v. *State of M.P*.[82] the accused were searched and nothing was found from them. However, a search of the scooter allegedly led to the recovery of opium. The court in *Dilip* referred *Baldev Singh* and held as under:

> In this case, the provisions of section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the persons of the appellants were also searched, it was obligatory on the part of P.W.10 to comply with the said provisions. It was not done.

Dilip Singh was conscious that section 50 is applicable only on personal search and not on search of the vehicle but in case of search of a person as well as vehicle, section 50 will be attracted. *Dilip Singh* did not discuss *Madan Lal* mentioned above. The attention of the court was not taken to the joint reading of *Baldev Singh*[83] and *Madan Lal*.[84] Therefore, the court in *Baljinder Singh* has held that:

> The decision of this Court in *Dilip's* case, however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of section 50 relating to personal search were not complied with. In our view, the decision of this Court in said judgment in *Dilip's Case* is not correct and is opposed to the law laid down by this Court in *Baldev Singh* judgments.

80 (2003) 7 SCC 465 at 471, para 16.

81 (2010) 3 SCC 746.

82 (2007) 1 SCC 450.

83 *Supra* note 78.

This discussion suggests that there are three situations under section 50. (i) When an accused is searched, section 50 is mandatory. (ii) When the accused is not searched but his bag, his vehicle is searched, section 50 is not attracted. (iii) When the accused is searched and his bag, his vehicle *etc.* is also searched, section 50 is attracted in case of personal search but it is not attracted in case of search of any other thing like bag or vehicle *etc*. The interpretation in *Dilip Singh*[85] is a liberty oriented or rights based interpretation that favours the accused and follows "due process model". The interpretation in *Baljinder Singh*[86] is not in favour of the accused and follows the "crime control model". Though *Dilip Singh* has been declared "not correct and is opposed to the law laid down" in the constitution bench judgement in *Baldev Singh,* the operative part of *Dilip Singh* remains unaffected because the prosecution witnesses were very weak. However, the question remains, is *Dilip Kumar per incuriam*? Is there any difference between declaring a pronouncement as "not good", "against binding precedents" and declaring a law as "*per incuriam*"?

Another lesson for the judiciary is how to access all relevant judgements while deciding a case. Why did *Dilip Singh* not discuss the case of *Madan Lal*? Can technology be used with artificial intelligence to find all relevant cases? This will ensure greater certainty and predictability of the decisions based on principles, provisions and precedents. *Baljinder Singh* case "gives coherence and direction to thought" in further interpretation of section 50 in a balanced manner where the compelling interest of state and chances of misuse by State has been harmoniously construed.

V OFFENCES OF SEX SELECTION : PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES ACT, 1994

Sex selection and fetus killing is a menace which has socio economic dimensions like dowry offences. A group of health professionals agree to disclose the sex of the fetus. Such agreement amounts to criminal conspiracy under section 120B, abetment under 107(b) of IPC as well as offences under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT). The health professionals use their professional position to earn easy money and exploit the desire of a family to have a son. As per the formulation of Edwin Sutherland this is an illustration of white collar criminality.[87] The poor as well as rich clients, both are partners in this unholy alliance. The socio-economic nature of sex identification of fetus is acknowledged in the case of *Centre for Enquiry into Health and Allied Themes* (CEHAT) v. *Union of India*,[88] as under:

It is an admitted fact that in Indian society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient

84 *Supra* note 80.

85 *Supra* note 82.

86 *Supra* note 77.

87 Edwin H. Sutherland, "White-Collar Criminality" 3 *American Sociological Review* (1940).

88 (2001) 5 SCC 577.

education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity.…

Rich and elite do cultivate this evil. Easy and huge money passes from one side to others willingly or under compulsion.

***Federation of Obstetrics and Gynaecological Societies of India* case**

In 2019 a significant development took place *i.e.,* constitutionalisation of a part of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT) in the case of *Federation of Obstetrics and Gynaecological Societies of India* v. *Union of India*.[89] In this case the constitutional validity of a few provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 was challenged. Proviso to section 4(3), section 20, sections 23(1) and 23(2)[90] or 30,[91] form 'F' of the Act was under attack. The petitioners were seeking direction of certiorari/mandamus by decriminalising the provisions.

Issues before the court

The central issue was constitutional validity of penal provisions and administrative clauses under the PCPNDT Act, 1994. It was argued that the enactment is over-criminalised and over-regulated. In order to decide the central issue the judgement revolves round following questions-

i. Whether suspension of the licence of a health professional violates article 14 and 21?

ii. Whether the requirement to fill various columns in the form F as per rules is a clerical activity?

iii. Whether wrong/vague entries or omissions in the columns under form F is clerical mistake? Such mistakes include writing short forms, writing 'NA' instead of "not applicable", writing initials of the doctors *etc.* while filling up form 'F'.

89 (2019) 6 SCC 283.

90 The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, s. 23 reads: Offences and penalties.— (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

(2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

91 *Id.,* s. 30 empowers appropriate authority to search and seize records.

iv. Should health professionals (including specialist doctors) be punished for such vague entries or omission in filling columns like ?

v. Should substantive offences (actual commission of offences of sex determination test by doctors, its advertisement and its communication to the interested parties) and procedural offences (vague entries, omission in forms) stand on equal footing?

vi. Whether the proof of *positive* presence of *mean rea* in PCPNDT is the responsibility of the prosecution or mere *actus reus* will imply *obvious* presence of *mens rea* like intention, dishonesty and fraudulently ?

vii. 60% cases are on lapses in the filling columns in the forms. Is it a good ground to read down some provision that criminalises the conduct of doctors?

viii. PCPNDT Act has two categories of offences with wide differences in punishment. Those punishable by 3 years and those punishable by 3 months. Both are cognizable, non-bailable and non-compoundable? Is it reasonable to place both offences in the same basket? Is it arbitrary?

ix. Are there sufficient safeguards against misuse of PCPNDT Act against doctors and health professionals?

The court has addressed these questions as under—

a. The court found that there are safeguards against arbitrary use of powers.

i. Under section 16A, there are provisions for State Supervisory Board and Union Territory Supervisory Board. This is a large body consisting of various representatives.

ii. Under section 17 the constitution of Appropriate Authority and Advisory Committee. This is also a multi-member committee from different walks of life.

iii. There are provisions for appeals under section 21 and rule 19 of PCPNDT Act.

On the point of chances of misuse the court rightly held:

> There are internal safeguards in the Act under the provisions relating to appeal, the Supervisory Board as well as the Appropriate Authority, its Advisory Committee and we find that the provisions cannot be said to be suffering from any vice as framing of the charges would mean prima facie case has been found by the Court and in that case, suspension cannot be said to be unwarranted.

Chances of misuse is too fluid to be considered as grounds for declaring a law illegal. Moreover, the court was impressed that section 16A, 17 and 21 sufficiently addresses the issue of misuse.

Is the requirement of 'Form F' clerical in nature?

As per PCPNDT Act, form F is required to be filled in detail. It contains the identification of patients and doctors, nature of test, *etc.* Therefore, it needs names, address, diagnosis, last menstrual period/weeks of pregnancy, history of genetic/

medical disease in the family. These are basic information without which no test can be conducted. Therefore, it cannot be called clerical in nature. "It is a responsible job of the person who is undertaking such a test *i.e.,* the Gynaecologist/Medical Geneticist/ Radiologist/Paediatrician/Director of the Clinic/Centre/Laboratory to fill the requisite information." The court further held that:[92]

> It is absolutely clear that the provisions in the Act in question cannot be termed as arbitrary or illegal or unreasonable. The provisions are not vague. A responsible doctor is supposed to know before undertaking such pre-natal diagnostic test *etc.* what is he undertaking and what his responsibilities are. If he cannot understand the form he is required to fill and the impact of medical findings and its consequences which is virtually the pre-requisite for undertaking a test, he is not fit to be a member of a noble medical profession. Such culpable negligence is not warranted from a doctor. It is crystal clear from the provisions of the Act which can be gathered by a person of ordinary intelligence and they can have fair notice of what is prohibited and what omission they should not make.

The court rightly highlighted the *indispensability* of the Form in following words:[93]

> Non maintenance of record is spring board for commission of offence of foeticide, not just a clerical error. In order to effectively implement the various provisions of the Act, the detailed forms in which records have to be maintained have been provided for by the Rules. These Rules are necessary for the implementation of the Act and improper maintenance of such record amounts to violation of provisions of section 5 and 6 of the Act, by virtue of proviso to section 4(3) of the Act. In addition, any breach of the provisions of the Act or its Rules would attract cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, by the Appropriate Authority as provided under section 20 of the Act.

The court further added:[94]

> There is no other barometer except Form 'F' to find out why the diagnostic test/procedure was performed. In case such an important information beside others is kept vague or missing from the Form, it would defeat the very purpose of the Act.

Maintenance of records under the PCPNDT Act and Rules serves various purposes. (a) it provides a regulatory framework for check and balances. (b) highly specialised nature of services rendered by medical professionals makes proper maintenance of records an integral part of the profession. Therefore, there are several

92 *Supra* note 89 at para 78.

93 *Id.* at para 92.

94 *Id.* at para 59.

enactments that provide for record keeping.[95] (c) record keeping helps tracking or monitoring the use of technology for possible sex selection exercise. (d) As there is a close nexus between the patients and the doctors in this collusive crime, records become the most significant piece of evidence for identifying offence and the accused. (e) In many cases, inspection of records is the only source that reveals the crime and the criminals. (f) the gravity of the situation is proportional to judicial discretion to declare on the validity of law. The court found that 0.46 million girls were stated to be missing at birth as a result of sex selective abortions. The court was very much influenced by these facts which indicated the gravity of the problem. The court was appalled to know that despite strict law there were "only 586 convictions out of 4202 cases registered even after 24 years of existence" which is around 13%. [1994-2018]. Therefore, such records cannot be underrated by reducing it to a consequence of formal clerical activity.

The court rightly concluded that "if record keeping is diluted or exempted from the mandatory requirement of the Act, the probable involvement in sex determination and sex selection in the guise of use of diagnostic techniques would continue unbated." Any such dilution in "the provisions would be against gender justice. It is in order to create the equality that the provisions have been enacted not that unequals are being treated equally." The non--maintenance of form/not reflecting correct medical condition is an offence, not mentioning it would also be an offence or keeping it vague. This interpretation may be little pedantic but they are "committed with cool calculation and deliberate design with the motive of personal gain regardless of the consequences to the society," there is no other way to interpret the law. The rule that fits the case is supplied by the PCPNDT. It has a clear end and the Form F is an essential means to achieve it. "If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey."[96]

The court also referred to the case of *Voluntary Health Association of Punjab* v. *Union of India*,[97] where the issue of misuse of PCPNDT Act was raised. It was argued that the rigour of the PCPNDT Act be addressed by reading down certain provisions but the court declined to do so because the validity of any provision was never questioned. The court relied on the classical principle of presumption of constitutionality and made a passing reference of fundamental duty under article 51A(e) which casts a duty on citizens to renounce practices derogatory to the dignity of women.

***Mean rea* and PCPNDT**

Chapter seven of PCPNDT Act criminalises certain conduct. There is legislative silence on the requirement of *mens rea*. The petitioners imported the doctrine of *mens*

95 The Indian Medical Council Act, 1956, s. 33: has framed the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. Pharmacy Practice Regulations, 2015 also require pharmacists to maintain records. The Transplantation of Human Organs and Tissues Act, 1994, s. 20 reads thus: Punishment for contravention of any other provision of this Act. Medical Termination of Pregnancy Act, 1971, also places an obligation on medical professional to maintain proper records.

96 Cardozo, *supra* note 76.

97 (2016) 10 SCC 265.

rea through *Arun Bhandari* v. *State of Uttar Pradesh*.[98] They raised the point that in the "offence of cheating, '*mens rea*' on the part of that person, must be established." Why did they argue it? This cannot be discerned with certainty because the judgement is silent on this. It seems the petitioner argued that the court was considering the vague filing (or omission) of Form F or columns as intentional wrong which is similar to cheating. Criminalisation of cheating under IPC needs evil intention. If the *actus reus* of doctors is criminalised, it must be with *mens rea* as required for cheating. In other words, the offences under PCPNDT does contain the proof of *mens rea* by default which the prosecution is duty bound to prove. However, the court did not accord weight to this precedent and rejected this line of argument. It presented following reasons for it:

> No sustenance can be drawn from the aforesaid decision (Arun Bhandari) as keeping the information blank is definitely a violation of the Act and very basic fundamental requisite for undertaking the test. Thus, when form has not been filled up, obviously the act is dishonest, fraudulent and can be termed intentional also. Such cases cannot be classified into clerical error.

This line of interpretation by the Supreme Court is little disturbing. Above para has two parts. In the first part the court reiterates that keeping a column blank amounts to serious omission on the part of Doctors (and not just a clerical error) because the information is vital for a medical test of this nature. This is completely agreeable. Second part says that when the "form has not been filled up, obviously the act is dishonest, fraudulent and can be termed intentional." This statement though very short but is crucial because this does not conform to the norms of criminal jurisprudence. If form F is not filled or has omissions, it cannot always be dishonest, fraudulent or intentional. It can be a negligent act also. Not filling the form is the *actus reus*. It can be with intention/ knowledge or can be without it. It seems the Supreme Court has itself developed a presumption of guilt based on the *actus reus*. PCPNDT Act does not provide any presumption as to *mens rea*. There is only one presumption clause and that is section 24[99] which is a protection for pregnant women. More presumption against accused is against the common law principle of *mens rea*. The best course of construction of such provision could be to incorporate the doctrine of negligence. PCPNDT Act casts duty on health professionals. Breach of such legal duty to take care could be an act of negligence. As the punishment for such conduct is three years or five years (maximum), negligence could have been a better option instead of inaugurating a presumption of *mens rea*. This interpretation of automatic or obvious

98 (2013) 2 SCC 801.

99 The Pre- Natal Diagnostic Techniques (Regulation and Prevention of misuse) Act, 1994, s. 24 reads: Presumption in the case of conduct of pre-natal diagnostic techniques.- Notwithstanding anything contained in the Indian Evidence Act, 1872, the court shall presume unless the contrary is proved that the pregnant woman was compelled by her husband or any other relative, as the case may be, to undergo pre-natal diagnostic technique for the purposes other than those specified in sub-section (2) of section 4 and such person shall be liable for abetment of offence under sub-section (3) of section 23 and shall be punishable for the offence specified under that section.

100 *Supra* note 21.

presence of *mens rea* because of the presence of *actus reus* erodes the general protection granted to the accused through time honoured doctrine of common law. This interpretation of the court may be wrongly used for those offences where the punishment is harsh like ten years or more. Without this approach also the "reasons are nicely balanced". The legislature should remove the confusion or a bench in a suitable case should clarify the judgement.

Resort to less relevant precedents

Benjamin N. Cardozo has rightly raised a few questions which are relevant here. His questions as a judge is "To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute?"[100] One of the problems of decision making by the Supreme Court of India is that many of their judgements appeal for guidance through those precedents which are not directly relevant. Some of these precedents need not to contribute to the result in the proportions they are referred to. The court in this case has discussed *Subhash Kashinath Mahajan* v. *State of Maharashtra*,[101] which was on the validity of section 18 (anticipatory bail) under SC/ST Act, *Subramanian Swamy* v. *Union of India*[102] which was on section 499 of IPC *i.e.,* defamation, *Shreya Singhal* v. *Union of India*,[103] which was on validity of section 66A of IT Act, 2000. *Nikesh Tarachand Shah* v. *Union of India*,[104] which was on validity of section 45 of PMLA, 2002. *P. Rathinam* v. *Union of India*,[105] was on the validity of section 309 of IPC and was overruled later on. None of them have an exclusive relationship with females or violence or death. SC/ST Act contains life imprisonment as punishment unlike PCPNDT which has three or five years punishment. Section 499 expressly uses *mens rea* unlike PCPNDT. Section 66A of IT Act had punishment of three years which is similar to PCPNDT Act. But has been declared unconstitutional though out of three clauses of section 66A second clause used *mens rea* element while none of the offence under PCPNDT Act uses *mens rea*. Section 66A was declared unconstitutional unlike the provisions of PCPNDT Act which were declared valid. Section 45 of the PMLA dealt with bail. The only link is that PMLA and PCPNDT both are socio economic crimes. However, section 45 of PMLA was declared unconstitutional for arbitrariness. This analysis indicates that the advocates and the judiciary needs to be more alert while finding a supportive precedent. Just because a precedent has some passages favourable to the logic of argument does not mean it is relevant. The issue involved, the gravity of the law it addresses, punishment, *etc*. should be decisive factors. A precedent which is not directly related opens scope for any precedent and brings vagueness in further decision making process.

101 (2018) 6 SCC 454.

102 (2016) 7 SCC 221.

103 (2015) 5 SCC 1.

104 (2018) 11 SCC 1.

105 (1994) 3 SCC 394.

Gradation of punishment

Should the offences be treated separately for procedural purposes? This was answered as under:

> It cannot be said to be a case of clerical or technical lapse. Section 23(1) need not have provided for gradation of offence once offence is of non-maintenance of the record, maintenance of which itself intends to prevent female foeticide. It need not have graded offence any further difference is so blur it would not be possible to prevent crime. There need not have been any gradation of offence on the basis of actual determination of sex and non-maintenance of record as undertaking the test without the pre-requisites is totally prohibited under the Act. The non-maintenance of record is very foundation of offence. For first and second offences, gradation has been made which is quite reasonable.

Throughout the judgement the Parliamentary intention to check the menace of female foeticide dominates. For this the court preferred the crime control model over due process model. A few laws with harsh provisions under PCPNDT Act are necessary evil because the mischief that the law desires to suppress is *sui generis*. Both parties are offenders. Both are beneficiaries. The health professionals receive material benefits using their professional position. The other party feels relieved from the alleged heavy burden of having a daughter. Indeed both serve as modern *Kalidas*.[106] While the legislature has made laws which are reasonably good to create deterrence, the executive needs to implement it with full force. In the last 24 years 4202 cases were registered. There are only 586 cases where action against 138 medical licenses was taken. This is further area of research as to why a country like India with 28 states and 8 union territories is registering only 14 cases/month? Besides strong implementation of PCPNDT, it is necessary to address the son preference. This can be done through educative, persuasive and coercive means through government and non-government channels. Involvement of religious/spiritual leaders, greater empowerment of females, zero tolerance for crime against women (eve teasing, sexual assault, dowry, and domestic violence especially) and evolution of women as role models in all sectors of society, greater social security and better health services of senior citizen are some of the ways forward.

VI ANTI-DOWRY LAWS

Dowry related offences

Section 498A, 306 and 304B of IPC and the Dowry Prohibition Act, 1961 is the bouquet of provisions which is used to check the menace of socio-economic crime related to dowry. They are often used as complementary to each other. Indeed the courts use one section as an alternate to another. For example, if the conviction under section 304B is not possible in suicide due to dowry harassment (where punishment ranges between seven years to life imprisonment), the courts some time convict accused

106 Kalidas was one of the greatest sanskrit scholars. It is said that Kalidas was initially so foolish that he was trying to cut the branch of the tree on which he was sitting.

under section 306 of Indian Penal Code, 1860 (IPC) (where maximum punishment is 10 years) or even 498A of IPC (where maximum punishment is three years). Similarly, if prosecution cannot establish section 306, the courts punish under section 498A. The desire to meet the ends of justice motivates the courts which is appreciable. However, there are certain norms developed by the judiciary so that justice is not only done but it must be seen to be done.

Material error in the framing of charge : *Gurjit Singh case*

Gurjit Singh v. *State of Punjab*[107] lays down one such norm which needs to be followed by trial courts and appreciated by the high courts. In the present case, there was a demand for dowry for Rs 50000/- after the marriage. It was a big amount in 1990s. The wife committed suicide due to harassment. The charge reads thus:[108]

That you all on September 28, 1994 in the area of Village Bohan, the death of Jaswinder Kaur wife of you, Gurjit Singh and daughter -in- law of you, Gurdial Singh and Mohinder Kaur and sister -in- law of Ranjit Kaur, was caused otherwise than under normal circumstances, you all being her relatives, within a period of seven years of her marriage subjected to her to cruelty and harassment for all in connection with demand for dowry and thereby committed an offence of dowry death punishable under section 304-B of the Indian Penal Code, 1860 and within my cognizance.

Though the chargesheet cannot be understood easily as it is not correctly worded, this chargesheet contains the element of dowry death. The trial court convicted the accused under section 304B and 498A. The high court acquitted the accused from the charge of section 304B but convicted under section 306. The conviction under section 306 was for the first time. If the chargesheet is read, the element of section 306 IPC read with section 113A of IEA, 1872 is not met because section 306 requires some positive *actus reus*. The issue before the Supreme Court was, can such conviction under 306 be sustained even if there is no charge framed under section 306 of IPC?

Omission in chargesheet and Cr PC

The law is very clearly worded. According to section 221 of Cr PC, a court can convict an accused even if charge is not framed under a particular provision or there is an error in framing of charge, provided the facts establish the commission of a new offence. It can be done considering two conditions mentioned under section 215, *i.e.,* (i) the accused was not misled by such error or omission (ii) it did not occasioned failure of justice. Therefore, (as per section 221 of Cr PC, 1973) the accused can be convicted under section 306 of IPC even if no charge is framed under it. Did *Gurjit Singh* case fulfil the command of section 215? Indeed this is the central question? section 304B and section 306 are two different provisions with different elements and rules of evidence. The accused must get a chance to defend himself before he is convicted under section 306.

107 2019 (16) SCALE 634.

108 *Id.,* para 35.

Omission in chargesheet and guiding precedent

The precedent for the guidance of the Supreme Court was *K. Prema S. Rao* v. *Yadla Srinivasa Rao*.[109] In this case also the charge was framed under section 304B of IPC but the accused could not be convicted under section 304B. The court convicted the accused under section 306 of IPC though there was no charge framed under section 306. Does it mean the court is free to replace one provision for another in all such cases?

***K. Prema S. Rao* distinguished**

The chargesheet in both cases were different. In *K Prema S Rao* the charge was as under:[110]

> That on or about the 22nd day of October, 1989, at your house at Tunikipadu of Gampalagudem Mandal Yedla Krishna Kumari, wife of A-l of you and daughter-in-law of A2 and A-3 among you, committed suicide by consuming poison, and that you all subjected her to such cruelty and harassment *as did drive her to commit suicide*, with the object of extracting Ac. 5-00 of land as dowry to A-l and thereby committed an offence punishable under Section 304-B of the Indian Penal Code and within the cognizance of this Court.

In this case ingredients to constitute an offence under section 306 of the IPC were already found in the chargesheet. Though no charge was framed under section 306, no prejudice was caused to the accused. One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. The chargesheet did mention it. The courts have examined the ingredients of section 306 and then it convicted the accused.

Gurjit Singh differs in two respects. (i) the chargesheet did not mention the elements of section 306 (ii) the conduct of the accused did not satisfy the elements of section 306. The chargesheet did not contain the fact that the deceased committed suicide because of the conduct of the accused. It was a material error on the part of the trial court. It would also be prejudicial to the accused. Therefore, the Supreme Court rightly pointed out that the precedent of *K Prema S Rao* was not applicable here.

Lessons for trial court

In case of a prosecution under section 304B where the wife committed suicide the trial court should consider the possibility to mention the elements of both sections, 304B as well as 306. Suicide cases under section 304B may or may not be covered as dowry death. For example, if the wife was subjected to cruelty but it was not "soon before", or if the harassment was not for dowry, the suicide will not amount to dowry death under section 304B but can be punished under section 306. In case of suicide of a bride, the common elements of section 304B and 306 are suicide of wife, within

109 (2003) 1 SCC 217, *hereinafter* referred as *K. Prema S. Rao*.

110 *Id*., para 21.

seven years and cruelty by husband. If it is in relation to "dowry" and "soon before the death", the accused can be convicted under section 304B. However, in many cases the court is not convinced whether it was for a case of dowry. In such cases an accused can be convicted under section 306 provided the charge mentions section 306 or at least the elements of section 306 is mentioned in the chargesheet. Where suicide of a wife takes place the elements of section 306 does mean the elements provided under section 113A and those provided under section 498A *i.e.,* the conduct of accused was wilful and its nature must be as is "likely to drive the woman to commit suicide". In *K Prema S Rao* the chargesheet mentioned the elements of section 306 while in *Gurjit Singh* the chargesheet missed it. Consequently, in *K Prema S Rao* the accused was punished while in *Gurjit Singh* the court missed the opportunity to do justice. The trial courts should understand this distinction with utmost care.

Girish Singh v. *State of Uttarakhand*,[111] reminds the high courts about their powers and limitations as appellate body. In this case the accused were acquitted by the trial court under section 304B of IPC but the high court convicted the accused. The high court was not able to indicate serious lapse in the finding of the trial court. The Supreme Court warned that the high court ought not to reappreciate unless there is a glaring defect. It is possible that based on evidence two views can be taken. One court can acquit while another court can convict on the same evidence. A different view plausible is not a ground to reverse acquittal at appellate level. The reversal may be done if the finding of trial court is perverse. The word "perverse" mean, "against the weight of evidence". The high court before reversing must test whether the acquittal was against the weight of evidence.

The statements of witnesses are English translation of what was written in the original document. But the translation seems to be incoherent and missing for readers and researchers like us. There are two solutions for it. (i) the original documents which might be in Hindi, may also be attached in the judgement. (ii) The cases should be placed before the bench who is aware of the language. For example, if cases contain statements in Tamil, a judge who is aware of the language should hear such cases. It may not be initially possible for all languages but in major languages like Hindi, Tamil *etc.,* it can be done. If a beginning is made now, in the next twenty years we may find judges who are well versed in their own parent high court. This is also necessary so that judges can appreciate the content of language independently.

In *Girish Singh* the delay is manifest. The suicide was committed in 1991. The high court decision came in 2009. The Supreme Court decision came in 2019. It took 18 years from the incident of suicide to the high court decision. The case further took 10 years in the Supreme Court. Total duration of the case was (1991-2019) 28 years. This is excessively unreasonable for both victim and accused. This is against the spirit of rule of law and fair trial. It cannot be a due process model but a tortuous model of adjudication. The system needs to do something concrete.

111 AIR 2019 SC 4529.

Summoning order : how to apply mind - *Rashmi Chopra* case

Rashmi Chopra v. *State of Uttar Pradesh*[112] deals with the summoning order of the subordinate court. Here the couple were in the United States. In 2014 the husband (Nayan) filed a divorce case in Michigan, US. After 20 days of divorce application a criminal complaint was filed with the Police in Gautam Buddha Nagar, UP under section 498A and sections 3/4 of the Dowry Prohibition Act, 1961 against the husband and five other family members. Some of these accused stayed separately. Against Rajesh Chopra there were allegations under sections 323, 324, 504, 506, 392 of IPC also. In 2016, the couple got their divorce from Michigan Court. However, the Judicial Magistrate, Gautam Buddha Nagar issued a summoning order in 2017 against all accused under dowry laws and various provisions of IPC mentioned above. Against this summon order the accused approached the high court for quashing under section 482 Cr PC which was refused. They approached the Supreme Court. It was argued that evidence is not adequate for summoning and the order of the magistrate is without reason. For the law on summoning order the Supreme Court took support from *Dy. Chief Controller of Imports and Exports* v. *Roshanlal Agarwal*,[113] where it was laid down that :

a. While summoning an accused the judicial satisfaction is limited to find "whether there is sufficient ground for proceeding, and not whether there is sufficient ground for conviction." It is because summoning is the stage of inquiry which is different from the stage of trial. Adequacy of evidence can be determined only at the trial.

b. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.

c. If two courts (judicial magistrate and the high court) have same view (*i.e.*, summoning order is valid) the chances of interference have to be rare.

After delineating the principles the Supreme Court interfered in this case (*Rashmi Chopra*) and quashed the summoning order. The reason for quashing was the sequence of the events and circumstances of the case which is as under -

i. Timing of complaint-The criminal complaint was filed by the wife after the divorce application was presented by the husband in the Michigan Court. The Supreme Court concluded that "the complaint under section 498A and section 3/4 of Dowry Prohibition Act, 1961 have been filed as counter blast to divorce petition proceeding in the State of Michigan by Nayan Chopra."

ii. General allegations-There is "no specific allegation. A general allegation against everyone *i.e.,* "they started harassing the daughter of the applicant demanding additional dowry of one crore".

iii. Roping in all-"All relatives of the husband, namely, father, mother, brother, mother's sister and husband of mother's sister have been roped." They "clearly

112 AIR 2019 SC 2297.

113 (2003) 4 SCC 139, It was a division bench of S. Rajendra Babu and G.P. Mathur, JJ.

indicate that application under section 156(3)Cr PC was filed with a view to *harass the applicants*."

iv. Summoning for wrong provisions -The complaint and summoning order directed that "Nayan Chopra, Rajesh Chopra, Rashi Chopra, Amit Chopra, Kuldeep Gandhi and Anita Gandhi are summoned for the offence under sections 498A, 323, 504, 506 of IPC and section 3/4 of D.P. Act." The fact was that the allegation under section 323, 504, 506 was only against Rajesh Chopra. Why was the summoning order issued against five other members?

The Supreme Court was also disappointed to find that the high court did not exhibit the seriousness this case deserved. The high court noticed the summoning order. It noticed the principles of law. But it "has not referred to allegations made in the complaint." How did the high court apply the principles of law on this case? The Supreme Court seems to be of the opinion that had the high court referred to the peculiar facts like timing of filing of criminal complaint, absence of specific allegations and number of accused, and summoning of five unconnected family members under sections 323, 504, 506, the high court must have smelled the real motive of such complaint, i.e., to harass accused to extort "reverse dowry". Under section 498A and other anti-dowry provisions the court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution.

***Jagdish Prasad* case: Is the high court required to mention the facts?**

In *Jagdish Prasad* v. *State of Uttar Pradesh*[114] the allegations were under sections 498A and 323 of IPC and sections 3 and 4 of the Dowry Prohibition Act, 1961. An order was passed by the trial court. Against this order the aggrieved party approached the high court under section 482 of Cr PC. The high court refused to quash the order. It referred to principles of law and various precedents but did not refer to facts. The Supreme Court held that they were "unable to know the factual matrix of the case after reading the impugned judgment except the legal principles laid down by this Court in several decisions." Abhay Manohar Sapre, J. observed as under: [115]

> In our view, the Single Judge ought to have first set out the brief facts of the case with a view to understand the factual matrix and then examine the challenge made to the proceedings in the light of the principles of law laid down by this Court with a view to record the findings on the grounds urged by the appellants as to whether any interference therein is called for or not.

They remanded the case to the high court (single judge) with a request to decide the application afresh on merits (and mention the factual controversy involved). In *Sangeeta Agrawal* v. *State of Uttar Pradesh*[116] the Supreme Court made similar observations.

114 (2019) 2 SCC 184.

115 *Id.*, para 10.

116 (2019) 2 SCC 336 .

***Jatinder Kumar* v. *State of Haryana*[117] on December 17, 2019**

Jatinder Kumar judgement has three points for discussion. Demand of money as financial support, mental status of the bride, charges under section 306 *vis-a-vis* 304B. Meenakshi committed suicide in 1991, within six months of marriage because of consistent demand of Rs 100000/ for car, clinic, *etc*. Appellant (Jitender Kumar), his mother, two brothers Atul Mittal and Anil Kumar were awarded rigorous imprisonment for a period of 10 years under section 304-B and four years under by the trial court. High court, however, acquitted the mother and two brothers of the appellant but conviction of husband under 304B was upheld. However, conviction of the appellant under was set aside. The Supreme Court upheld the high court.

Financial assistance *vis-a-vis* dowry demands

It was argued that the demand of money was not a dowry demand but it was sought in the nature of financial assistance to help the clinic of the accused husband (Jitender Mittal who was a medical doctor) or in laws. This financial support theory is a weak *alibi* though it was accepted by the apex court also in *Appasaheb* v. *State of Maharashtra*.[118] *Jatinder Kumar* took precedential support of *Appasaheb*[119] where such distinction was admitted through interpretative process. The ratio of *Appasaheb* was based on the strict interpretation of penal laws. It was held that "dowry" must have "some connection with the marriage" and "a demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry." The precedent of *Appasaheb* was relied on in the case of *Vipin Jaiswal* v. *State of A.P.*,[120] and distinction of demand for business, needs and demand of dowry was maintained. This interpretation was not in conformity with the objective of the dowry laws. The Supreme Court realised it and in the case of *Rajinder Singh* v. *State of Punjab*,[121] upon considering the case of *Appasaheb*, *Vipin Jaisawal etc.* it was held as under:[122]

> Given that the statute with which we are dealing must be given a fair, pragmatic, and common- sense interpretation so as to fulfil the object sought to be achieved by Parliament, we feel that the judgment in *Appasaheb* case followed by the judgment of *Vipin Jaiswal* do not state the law correctly. We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a

117 (2019) SCC, *hereinafter* referred as *Jatinder Kumar.*

118 (2007) 9 SCC 721.

119 *Ibid.*

120 (2013) 3 SCC 684. In the *Annual Survey of Indian Law*, of 2015 this author has disagreed with this judgement and suggested that the distinction between financial support and dowry demand is a "distinction without difference." The Parliament should intervene. In 2015 the Supreme Court agreed that such distinction is not as per the objective of dowry laws.

121 (2015) 6 SCC 477.

122 *Id.*, para 20.

> married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise.

Jatinder Kumar followed the precedential line of purposive interpretation of dowry provisions inaugurated in *Rajinder Kumar.* Modern trends of penal interpretation are coming out of its rigid shell of strict interpretation which provides benefit of doubt to the accused. It is adopting purposive interpretation so that over emphasis on benefit of doubt rule does not lead to unnecessary acquittals.

Bride over sensitive : burden of proof

Another argument of *Jatinder Kumar* is more significant on the point of burden of proof. One of the templet of argument in suicide cases due to dowry is that the deceased had "a depressive state of mind". Whose burden is it to establish the state of mind of the victim? The Supreme Court rightly held that the accused have to present evidence for this. The burden of proof to establish any hypersensitive nature of the wife or mental imbalance due to other reasons is on the defence (accused) and not on the prosecution**.** There is a legal presumption in favour of soundness of mind of every party. Anyone who alleges otherwise is required to neutralise this presumption.

Conviction under sections 306 *vis-a-vis* 304B

In *Jatinder Kumar* conviction under 306 was rejected but under section 304B was upheld. The purpose of law was served because 304B is more severe in respect of punishment. However, for academic purpose and for future understanding section 306 needs to be discussed. Under section 306 it is required to be proved that the conduct of accused *lead* to suicide. Under section 304B proximate relationship of suicide with conduct is not as strong as it is in case of 306. Section 306 has to be regulated by 107 but suicide under 304B need not be.

Under section 304B the prosecution has no burden to prove scientifically that she had mental imbalance of that degree which compelled her to commit suicide due to the conduct of accused. It is enough that the factum of suicide is established beyond reasonable doubts for section 304B. For section 306 the prosecution has to establish a proximate link (cause, conduct and consequence connection-3C's) that the conduct was the driving force for suicide. It is because of section 113A of the Indian Evidence Act, 1872, precedent of *Ramesh Kumar*, definition of cruelty under section 498A, explanation 1. It is suggested that in dowry death by suicide cases the prosecution should insist on framing express charges under section 498A, 306 and 304B.

Section 319 of Cr PC and dowry related offences

When should a public prosecutor make an application under section 319 of Cr PC. How should the trial court exercise discretion under section 319 of Cr PC? This issue was addressed by the Supreme Court in the case of *Sunil Kumar Gupta* v. *State of Uttar Pradesh.*[123]

123 (2019) 4 SCC 556.

In this case the father of the deceased alleged harassment for dowry against all accused who poured kerosene on her daughter who died. Based on these statements of father an FIR was registered against 9 family members under sections 304-B, 498A, 302 IPC and 3 and 4 of the Dowry Prohibition Act, 1961.

There were two dying declarations. One was before father and the other was "recorded by Tehsildar in which she stated that there was some fight with Chanchal @ Babita who poured kerosene and set her on fire." Based on second dying declaration the Police submitted chargesheet against only one accused out of 9 *i.e.,* Chanchal @ Babita under section 302 and rest others were given clean chit in the Police report. Charges were framed and trial started against one accused in 2015. In 2016, one year after the trial started, the prosecution filed an application under section 319 of Cr PC to summon other accused for the offence punishable under section 302 IPC, though there was no new evidence against them. Section 319 empowers court to proceed against those persons appearing to be guilty of offence even if they were not tried as accused. The trial court admitted that *prima facie* evidence is available against the appellants (other accused who were not chargesheeted) because (i) their names were mentioned in the FIR and (ii) PW-1 and PW-3 also mentioned their names in the evidence. High court upheld the order "observing that there are specific allegations against the revisionists."

What was surprising for any law person is the approach of the trial court as well as the high court. The trial court had accepted the chargesheet in 2015 on the basis of the report of the police which did not find any evidence against other suspects in the FIR. A year after the prosecution has filed an application under section 319 of the Cr PC, 1973 without any additional evidence. The trial court has accepted the application under section 319 not on the basis of any new evidence but on the basis of the old evidence (statement in FIR and statement of PW). If these two pieces of evidence were so crucial for the trial court why did the court not find it useful at the time of framing of charges. The high court also failed to notice this inconsistency by the trial court. Fortunately, the Supreme Court had noticed this and quashed the summoning order of the trial court. The Supreme Court advanced following reasons for quashing of other accused, *viz* (i) Dying declaration of deceased Shilpa before government official was recorded on the day of incident which contains only one name, *i.e.,* Chanchal @ Babita, and no other accused (ii) The chargesheet was also filed under section 302 of IPC only against Chanchal @ Babita (iii) The complainant has not filed any protest petition at that stage.

A trial court has two occasions to identify who can be accused in a trial (i) When charges are framed by the court and (ii) under section 319 after the trial. The legal sense suggests that there must be some strong reasons to exercise section 319. For example, some new evidence was discovered which has material bearing on the case. If the trial court has to rely on the same evidence at both stages, then there is no meaningful purpose of section 319. This will make the trial procedure at the mercy of the court and will make fair trial casual as well as uncertain. Such uncontrolled power will be a breeding ground for doubts on the calibre and integrity of the court, negligent examination of charges at trial stage, corrupt practices. They will invite personal as

well as professional pressures on trial court. Therefore, to make the scope of section 319 limited there has to be two preconditions. (i) The power has to be exercised only in rare cases. (ii) The power of the court is to be exercised if there is some new and strong evidence against the accused being summoned. These principles are matters of legal sense. Therefore, *Sunil Kumar*

Gupta[124] quoted the case of *Hardeep Singh* v. *State of Punjab*,[125] where the Constitution Bench held as under:[126]

> Power under section 319 Cr PC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the magistrate or the sessions judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

Prior to this Constitution Bench, a division bench in the case of *Sarabjit Singh* v. *State of Punjab*[127] also laid down the test as under:

> An order under section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other persons(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. For the aforementioned purpose, the *courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction* of the person sought to be summoned. [emphasis added]

Higher standard of proof under section 319

Sarabjit Singh also elaborated the test as under:[128]

> Whether a higher standard be set up for the purpose of invoking the jurisdiction under section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof *viz.* (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied.

The Supreme Court in *Sunil Kumar Gupta*, applied the principle laid down in the two precedents referred above and held that in this case "no prima facie case is made out for summoning the appellants" under section 302 of IPC. The chargesheet

124 *Ibid.*

125 (2014) 3 SCC 92.

126 *Id.,* para 98.

127 (2009) 16 SCC 4621; AIR 2009 SC 2792.

128 *Id.,* para 18.

did not rely on the first dying declaration but relied on the second dying declaration. This was the correct approach because dying declaration before tahsildar was more reliable *vis-a-vis* those provided to the father. The trial court had to follow "stringent test" or "higher standard" from prosecution as laid down in the coordinate bench of *Sarabjit Singh*. The trial court was "of the opinion that some other person may also be guilty of committing that offence" which was made impermissible by the constitution bench in the case of *Hardeep Singh*. This "may" element is valid at the stage of framing of charges but not under section 319.

On the basis of the report of the father an FIR under section 304B, 302 of IPC *etc.* can be registered against family members. Surprisingly no charges were framed under section 304B. However, for summoning all such members under section 319 of Cr PC, the prosecution needs to establish a *prima facie* case. FIR does not need a reliable information or *prima facie* case. An FIR needs some facts necessary to disclose the crime. On the other hand, section 319 needs more than only some information. The Supreme Court applied the principle of the Constitution Bench judgment in *Hardeep Singh*, for summoning an accused under section 319 Cr PC that "it requires much stronger evidence than mere probability of his complicity which is lacking in the present case." The court held:

> The statement of PW- 1 both in the complaint and in his evidence before the court is very general stating that he had given sufficient dowry to Shilpa according to his status and that the groom side were not satisfied with the dowry and that they used to demand dowry each and every time. Insofar as the demand of dowry and the dowry harassment, there are no particulars given as to the time of demand and what was the nature of demand. The averments in the complaint and the evidence is vague and no specific demand is attributed to any of the appellants. In such circumstances, there is no justification for summoning the appellants even under section 498A IPC and under sections 3 and 4 of Dowry Prohibition Act. It is also pertinent to point out that upon completion of investigation, the investigating officer felt that no offence under section 498A , 304-B IPC and under sections 3 and 4 of the Dowry Prohibition Act is made out. Charge sheet was filed for the offence punishable only under section 302 IPC against Chanchal @ Babita.

Therefore, the Supreme Court quashed the summoning order by the trial court. In the opinion of this author the subordinate judiciary is the second institution assigned with the duty as a protector of the human rights of a person.[129] In the enthusiasm of protecting the rights of victims the court should not forget that it has a primary duty to protect the rights of accused also. Moreover, it has to conduct the proceeding based on certain principles, norms and rules. The Supreme Court has rightly restated the same. Hope the prosecution, the trial court and the high court will learn from *Sunil Kumar Gupta* case.

129 The first institution for human rights protection is the Police.

Suicide by husband and allegation of dowry

If there is time gap between the conduct of accused (false allegation) and consequence (suicide), how to establish causal relationship? Should it be the rule of grave allegation and sudden consequence. Usually dowry related suicide cases deal with suicide of a women *i.e.,* wife. Unlike most of these cases, in *Rajesh* v. *State of Haryana,*[130] husband committed suicide after five months of allegation. The suicide note as under:

In the suicide note, the deceased Arvind stated that false allegations of demand of dowry were made against him and that a Panchayat was also conducted in which there was an attempt to assault him. There were continuous threats from his father-in-law, his brother-in-law and the sister-in-law that his family members would also be implicated in a criminal case. Unable to withstand the harassment, the deceased took the extreme step of committing suicide and held his father-in-law, the Appellant and his sister-in-law responsible for his death.

After five months of alleged public insult and assault (September 2001), the deceased Arvind committed suicide in February 2002. PW-1 (father of deceased) stated that "he and his son Arvind (deceased) had forgotten about the Panchayat episode in view of the apology tendered by the accused." Prosecution also alleged that even after the *panchayat,* Arvind was threatened on phone.

The point that arises for the consideration of the court was, whether Rajesh (who slapped) can be held guilty under section 306 IPC as the suicide was committed five months after the public insult and assault. The cause effect relationship matters a lot. The proximity of time and the conduct is crucial. The incidents of threatening, insult and slapping, apology, suicide and gravity of conduct of the accused are decisive factors in criminal jurisprudence.

Working definition of section 306 : *Ramesh Kumar* provides *stare decisis*

The court took jurisprudential support from *Ramesh Kumar*[131] case which has propounded the principle on the law of abetment. It has earned the status of *stare decisis* because the same has been followed and approved many times. In *Ramesh Kumar* it was held that:[132]

> Conviction under Section 306 IPC is not sustainable on the allegation of harassment without there being *any positive action proximate to the time of occurrence on the part of the accused*, which *led or compelled the person to commit suicide*... the person ...must have played *an active role by an act of instigation* or by doing certain act to facilitate the commission of suicide.

Ramesh Kumar provides the working definition of section 306. Based on *Ramesh Kumar* the elements of section 306 can be summarised as :

130 Criminal Appeal No. 93 of 2019 (Arising out of SLP (Crl.) No.8667 of 2016) ; [2019 (108) ACC 978.

131 *Ramesh Kumar* v. *State of Chhattisgarh* (2001) 9 SCC 618. It was a full bench opinion.

132 *Ibid*.

(i) *actus reus*-any positive action by accused

(ii) time factor -proximity of the *actus reus* to the time of suicide

(iii) *Causa Causans* -that action or conduct of accused must have led or compelled the victim to commit suicide (cause consequence relationship). *Black's Law Dictionary* (fifth edition) defines *Causa Causans* as "The immediate cause; the last link in the chain of causation." The act of the accused must be the proximate, immediate or efficient cause of the death of the victim.

(iv) proportionality- The *actus reus* (conduct) is proportional enough that a reasonable person considers it grave enough to commit suicide under that circumstances. Proportionality is connected with the third element *i.e. Causa Causans*.

There must be a proximate causal relationship between the conduct and the result.

Application of the *Ramesh Kumar dictum* on *Rajesh* v. *State of Haryana*

i. The positive action by accused was (a) threat of false implication in dowry cases, (b) slapping in *Panchayat*

ii. Proximity of time -The threat was consistent but the time between slapping and suicide was five months.

iii. Causal relation-Was the conduct of threatening and slapping in public sufficient to provoke or drive him to death? Was it an immediate cause or remote cause? Or was it a connecting link to create suicidal tendencies?

To understand the extent of the role of *actus reus*, this case *i.e., Rajesh* takes support from *Amalendu Pal alias Jhantu* v. *State of West Bengal.*[133] This was a good precedent because there was a time gap in conduct and suicide. The wife committed suicide after three months of harassment and mental torture by the husband. The Supreme Court found that there is sufficient evidence of the *actus reus* of section 498A. But it was not sufficient for section 306 because the cause of death cannot be the conduct of the husband for the want of proximity. The suicide took place after three months of the conduct of husband, *i.e.,* marrying the second lady and bringing her home. The continuous stay of second wife could be a reason for mental harassment of first wife but cannot be sufficient reason "to drive her to commit suicide."

Cruelty under sections 113A and 498A of IPC

The nature of cruelty under section 113A is far more grave *vis-a-vis* section 498A. Under section 113A the cruelty must be of such grave nature that it ought to drive the woman to death. Every cruelty will not be covered for 113A but can be sufficient for section 498A. For example, abusing or slapping a wife will amount to cruelty under section 498A. The same cannot be cruelty under section 113A even if suicide is committed.[134] Slapping or abusing is not a sufficient reason (proportionality test) for committing suicide. A reasonable person (here woman) cannot commit suicide for one time slapping or abusing though it is insulting. This as per objective test and

133 (2010) 1 SCC 707. (Mukundakam Sharma, J.).

a subjective test cannot be invoked. Section 113A needs greater proximity of cause and consequence *vis-a-vis* section 498A. In other words, every cruelty under section 113A will cover section 498A but not *vice versa*. Therefore, a failed prosecution under section 306 may be successful under section 498A but not *vice versa*.

Rajesh further elaborates another limitation on section 306 as applicable in this case that the "Words uttered in a fit of anger or omission without any intention cannot be termed as instigation." The Supreme Court declined to accept the "incident of slapping by the Appellant in September, 2001 [as] be the sole ground to hold him responsible for instigating the deceased, husband." There was a continuous threat to the deceased husband as to false FIR and institution of court cases under dowry laws. It was a personal injury in private domain. A *Panchayat* was convened in September, 2001 to resolve the matter. The deceased was publicly insulted and slapped by brother in law. It was another and more grave injury but this time it was not in private domain. The deceased husband was insulted in public. Is not such public humiliation in *Panchayat* a ground for abetment to suicide? Moreover, the court also held that suicide was committed five months after the incident of dishonouring in public. The lapse of five months between public insult (slapping) and suicide was considered too long to be sufficient (proportionality test) for sustained incitement or provocation for death. This case reminds feministic thinking[135] on Post-Traumatic Stress Disorder, comparable to trauma like being in battle or torture.[136] Cyclical violence and learned helplessness are the two key elements of 'Battered Women Syndrome'. The element of abuse by one party includes behaviour such as extreme verbal harassment, restriction of activity, threats of punishment, physical assault.[137] Can such arguments of stress disorder be considered in this case? The Parliament has not yet considered the issue of Post-Traumatic Stress Disorder because of the complexities involved like those in *Rajesh* case. The reason is the complexities involved in these types of cases which will make the law less predictable and more uncertain.

Delay and the issue of abuse of law

In *Sunil Kumar Gupta* v. *State of Uttar Pradesh*[138] the father of the deceased alleged harassment of her daughter for dowry. The death of Shilpa was caused in

134 113A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband." Explanation.—For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).]

135 This author acknowledges the assignment of . Harshita Chaudhari, LL.M. (2020) ILI, submitted under me for the course on "Crime Against Women."

136 Herbert Levit, "Battered Women: Syndrome versus Self-Defence" 9 *American Journal of Forensic Psychology* 31 (1991).

137 Lenore Walker, "Battered Woman Syndrome and Self-Defence" 6 *Notre Dame Journal of Law, Ethics and Public Policy* 321 (1992).

138 *Supra* note 123.

2012. The trial started in 2015. The suspects were summoned in 2016. The summoning order was quashed in 2019. Seven years have passed in deciding who is accused. The trial court order, appeal in the high court and the Supreme Court will take another decade. The father complained against 9 family members who poured kerosene on her deceased daughter. Based on these statements of father an FIR was registered against all 9 members under sections 304-B, 498A, 302 IPC and 3 and 4 of the Dowry Prohibition Act, 1961. The tendency of "roping in" all members in dowry cases is also manifest in this. 9 persons were made accused in FIR while the prosecutable evidence was only against one accused. Certain police personnel, some lawyers and friends of the victim family incite father, brother or mother to implicate all. To check this tendency something needs to be done by the Parliament. It is useful to refer to *Rajesh Sharma* v. *State of Uttar Pradesh*[139] tried to check this tendency of roping in all relatives of the husband under section 498A cases. However, due to heavy resistance the judicial legislation in *Rajesh Sharma* was modified in a review petition (*Social Action Forum for Manav Adhikar* v. *Union of India*[140]). Abuse of legal process is a hard and harsh reality. Judiciary can also think of other directions to check misuse of dowry related provisions.

In *Jatinder Kumar* v. *State of Haryana*[141] on December 17, 2019 the Supreme Court has made a reference to the tendency of "roping in" all members in dowry cases. In this case many accused were not residing with the deceased. Their business, their mess was not in the same house and was away from that place. The Supreme Court quoted the high court as under:[142]

> It appears that, Anil Kumar, Bimla Wanti, and Atul Mittal, were falsely implicated, in the instant case, with a view to exaggerate the number of the accused. Only Jatinder Kumar, committed the offences, punishable under sections 304 -B and 498-A of the Indian Penal Code. Out of abundant caution, Anil Kumar, Bimla Wanti, and Atul Mittal, accused, are required to be given the benefit of doubt, and, thus, are entitled to acquittal.

The Supreme Court held that it was not required to make a reappreciation of evidence in such appeal and there was no compelling evidence for it. However, it is a matter of common knowledge that the family members of the deceased daughter want to teach a lesson to all members of in laws. The emotions are high and even the lawyers, the friends also provoke them to rope in all members. If it is intentional or made with the idea to extort money, such roping in needs to be checked by initiating penal and civil proceedings.

139 2017 SCC OnLine SC 821.

140 (2018) 10 SCC 443.

141 MANU/PH/2151/2019 (Ajay Tewari and Vivek Puri, JJ). IS THIS HIGH COURT CASE? VERIFY CITATION (yes sir this a high court case the name of the judges is also right).

142 *Id.,* para 10.

Mahesh Kumar v. *State of Haryana*[143] highlights the issue of long delay in the higher courts. In this case the wife died due to consumption of poison in 1994. Trial court punished the accused under section 304-B of IPC in 1995. 14 years after the trial court decision the High Court of Punjab and Haryana acquitted the mother of the appellant and affirmed the conviction of the appellant husband in 2009. The Supreme Court set aside the conviction and acquitted the husband in 2019. From the suspicious death of wife in 1994 to the acquittal of the accused in 2019, it was around 25 years. While the trial court has decided the case in 1 year, the High court decided it in 2009 *i.e.,* 14 years and in the Supreme Court the decision took another 10 years. Out of 25 years, 24 years the case was in higher courts. In the judicial journey 55% of the time was taken by the high court and 40% time was taken by the Supreme Court. So, 95% of the time, the case was with the higher constitutional court.

VII CONCLUDING REMARKS

The survey signifies that in certain cases the PIL jurisdiction is not used for the purpose it was meant. The corruption issue in the *Rafale I* case was blown out of proportion for political purposes without sound legal basis. The full bench has highlighted the scope and limitation of judicial review which provides an insight into various levels of judicial scrutiny. *Rafale II* underlines the impact of *Lalita Kumari* judgement and scope of preliminary inquiry under the Prevention of Corruption Act, 1988. *Rafale II* also provides the first important interpretation of the Prevention of Corruption Amendment Act, 2018. *VK Garg* establishes the difference between minor contradictions and material contradictions in the statement of witnesses. *Neeraj Dutta* highlights the issue of the *quality* of proof of demand for bribe (illegal gratification) under the Prevention of Corruption Act, 1988. Should such demand be established only by original or direct proof (as held in *B. Jayaraj* and *Satyanarayana Murthy*)? *B. Jayaraj* and *Satyanarayana Murthy* have propounded a rule of absolute exclusion of inferential evidence in bribe cases under the PC Act. Or the same can be proved by inferences based on other convincing irresistible evidence if the original witness is dead or turns hostile (as held in *M Narsinga Rao*). The problem was raised because two different benches of the Supreme Court did not consider its own precedent of coordinate strength. This was a lapse on the part of the counsel on both sides especially the office of attorney general. Had they brought into notice the case of *M Narsinga Rao*. (2001) when the later decision in *B. Jayaraj* (2014) and *Satyanarayana Murthy* (2015) was being decided, the issue of *Neeraj Dutta* (2019) might not had come. The research wing of the Supreme Court needs greater attention. *P Chidambaram* case on PMLA has lessons for independence of judiciary.

Jaswant Singh[144] declines to grant retrospective application of beneficial penal laws and presents a literal approach to interpretation of NDPS which indeed raises human rights concerns under ICCPR and ECHR. *Baljinder Singh* held that the protection available against search of body under NDPS Act cannot be extended to search of vehicles. One of the significant developments of 2019 is the

143 (2019) 8 SCC 128.

144 *Supra* note 60.

constitutionalisation of the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994. The validity of a few disputed provisions of the enactment was challenged in the case of *Federation of Obstetrics and Gynaecological Societies of India* and was upheld.

Anti-dowry laws remain controversial on the application of section 306 of IPC. Gurjit Singh re-establishes that an accused can be convicted under section 306 even if the charges are not expressly framed under section 306. If the elements of section 306 are mentioned in a dowry death case, such omission will not be a material omission in the charges. Sunil Kumar Gupta, Jatinder Kumar, Rashmi Chopra highlight the chances of misuse of anti-dowry provisions. Rashmi Chopra also suggests how to examine facts and sequence of events before a summon order is issued.

This survey like the previous survey has focussed also on the issue of delay in the judicial process especially in the Supreme Court. Many cases are delayed in the high court as well as in the Supreme Court. In some cases time taken in the Supreme Court is more than the time taken in the trial court. This can be addressed with the help of alertness, technology and regular monitoring.