NPA Criminal Law Review - 2019

Volume - 5 No.1

SVP National Police Academy
Criminal Law Review 2019

ABOUT THE ACADEMY

The National Police Academy (NPA) Trains Officers of the Indian Police Service, who have been selected through an All India based Civil Services Examination. The trained officers will be posted as Assistant Superintendent of Police (ASP) in their respective state under whom the other sub-ranks of Police force will be working. The recruitment of sub-ranks such as Constables, Sub-Inspectors, Deputy Superintendents of Police is each states prerogative, and will be done by respective State Director Generals of Police. The IPS cadre is controlled by the Home Ministry of the Government of India and the officer of this service can only be appointed, removed by an order of the President of India.

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SVP National Police Academy

Criminal Law Review 2019

Volume - 5 No. 1

Published by

SVP National Police Academy
Hyderabad

SVP NPA Criminal Law Review
2019

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NPA Criminal Law Review

Vol. 5	No.1	2019

CONTENTS

Director's Foreword ix

1. A Tale of Two Judgments 1

Umesh Sharraf

2. E-Defamation: Struggle for Freedom of Speech and Expression on Social Media Platforms – A case Study 28

Manpreet Kaur & Mohit Verma

3. Idol Theft Investigation: A study of the SOPs & Best Practices adopted by the Idol Wing, Tamil Nadu Police 42

Vishwesh B Shastri

4. Section 144 Cr.p.c: Striking a Balance Between Public Peace and Order and Private Rights 55

Ravi Choudhary

5. Confessions: When to Act Upon? 67

Ambrish Rahul

6. FIR: Registration not a Discretion but compulsion – A case Study 80

Shraddha Pandey

7. Violence against doctors: Threat of Defensive Medicine - Countering It 99

Shabarish P

8. Drug Walking - The Trails of Police Investigation 113

Aishwarya Dongre

सरदार वल्लभभाई पटेल राष्ट्रीय पुलिस अकादमी
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ABHAY, IPS
Director.

FOREWORD

Sound knowledge of law is sine qua non for effective police functioning. So this has always been top priority at the Sardar Vallabhbhai Patel National Police Academy. In order to ensure that the officer trainees are well conversant with legal aspects and intricacies of law, a great deal of attention is paid to enable and equip the trainee officers with legal knowledge and skills.

The NPA Criminal Law Review is a commendable step in this direction. It comprises contributions from Faculty of the Academy as well as recent entrants into the IPS (Officer Trainees).

The articles in present volume are thought provoking and should interest police officers, lawyers and academicians alike.

Congratulations to all the members of the Law Society. I wish them a bright future.

(ABHAY)
18.8.2019

Dt.18.08.2019

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ABBREVIATIONS

A.I.R.	:	All India Reporter
Cr.p.c.	:	Code of Criminal Procedure
Ex.	:	Exhibit
IPC	:	Indian Penal Code
IT	:	Information Technology
IEA	:	Indian Evidence Act
J.	:	Judge/Justice
M.O.	:	Material Object
PW	:	Prosecution Witness
P.	:	Page
S.C.	:	Supreme Court

Sardar Vallabhbhai Patel
National Police Academy
Criminal Law Review 1-27

A Tale of Two Judgments

UMESH SHARRAF*

{ It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity…}

Dickens' immortal opening lines of 'A Tale of Two Cities' come to mind when reviewing the tragic Ayesha Meera case of Vijayawada and its aftermath in the Criminal Justice System.

The story according to the Prosecution (as gleaned from the case diaries)

Ayesha Meera, a 17 year old girl, was studying in first year Pharmacy in Nimra College and residing in Sri Durga Ladies' hostel at Ibrahimpatnam in Vijayawada since 24.10.2007. She went for Christmas vacation to her native place in Tenali on 20.12.2007 and returned to her hostel on 26.12.2007 at about 6 p.m. along with her mother Syed Shamshad Begum. Her mother dropped her at the hostel and went back to Tenali on

*****Joint Director (Admin. & Senior Course) SardarVallabhbhai Patel National Police Academy.

the same day at about 7.30 p.m. On the next day at about 6:00 a.m. there was a phone call to her parents by the husband of the hostel warden who informed them that Ayesha Meera was in a serious condition and they rushed to the hostel by 8:00 a.m.

Preeti, studying in B.Tech. in Nimra College and residing in the same hostel for 4 years, revealed that she along with others had called Ayesha Meera to join them for dinner the previous night, but she had replied that she had already eaten and had gone to bed. They went for dinner and after returning stayed awake talking till midnight in their rooms and then they too went to sleep.

That morning, at about 5:30 a.m. Preeti got up to go to the toilet and she saw suitcases and other stuff spilled in the corridor on the second floor and found Ayesha Meera missing and blood stains on her bed. She took her colleagues Navya, Deepti and Radhika and went to the first floor where their warden stayed with her family and informed her. Immediately, the warden and her husband went to the second floor bathroom and found the naked dead body of Ayesha Meera lying in a pool of blood with her right leg tied to the water tap and blood oozing out from her nose and ears.

A case in crime No. 477/07 U/s. 302 IPC was registered by the CI of police. The ACP took up further investigation and basing on the opinion given by the doctor, he filed a memo for inclusion of section 376 IPC.

Investigating officers seized a letter addressed by an unknown person to the hostellers that was found at the scene of offence. The doctor who conducted the autopsy collected the vaginal swabs and smears and sent it to FSL for chemical analysis. Experts developed DNA profile from the samples

collected from the person of Ayesha Meera. Later, when the videograph of the scene of offence was scrutinized by the FSL, they found a partial footprint of a left foot.

Police examined several witnesses, recorded their statements and also subjected them to polygraph test, DNA test and also sent their hand writings and footprint impressions for comparison with the samples collected by them at the scene of offence.

During the course of investigation, they suspected one Guruvinder Singh @ Laddu @ Bobby, who had a criminal history and subjected him to polygraph test on 11.3.2008 and on 12.3.2008. It was held that he was withholding his responses and hence no conclusive inference could be drawn. His hair sample was collected, but it was not tallied due to dissimilar morphological characters. His DNA profile was also did not match the profile obtained at the scene of offence, though his footprints tallied with the footprints available at the scene of offence. His name was deleted as a suspect on 12.11.2008.

The ACP came to know on 17.8.2008 that one Pidathala Satyam Babu, who was arrested by P.S Nandigama of Krishna District in Cr.241/08 U/Ss. 450,457 and 380 IPC, had voluntarily confessed regarding the commission of offence against Ayesha Meera on the intervening night of 26/27-12-2007. Accordingly, the ACP obtained a Prison Transfer Warrant on 18.8.2008 and took him into custody on 29.8.2008 and interrogated him. He confessed his guilt and in pursuance of the confession they seized a chutney pounder used in the commission of the offence. With the permission of the Court they obtained his foot prints and handwritings and also blood and hair samples for DNA examination for comparison and they were found tallied with the

samples collected at the scene of offence. A charge sheet was filed against him (Pidathala Satyam Babu) for offences U/s.302 and 376 IPC.

The story according to the victim's mother

The peculiarity of this case is that PW1, Ayesha Meera's mother, came up with a different version and claimed before the court that a party was organized in the ground-floor of the hostel on 26.12.2007. The husband of the hostel warden I. Siva Rama Krishna, K. Satish, B. Suresh, Ganesh, Ch. Praveen Kumar and Rajesh participated in the party. Two of them went to the second floor to meet their girlfriends in the same block in which her daughter was staying. When her daughter saw them and threatened to expose them, they did away with her.

She filed a postcard that was received by her on 30.1.2008 during her evidence which was not brought to the notice of police during the investigation. She also stated that she came to know regarding the above fact on 29.12.2007 at about 8 a.m. through some unknown person's call to her husband's cell phone.

She also stated as the caller had requested her not to reveal his name, she didn't want to reveal his particulars even before the court on 10.8 2009. She said that she had not stated the same facts to the police till then as she had no faith in police. She stated that there was no proper investigation in this case and requested the court to order reinvestigation for tracing out the real culprits. She claimed before the Court that she had submitted memoranda to the Human Rights Commission, the Minorities Commission, the National Women Commission, MP Asaduddin Owaisi, the Chief Minister of AP and the Vice

President of India but she did not file copies of the same in the court.

The two judgments

On 29.9.2010, the Sessions Judge of Mahila Court Vijayawada (in Sc No. 34/2009), convicted Pidathala Satyam Babu u/s 302 & 376 IPC and he was sentenced to life imprisonment and fine of Rs.1000/-, in default, to suffer S.I. for 6 months & further sentenced to undergo R.I. for ten years and also to pay fine of Rs.1000/- in default, to suffer R.I. for six months for the offence u/s 376 IPC.

On 28.10.2010 the accused preferred a criminal appeal in the AP High court which was allowed and numbered as Crl.A.No. 1518 of 2010. On 31.3.2017 the High Court set-aside the conviction sentence stating *"Referred to Apex committee for taking action against all the erring investigating/prosecuting officials/ officers, for not identifying the real culprits and prosecuting an innocent person and getting him convicted"* and suggested that public spirited persons may take it forward to identify the real culprit. A PIL vide No. 186/17 and a writ petition, vide WP No 25434/17 were filed in High Court soon after. On 1.8.2017, the High Court ordered the constitution of an SIT. On 19.1.2018, the High Court disposed the PIL no. 186/17 & gave directions to conduct a court monitored de-novo investigation with directions to the SIT to file periodical reports under WP No. 25434/2017. On 12.10.2018 the High court impleaded the CBI in the writ petition and asked CBI to conduct a fresh investigation and to register an FIR regarding destruction of material objects. Till now, no significant process appears to have been made by the CBI in the matter.

It would be instructive to compare how the two courts viewed the same evidence. Given below are their different views in the key questions of fact (the relevant portions have been extracted from the judgments *aborigine* and have not been corrected for syntax or grammar):

Question of fact: about the first information received and registration of FIR

Sessions Court: "A report is needed only to set the criminal law in motion. The hostellers have no necessity to depose falsely against PW-12 and they have clearly stated that she came to the scene of offence along with PWs-1 and 13 and moreover the inquest report was also sent to the Magistrate on the same day and he put his initials at the about 9:30 p.m. Therefore, court feels that there was no delay in registering the FIR and in fact there was some delay in receiving the FIR by the court. In view of the other investigation material documents, it cannot be said that FIR was registered at 8 p.m. instead of 9 a.m." [PW1: Syed Shamshad Begum, mother of the deceased; PW7: Inapuri Venkata Siva Rama Krishna, husband of the warden; PW12: Kakumanu Sandhya Rani, colleague of the father of deceased and scribe of the FIR; PW13: Syed Iqbal Basha., father of the deceased]

High Court: "Quite interestingly P.W.7 has not given written report. There is a serious dispute about the time at which the report was given."

Question of fact: presence of parents of deceased at the time of inquest

Sessions Court: "PW-1 stated that she found the dead body by the side of the next block in a narrow line. At that time blood was oozing from her ears and nose and her body was covered

with blanket. It clearly shows that inquest was conducted in their presence. PW-30, Inspector of Police, stated that the entire scene of offence was photographed and videographed under Ex.P37 to P39. He stated that he recorded the statements of PWs-1 and 13 at the time of inquest. He also examined PW-12 on the same day. He clearly stated that all of them stated before him as in Ex.P5, P9 and P12 court pursued the C.D under Ex.P39 as per the request of the Addl.P.P and also conducted the local inspection of the scene of offence at the request of the learned senior counsel on 14.9.2010 for proper appreciation of evidence on record, therefore, Court feels that version of PWs-1 and 13 is not believable in the above aspects. Surprisingly, PWs-1 and 13 also denied that the inquest was not conducted in their presence at that time i.e., from 12 noon to 2.30 p.m. in the corridor of 5th block but PW-13 admitted their signatures on the summons issued by the Police as Ex.P10 and P11. PW-1 stated that she found the body of her daughter by the side of next block in a narrow lane. Moreover, their presence was mentioned under Ex.P16 and the co-hostellers also stated that the inquest was conducted in their presence." [Ex.P5: 161 Cr.P.C. statement of PW1, mother of deceased; Ex.P9: 161 Cr.P.C. statement of PW-12, scribe of the FIR; Ex.P10: signature of PW-13 on the summons to conduct inquest, father of deceased; Ex.P1: signature of PW-1 on the summons to conduct inquest; Ex.P12:161 Cr.P.C. statement of PW-13, father of deceased; Ex.P15: scene observation report; Ex.P16: Inquest Report; Ex.P37: photograph of the scene of offence; Ex.P39: C.D. of the scene of offence; PW18: Vemuri Sai Mahesh Babu, mediator; PW19: Guntupalli Vasudeva Rao, mediator; PW30: S.Murali Mohan, I.O, inspector of police.]

High Court: "If we carefully analyze the evidence of PW-19, it could be deciphered there from that he did not specifically state that Ex.P-16 was drafted in the presence of the parents of the deceased. After he has stated that at the time of inquest panchanama, himself, PW-18 and Krishna Prasad were also present, he has deposed that the Police have examined the witnesses, the parents of the deceased and the co-hostellers. PW-19 was not categoric whether the examination of the parents of the deceased by the Police was at the time of preparation of the inquest report or subsequent thereto.

The best person to speak about the preparation of Ex.P-16 inquest report and the presence or otherwise of the parents of the deceased at the time, is its scribe, Krishna Prasad. However, for the reasons best known to the Police, he was not examined. in the face of the categorical assertion by PW-1 and PW-13 that they were not permitted to see the dead body of the daughter till 3.30 p.m. and that Ex.P-16 inquest report was prepared after the dead body of their daughter was handed over to them in the evening, any amount of suspicion arises on the version of the prosecution that Ex.P-16 was in fact prepared in the presence of PW-1 and PW-13 at the time as pleaded by the prosecution. Further, in the charge-sheet it is alleged that all 18 items were seized from the scene of offence under Ex.P-15 in the presence of PW-18 and PW-19 only and there is no reference to the presence of PW-1 and PW-13, the parents of the deceased, at the time of its preparation. The preparation of Ex.P-15 in the absence of PW-1 and PW-13 strengthens the plea of these witnesses that they were not even permitted to see the dead body of their daughter on their arrival. Hence, there is any amount of doubt on the case of the prosecution that Ex.P-16 inquest report was prepared at the time as claimed by it and in the presence of

the parents of the deceased. This aspect, in our opinion, assumes huge significance while examining every other aspect, because, it is the version of the defence as well as P.W.1 that investigation of the case was not held on proper lines due to political interference, that the offence has not taken place in the manner as pleaded by the prosecution."

Question of fact: Submission of scene observation report to court along with charge sheet with delay.

Sessions Court: "I.O. stated in his evidence that he retained the document, scene observation report, EX. P15 for the purpose of investigation. Defence further stressed upon that PW-34 who laid charge sheet stated that he has seen Xerox copy of the non-judicial stamp paper at the time of filing of the charge sheet and he has not enclosed the said document to the charge sheet and more over, it was not signed by the Magistrate. He further stated that it was seized on 29.8.2008 and again stated that it was seized on 26.12.2007 and there is no record to show whether the document under Exs. P4 and P6 were filed in the court or not. PW-34 filed charge sheet in a sensational case; he ought to have been more careful and attentive while facing cross-examination. Taking advantage of his lapses, defence counsel argued that it clearly establishes that this Exs. P4 and P6 were manufactured at a later point of time and the accused might have made to write the letter Ex. P4 and P6 along with the sample handwriting and this is how the investigation indulged in implicating the accused in this case." [Ex.P4: xerox copy of affidavit given by PW-13 dt. 21.07.2007; Ex.P6: Contents of letter on the reverse side of Ex.P4 affidavit; Ex.P15: scene observation report; Ex.P16: Inquest Report; PW-34: P.Prakasha Rao, subsequent I.O., ACP]

High Court: "The failure of the Police to send Ex.P.15 to the court along with Ex.P.16- inquest report or at least within a reasonable time thereafter, coupled with the various suspicious circumstances pointed out hereinbefore, would certainly lend credibility to the version of the defense that Exs.P.4 and P.6 were brought into existence at a much later date and evidently after the appellant was apprehended to falsely implicate him."

Question of fact: absence of finger prints and foot prints (except a single partial foot print)

Sessions Court: "Pool of blood drag marks were found in the photographs and also in the C.D if at all they really intended to screen the evidence, they might have done it totally without any sign of blood. Clues team and finger prints also came to the scene of offence and they searched for foot prints and finger prints, but they were not found at the scene of offence. The learned Counsel stated when the Police found half foot print in the bath-room there is every chance for finding the foot prints in the corridor but several people walked in the Corridor till 9.30 p.m. and even if there were some foot prints as stated by him they might have overlapped and not traced out by the clues team."

High Court: "While it is the case of the prosecution that the appellant has solely handled the deceased from the stage of his attacking her with the chutney pounder till he raped her twice, by lifting and dragging the body for a length of about 60 feet, tying her one leg to the tap, it is impossible to believe that no fingerprints were found on the body of the deceased. The prosecution has not even attempted to explain the reasons for the absence of fingerprints and footprints, except an isolated footprint allegedly noticed and developed from the videograph

of the scene of offence. These serious lacunae in the case of the prosecution stare at its face"

Question of fact: capacity of the accused to climb and gain access into the second floor of the building

Sessions Court: "The counsel of the accused argued that there is no scope for entering in to the hostel as they have taken all the steps to safeguard the hostel. Topography of the hostel is also well explained through oral and documentary evidence. The case of the prosecution is that accused entered into the hostel by climbing from the top of the bath-room to the first-floor and from there he entered into the second floor through the stair-case. Admittedly, there was no watch-man at the hostel and there were no grills to the first and second-floors. The height of the top of the bath-room to the first-floor wall is 6 feet 5 inches. Addl.P.P submitted that as per the evidence of PW-15, the accused worked as mason and was also working as a lorry cleaner and argued that as a lorry cleaner he was accustomed to climb the lorry as the seating was more than the normal height. Accused in pursuance of his confession led the Police to the hostel and showed them how he entered in to the hostel, which is within his exclusive knowledge. Admittedly, he had not entered the hostel from the regular way but climbed from the top of the bath-room to the first-floor and then reached the second –floor. It clearly shows that it is not impossible to enter in to the hostel. PW-14 stated that accused beat on her head and when she raised cries he ran away by jumping over the wall. The dog handler also stated that dog climbed the parapet wall by the side of bathroom and barked and their evidence gives strength to the

arguments of Addl.P.P." [Ex.P26: potency certificate of accused dt:25.10.2008; PW14: Thota Rama Devi, residing in Nandigama; PW15: Kondapalli Veerabrahmam, lorry cleaner]

High Court: "Examining from the standpoint of an ordinary prudent man, it is impossible for one to believe that a person like the appellant, who, as per Ex.P.26-sexual offence report, was 165 cms. (5 feet 5 inches) tall and 50 kgs of weight, would have the capacity to perform the aforementioned feat. It requires not less than a Superman's effort to perform such a feet and it is a highly unlikely that an ordinary person like the appellant could accomplish such a task. The prosecution wants us to believe that the appellant has not only gained access to the second floor, but also sneaked into the hall, hit the deceased with chutney pounder, single-handedly lifted her up to the main door of the 6th block and dragged her for a distance of about 60 feet. That all the while till he has accomplished this task and left the building, not even a single inmate has noticed the offender committing a series of the alleged acts. Even in a surprise attack, the victim would raise alarm if she is attacked. The deceased has allegedly made only feeble sound "kue" and nothing else. It is impossible for anyone to believe that the appellant has gone about his violent acts of murder and alleged rape in a silent and serene manner without attracting anyone's attention even if it has taken place during dead of the night."

Question of Fact: Regarding accused gaining entry into the room of deceased.

Sessions Court: "He further submitted that prosecution introduced certain new facts in support of them that the hostellers were not in the habit of bolting the door of the hall from inside and they were not using the inside bath-room for any

other purpose except for bathing purpose and so also there was a stand fan in the kitchen and it was giving a lot of sound. All the said facts were stated by the witnesses even in their earlier statements. Therefore, it cannot be said that they were introduced newly only at the time of deposing before the court. It was laid down by the Apex Court time and again in various decisions that minor contradictions in statements under 161 CRPC and deposed in the court, without any material improvements made by him is not fatal for prosecution. It is well that every person who witnesses a murder reacts in his own way. There is no set rule of natural reaction. Admittedly, PWs-2 to 5 are co-hostellers and Ayesha Meera joined in their hostel about 2 or 3 Months prior to the incident and they have no enmity against her and there is no reason for them to depose falsely." [PW2: Shyam Pakaiya Raj Preethi, Co- hosteller and blockmate; PW3: Bolla Navya, Co-hosteller and blockmate; PW4: Vanama Sowmya, Co- hosteller and blockmate; PW5: Shaik Jawahar Sultana. Co-hosteller and blockmate]

High Court: "The theory of the prosecution that the hall door was kept unbolted paving the way for the offender to straight away enter the hall without the aid and assistance of the insiders is difficult to accept."

Question of Fact: Letter addressed to hostellers and left at scene of offence

Sessions Court: "There were no external injuries either on the body or on the private parts and moreover if at all there is any request and refusal it might have alerted the inmates sleeping in the kitchen. Therefore, it appears that he cleverly written the letter only with an intention to mislead the Police." [Ex.P4: Xerox copy of affidavit given by Pw13 dt.21.07.2007; Ex.P6:

Contents of letter on the reverse side of Ex.P4 affidavit; Ex.P17: Admissible portion in the confessional statement (Mediators' report)]

High Court: "It is written on the reverse of Ex. P.4 marked as Ex.P.6, that he went into the hostel not to kill the deceased but to say "ILU" and that after he entered the room the deceased refused to say "ILU" in spite of begging her many times and that therefore in anger he has given a strong blow on her head. Thus, there is a serious contradiction between Exs.P.6 and P.17. The contents of Ex.P.6 suggest that the appellant had previous acquaintance with the deceased while, if we go by Ex.P.17 he went into the hostel to satisfy his lust and he has accidentally chosen the deceased who was found sleeping alone in a hall while the other girls were sleeping in kitchen, next to the place where the deceased was sleeping. The prosecution, far from giving up Ex.P.6, placed heavy reliance on it. In our opinion, the motive suggested by the prosecution is not only self-contradictory but also highly improbable suffering from inherent weakness. On a close scrutiny of this part of the prosecution case, we find the motive theory set up by the prosecution not only self-contradictory, but also too artificial to be accepted."

Question of fact: Place of recovery of letter addressed by offender to hostellers

Sessions Court: "Even the contents were stated in their earlier statements merely because there are some contradictions in the evidence of the witnesses regarding the seizure of the letter near the coin box, from the belongings of the deceased in suit case will not go to the root of the case there may be slight variation in the exact place of recovery, but it clearly shows that the letter was recovered at the scene of offence so also PW-3 stated that she came to know about the seizure of letter through PW-2 and

PW-4 stated that Police informed about the letter after the inquest are also minor deviations in their evidence. PWs-5 and 6 came to know about the seizure of letter but PW-7 husband of the warden clearly stated that the said letter was searched from the belongings spread over and the contents were read over to them at the time of inquest. PW-18 is the scribe of the scene of observation report and PW-19 is another mediator and both of them stated regarding the seizure of the letter at the time of scene of offence. The evidence is also supported by Inspector of Police PW-30. Basing on the above evidence, Court feels that prosecution is able to establish seizure of the letter addressed by the accused on the reverse side of the non-judicial stamp paper, which is marked as Exs.P4 and P6 was from the scene of offence at an earliest point of time." [Ex.P4: Xerox copy of affidavit given by Pw.13 dt:21.07.2007; Ex.P15: Scene observation report; PW.2: Shyam Pakaiya Raj Preethi, co- hosteller and block mate; PW.3: Bolla Navya, co-hostellers and blockmate; PW.4: Vanama Sowmya, co- hosteller and blockmate; PW.5: Shaik Jawahar Sultana. Co- hosteller and blockmate; PW.6: Inapuri Padma, warden of hostel; PW.7: Inapuri Venkata Siva Rama Krishna, husband of the warden; PW.18: Vemuri Sai Mahesh Babu., mediator, scene of offence; PW.19: Guntupalli Vasudeva Rao, mediator; PW.30: S.Murali Mohan, inspector, SHO, I.O.]

High Court: "Significantly, the exact place at which Ex.P.4 was found is not mentioned in Ex.P.15."

Question in fact: Description of the letter in scene observation report and inquest report.

Sessions Court: "The said document was seized in the presence of the mediators at the scene of offence and they signed on the

document on 27.12.2017 itself. Therefore court feels that there is no other letter except the letter addressed on the reverse side of the non-judicial stamp paper and there is no reason for the Police to get up this letter at the earliest point of time only with an intention to apprehend the accused in future." [Ex.P4: Xerox copy of affidavit given by Pw.13 dt.21.07.2007; Ex.P15: Scene observation report; Ex.P16: Inquest Report]

High Court: "It is of relevance to note in this context that in Ex.P.16-inquest report, Ex.P.4 was described as 'letter'. Its contents were not referred, even in brief, in this document. However in Ex.P15, Ex.P4 was described as "a Xerox copy of affidavit typed on N.J. stamp paper (of) worth Rs.10/- and signed by the father of Ayesha Meera.." The prosecution failed to explain this vital discrepancy in the description of Ex.P.4 between Ex.P.15 and Ex.P.16."

Question of Fact: Contradiction in seizure of letter

Sessions Court: "When the expert clearly stated that the questioned document under Q1 and Q2 was available with him for comparison on 16.1.2008 itself. The contention of PW.1 that she handed over the copy of the affidavit to the ACP on 24.1.2008 at about 5 p.m. and the argument of the counsel that the Satyam Babu was made to write the letter under Ex.P4 and P6 along with sample hand-writings is not acceptable. There is no scope for improper collection of samples or for tampering of the questioned document, therefore court feels that there is no reason to discredit the important piece of evidence of the Expert in this case." [PW.1: Syed Shamshad Begum mother of deceased; PW.23: K.Vani Prasad Rao, Forensic Expert; PW.33: N.Ramachandra Murthy, subsequent I.O.; Ex.P4: Xerox copy of

affidavit given by Pw.13 dt.21.07.2007; Ex.P6: Contents of letter on the reverse side of Ex.P4 affidavit]

High Court: "If the FSL has received and retained Q.1 and Q.2 handwritings with itself, as spoken to by PW-23, it is not known how PW-33 could have sent the said documents which continued to be in the custody of the FSL along with the letter of advice on 29.08.2008. This serious contradiction casts a dark cloud on the prosecution theory regarding the seizure of Ex.P.4 containing Ex.P.6- writings from the scene of offence on 27.12.2007."

Question of fact: Collection of samples from accused

Sessions Court: "The accused was taken into custody on P.T warrant with a direction to remand him back within 5 days and as per the directions of the court, he was produced before the FSL not only for collection of hand-writings, but also for collection of foot impressions and the collection of hair and blood samples for DNA examination, As such they have felt that Joint Director of FSL is an authorized person for collection of the samples and he was examined by the ACP on 11.11.2008 and accordingly he deposed before the court as PW-22 there is no reason for him to depose falsely. The learned counsel further stated that the specimen hand-writings have to be taken only before the Magistrate, but not in the FSL. The hand-writings were collected in the FSL in pursuance of the orders of the court, therefore, it cannot be said that they were not collected in the presence of Magistrate and the collection of samples is not proper." [PW-22: A.Venkata Ramana Reddy, Joint Director of APFSL; PW-23: K.Vani Prasad Rao, Forensic Expert]

High Court: "The Police have not taken the permission of the court to send the admitted and questioned writings for the

opinion of the FSL. PW-23 admitted that he has not received any Court orders in this regard."

Question of fact: Authenticity of DNA report

Sessions Court: "PW-24 has not returned the vaginal swabs and smears and left over traces of the said samples available in their department, as such, it was suggested to him that they have taken the DNA profile from leftovers and matched with the DNA profile of Ayesha Meera and they have not collected blood and hair samples of Satyam Babu. He also suggested that they never prepared DNA profiles of Ayesha Meera and only after collecting the sample from Satyam Babu they have tampered his sample created DNA profile to show that it matched with that of Ayesha Meera. Defence counsel gave two contradictory suggestions only to create doubt in the mind of Court and to get the benefit of doubt for the accused. The learned defence counsel further argued that positive DNA report can be of great significance, where there is supporting evidence, depending of course on the strength and quality of that evidence, even if it is positive, it cannot conclusively fix the identity of the miscreant, but if the report is negative, it would conclusively exonerate the accused from the involvement of change. He further stressed upon that it cannot be accepted by the trial court in isolation as a sole piece of evidence to record the conviction of the accused U/s.376 IPC. Therefore, court feels that the opinion of DNA expert conclusively proves the involvement of the accused in the commission of offence. No doubt that the evidence of DNA expert alone cannot be based for conviction unless there is corroboration." [PW24:N.Venkanna, Forensic Expert, FSL; Ex.P30: DNA Report by PW.24 forensic expert with profiles.]

High Court: "Be that as it may the most crucial aspect is whether PW-24 has done the DNA profiling on item Nos 9 and 10, i.e.,

the alleged vaginal swabs and smears of the deceased on 13.02.2008, as deposed by him. On his own admission, PW-24 has not sent the DNA profiling allegedly generated by him on 13.02.2008 to the Police. Thus, it is evident that till the blood and hair samples of the appellant were sent to him, the existence of the DNA profiling of the deceased was not in the knowldge of anyone, including the Police, and the court. In the absence of the standard DNA profile of the deceased made known to anyone, it was not difficult for the FSL to manipulate the DNA report by comparing the DNA profile of the deceased, with her leftovers of items 9 and 10 belonging to the deceased and available with the FSL as suggested by the defence. The FSL as well as the investigating agency have not maintained transparency right from the stage of collecting the samples from the body of the deceased and in properly preserving and sending them till the alleged DNA profiling was done. Thus, the whole procedure adopted by the investigation agency was susceptible to manipulation in preparing DNA profile to falsely implicate anyone as they wish. When the DNA profiling was allegedly generated on 13.02.2008, the same, along with the left overs of items 9 and 10 should have been sent by PW-24 to the investigating agency which in turn should have produced the same before the Court for being preserved. This would have ruled out any possibility of manipulation of DNA report as suspected to have been done to falsely implicate the appellant. In the absence of such procedure being followed, it is not difficult for the Police and the FSL, a government agency, under the control of the Police Department, to manipulate the DNA results to suit their purposes and to falsely implicate the appellant. Thus, in our opinion, the procedure followed by the investigation agency and the FSL casts serious cloud of suspicion on the credibility of Ex.P.30, the DNA report."

Question of fact: Statement of tea stall owner about subsequent conduct and presence of accused, after offence

Sessions Court: "Prosecution also examined a tea-stall owner to establish the presence of accused around the tea-stall at that relevant point of time. Accused is resident of Anasagaram and there is no necessity for him to come to tea-stall in the early hours and stay till 11 a.m. and only out of his anxiety to know about the consequences of the offence loitering in the premises of tea-stall by watching T.V. Subsequent conduct immediately after the commission of offence is relevant fact. This is an additional link in the chain of circumstances." [PW.11: Avula Dhana Raju, tea stall owner, opposite to scene premises]

High Court: "Tea stall owner at Ibrahimpatnam, deposed that at around 5.30 a.m. on 27.12.2007, a stranger (who was later identified as the appellant) came to his shop and was in the shop till 11.00 a.m. watching TV. The prosecution failed to explain as to whether the appellant has washed his clothes and removed the blood stains before entering the tea stall? Considering the short time gap between the alleged event and the appellant going to the tea stall, it would not have been possible for him to wash his clothes and make them appear dry and normal without blood stains being noticed by PW-11. This part of the prosecution story appears to us to be farfetched."

Question of fact: contradiction on occurrence of offence, 376 IPC

Sessions Court: "He noted down the external appearance of the body as there was no struggle marks over the body and private parts. He also observed bite marks present here and there over the body. He received chemical analysis report under Ex.P25 in which it was clearly stated that human semen and spermatozoa

are detected on item no. 1, 2 and 3." [Ex.P25: Chemical analysis report Dt:17.01.2008]

High Court: "The absence of any struggle marks over the body or injurious to the private parts leads us to hold that there was no possibility of committing of rape on the deceased even once, leave alone twice, without causing injurious to her private parts. This, coupled with the highly suspicious DNA test completely negate the prosecution theory of rape. Dehors the rape, motive for the appellant to attack the deceased is non-existent. The circumstances would clearly suggest that the theory of rape is evidently floated by the investigating agency to divert the attention of the court from the real culprits and hide the truth."

Question of fact: Appreciation of evidence deposed by Scientific Expert.

Sessions Court: "Merely because, it was tallied with footprints of two suspects the evidence of the expert cannot be doubted. It can be taken as additional link in the chain of circumstances."

High Court: "After all the scientific evidence such as DNA Test, fingerprints and footprints expert's opinions do not constitute conclusive evidence and assuming that the samples of the appellant got tallied, that by itself does not offer any excuse for the investigation agency to abandon the line of investigation undertaken by them on various suspects and eliminate them from the investigation. The attempt of the Police to project different persons as culprits one after the other indicates not only their vacillating attitude and their abject failure in conducting proper investigation, but also their anxiety to draw a curtain on the case by projecting some body or the other as the culprit. In this process, they have come out with a theory which no person of ordinary prudence would accept. In other words, the entire case

of the prosecution, far from being proved beyond reasonable doubt, raised too many doubts as enumerated above which did not find satisfactory answers."

Opinion of the Court on the Prosecution Version

Sessions Court: "By keeping all these guidelines in mind and also considering the fact that most of the witnesses are disinterested and they have no motive to implicate the accused and others are public servants I am proceeding to appreciate the evidence on record… If at all it was really planted by the Police, they might not have sent it to the FSL to know whether there was any human blood or not. Admittedly the MO7 was seized only at the instance of the accused nearly 8 months after the offence as it was dried in the hot sun and also rinsed in the rain there was no blood stains found on the material object and there is every possibility that the blood stains might have faded out. …Merely because they acted as common mediators for two or three reports their evidence cannot be disbelieved and moreover, they are public servants and respectable persons of the locality and they have no motive to implicate the accused. All the links in the chain of circumstances may be strong or weak when taken separately but when hooked on to the next, incriminated the accused inescapably. All the circumstances, from which the conclusion is drawn, are fully established and are conclusive in nature and also, they are consistent only with the hypothesis of guilt of the accused. Evidence shows that accused had strong motive and opportunity to commit the offence and then the explanation given by the accused should be considered. Therefore his explanation is not convincing and acceptable. The prosecution is able to establish the guilt of the accused within all human probability and the accused is found guilty for an offence U/s.302 IPC and also for an offence U/s.376 IPC."

High Court: "Even if the appellant had resorted such daredevilry and was lucky enough to escape, it is not possible to believe that any person with whatever state of mind would ransack the baggage of the deceased, leisurely write on their body and address a letter without being panicky after committing the ghastly acts of the alleged murder and rape. Even if the appellant was psycho, (he was not declared as such by any Doctor), it is impossible for any person with the best of care and caution to do all these alleged acts without being noticed and caught by the inmates. But the prosecution attributed such incredible acts to the appellant and the court below has believed the same. We are, however, unable to endorse this extravagant version of the prosecution. There may not be perhaps a better case than the present one for being referred to the Apex Committee for taking action against all the erring investigating/prosecuting officials/ officers, for not identifying the real culprits and prosecuting an innocent person and getting him convicted. The state is accordingly directed to refer the matter to the Apex Committee."

Appreciation of evidence and Confirmation bias:

It is striking as to how the trial court saw the evidence as proof of the guilt of the accused whereas the Appellate Court saw it as a conspiracy against an innocent person. Confirmation bias is our tendency to consistently seek out evidence that confirms our hypothesis and overvalue any confirmatory evidence and devalue the evidence against our pre-existing hypothesis. Keeping this in mind, we may get a glimpse of how the two courts could have seen the same picture in such dramatically different views.

What might have happened?

With passage of time, any reconstruction of such events is a fraught exercise; especially with the inability or the unwillingness of police leaders to document, supervise the investigation beyond superficial orders to arrest/charge and monitor processing of evidence. This case was reported on 27.12.2007. As usual, the case was handled at the PS level with scant regard to preservation of the scene of offence, local media was allowed free access and investigative processes were poorly supervised. Vijayawada is a politically hypersensitive place and the opposition party used this case to embarrass the Government by leveling allegations of involvement of ministers' kin in the crime. The grieving mother of the victim became the principal accuser of this allegation and the resultant political storm swept away the Police Commissioner, who was otherwise very media savvy. The new Commissioner continued to be under the pressure to 'detect' this case and in March 2008, the Vijayawada police 'suspected' Guruvinder Singh @ Laddu, a history sheeter and despite his DNA not matching the sample collected from the victim, determined to prosecute him.

Satyam Babu was not arrested by Vijayawada police. He was arrested in August 2008 in the neighbouring district of Krishna, in Nandigama PS, where he confessed to as many as eight cases of that PS and also, embarrassingly for Vijayawada police, this crime as well. This was not received well in Vijayawada police but in light of his detailed confession, ability to reconstruct the scene perfectly and matching of his DNA with the sample from the victim, they were forced to 'delete' the name of 'Laddu' from their chargesheet in November 2008 and prosecute Satyam Babu. Those who claim a conspiracy against him by the police, do not understand how the district police system functions. At a PS level, with all its pathologies, it would

be totally out of character to insert a case of murder of this sensational a nature, that too of a neighbouring district, in the mouth of a confessor.

Having staked emotional capital in the opposition's narrative of the involvement of politically connected persons in the murder of her daughter and seen the shambolic efforts of Vijayawada police to implicate 'Laddu', it is not difficult to understand the unwillingness of the victim's mother to accept that the police might just have stumbled over the real killer of her daughter. After the arrest of Satyam Babu and his trial and his conviction in the Sessions Court in September 2010, the case wound up its way to the High Court by way of appeal where he was acquitted in March 2017. The party in opposition in 2008 was now in power and refused entreaties of the top Police leadership to appeal to the Apex Court. The accused's dalit identity had become a cause to anoint him with victimhood. And, the victim's mother still did not believe that her daughter had received justice. In fact, this strident belief was echoed repeatedly in the High Court's judgment where the belief of victim's mother in the innocence of the accused was the apparent prism from which all evidence was viewed.

And, what about the eight cases of molestation, rape, murder and house trespass of Nandigama PS confessed by Satyam Babu, the five cases in Cr. Nos. 284/07 u/s 450, 379, 376 r/w 511,307 IPC; 344/07 u/s 302, 307,342,452 IPC; 153/08 u/s 458,324 IPC; 154/08 u/s 452, 354,341,342,323,379 IPC; and 224/08 u/s 450, 457 IPC wherein cases were charged against him and were in committal stage, were quashed by the High Court in September 2009 for having little evidence beyond his confession. Nandigama police's pathetic 'investigation' was shred to pieces by the Court. The Court had quashed the

committal proceedings but had not precluded the police from investigating the matter properly. Instead of re-investigating these cases properly. An SLP was filed in the Apex court against the 'quash' orders. Not unexpectedly, the Apex Court dismissed the SLP. Unfortunately, till today, Krishna police lists these cases as 'quashed by the High Court', having never re-investigated these cases. So, not only Ayesha Meera, but the victims of these cases also never got justice.

In Cr. No 11/08 u/s. 457, 324, 354 IPC, Satyam Babu was convicted and sentenced to undergo one year SI on 2.2.2012.

The case in Cr. No 152/2008 U/s 458, 509, 380 IPC was acquitted. In Cr no 241/08 U/s 450, 457, 380 IPC also, he was convicted and sentenced to undergo one year SI on 2.2.2012.

Conclusion:

We have neglected investigation for far too long. Building capacity of our Investigating Officers, building domain expertise in the IPS and other ranks for various facets of crime and its investigation, management of case load by harnessing the power of IT, rationalizing police duties, installing systems for effective station house management, developing state CIDs' competence (instead of treating them like dumping grounds)- are all doable by police leadership- and no litany of 'political interference' or 'media pressure' can hide this truth. Failures in following basic protocols in investigation are leading to cases every other day where public order gets disrupted, police image gets vitiated and the public faith in the rule of law gets further eroded.

Also, the urge of some police leaders to be in the limelight has little to do with the public's right to know, the media's right to information and the need to engage with the media as the fourth estate. It has much more to do with personal

aggrandizement and publicity. The self evident pitfalls of this are firstly, that our entire policing has become 'arrest' oriented. Because it is the 'arrest' that has the photo-op and because it is the 'arrest' that is proximate in time to the event, it makes much more sense for such glory seeking police leaders to harvest the entire publicity with the 'arrest'. No one wants to invest time and effort in investigation and prosecution that are time consuming with the reward of conviction after trial being not only uncertain but also remote. This also has had a subtle effect of subverting the process of 'going from the crime to the criminal' to 'going from the criminal to the crime' by placing 'arrest' at the beginning of the investigative process than at the end of it.

This case is a prime example of failures in crime scene management, application of forensic technologies in evidence collection and documentation. Young IPS officers are advised to pay attention to capacity building of themselves and their subordinates. Such cause célèbre cases come perhaps once in one's career. They should not be found wanting at that time.

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Criminal Law Review 28-41

E - Defamation: Struggle for Freedom of Speech and Expression on Social Media Platforms – A case Study

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Introduction:

"Human beings are human beings. They say what they want, don't they? They used to say it across the fence while they were hanging wash. Now they just say it on the Internet." – Dennis Miller

These lines best explain the wide usage of internet as a platform for discussing Government actions, latest issues or even someone's life. With all latest audio video applications like Twitter, Instagram, Facebook, You Tube and many more, the discussions are now no more confined to audience who are educated ones but also those who though can't read and write but can hear, see and understand. With the advancement of technology, the decision regarding sensitivity or importance of news or news to be broadcasted or circulated has slipped from the hands of News Channels, Government Regulatory Authorities and is now just at a click of button of mobile phone.

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Whenever anything is published on sensitive issue, the posting of comments on social media may not attract the criticism or raise a debate on relook at the wide contours of Fundamental Right to Freedom of Speech and Expression or Freedom of Press but when the same is penned down by someone from media, considered as representative of watchdog of Democracy i.e. Press, or is against well known personality then the reaction and steps to combat the situation showcase the fake side of tolerance. The latest incident of arrest of three journalists namely Prashanth Kanojia, a freelance Journalist on June 8th 2019, Ishika Singh, the Head of a private news channel, Nation Live, and its Editor Anuj Shukla for allegedly defaming Uttar Pradesh Chief Minister Yogi Adityanath,[1] has once again flooded the social media platforms and other chatter boxes with debate on limit on one's liberty of expression and provision related to defamation. All four were booked for publishing "objectionable content" related to a controversial video of a woman who claimed she had sent a marriage proposal to the state's Chief Minister Yogi Adityanath.

But this is not the first incident of arrest of journalist in India. In fact, Human Rights Watch has reported several instances of such harassment, including by the Tamil Nadu government, which had filed nearly 200 cases of criminal defamation against individuals between 2011 and 2016. Kerala is another state, besides UP, where the evidence of a crackdown on free speech is piling up. Recently data showed that police cases were filed against as many as 119 people for allegedly abusing Kerala's Chief Minister Pinarayi Vijayan on social media over the last three years.[2]

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[1] *https://www.deccanherald.com/opinion/first-edit/free-the-journalists-739447.html*

[2] *https://www.asiatimes.com/2019/06/article/free-speech-under-fire-in-india/*

India has dropped two places on a global press freedom index to be ranked 140th out of 180 countries in the Annual World Press Freedom Index, 2019.[3] It has been noted in the Index that "Violence against journalists including police violence, attacks by Maoist fighters and reprisals by criminal groups or corrupt politicians is one of the most striking characteristics of the current state of press freedom in India. At least six Indian journalists were killed in connection with their work in 2018." These remarks are enough to reflect the importance of taking up the discussion on this topic by the authors as it will not only reflect upon the wrong application of procedural laws, not necessarily arbitrarily or knowingly, but also the lack of will to rectify the mistakes done so far.

Allegations of Encroachment on Freedom of Press in view of offence of defamation alleged against four Journalists:

While the Media Houses have been calling it as a clear attempt to intimidate media and stifle the freedom of press,[4] the Police has been justifying its action shielding behind the Criminal Law provisions. The first question which needs to be answered is whether the action of Prashant Kanojia amounts to misuse of Freedom of Press or his arrest, resulting from his sharing of video, is an encroachment upon freedom of press? For this the facts of the incident needs a revisit. Prashant Kanojia had shared a video on his Twitter and Facebook account where a woman is seen speaking to media outside the CM's office

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[3] *//economictimes.indiatimes.com/articleshow/68940683.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst*

[4] *https://www.indiatoday.in/india/story/editors-guild-condemns-journalists-prashant-kanojia-news-channel-head-editor-arrest-1545470-2019-06-09- The Editors Guild of India issued a statement in the same regard saying police action amounts to misuse of laws, and it seems like an effort to intimidate the press and stifle freedom of expression.*

claiming that she had sent a marriage proposal to Yogi Adityanath. Now this video has been shared on the personal account of Prashant Kanojia. Does his personal account on Twitter or Facebook represent press or media? The answer is of course "No". At max, it can be called his personal activity on his online social media account. Then how the question of violation of Freedom of Press come into picture? It was with the arrest of Ishika Singh, the Head of a private news channel, Nation Live, and its Editor Anuj Shukla as they were accused of broadcasting this video during a debate on the same issue. The video in question has not been denied by the women, though she has been alleged as patient of unsound mind by her own relatives, but the material question is that only a video has been broadcasted. It's not alleged anywhere that it has been falsely created or edited by someone. If it is so, then why there has been so much of hue and cry against the broadcast of this video. The answer lies in the importance attached to one's reputation. It takes numerous deeds and enormous time to build ones reputation which may be even more important than wealth. Freedom of Speech and Expression or Freedom of Press cannot be taken for granted to target somebody socially. Even the law makers were aware of the fact that if this freedom left uncontrolled and unregulated it may cause chaos. Even the Hon'ble Supreme Court observed in the case of *Express Newspapers (P) Ltd. vs U.O.I.*,[5] that-

> Freedom of the Press, however is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of speech and expression would amount to an uncontrolled licence. The freedom is not to be misunderstood as to be a press free to disregard its

[5] *AIR 1986 SC 872 (para 76)*

> duly to be responsible. Public order, decency, morality and such other things must be safeguarded. Certain restrictions are necessary even for preservation of the freedom of the press itself.

It is clear that the right to Freedom of Speech and Expression carries with it the right to publish and circulate one's ideas, opinions and other views with complete freedom and by resorting to all available means of publication. However, the Freedom of Press is not absolute, just as the Freedom of Expression is not. Public Interest has to be safeguarded by article 19(1)(2) which lays down **reasonable limitations** to the freedom of expression in matters affection:

a. Sovereignty and integrity of the State
b. Security of the State
c. Friendly relations with foreign countries
d. Public order
e. Decency and morality
f. Contempt of court
g. Defamation
h. Incitement to an offence

The ground used by UP Police for registration of FIR and arrest of other three has been defamation caused to Chief Minister Yogi Adityanath. The journalists have been accused for offence of defamation under Section 500 IPC and Section 66 of the Information Technology Act (sharing obscene content in electronic form). The very registration of FIR, under these sections, brings the U.P police officials within the radar of doubt and misuse of law. Though the registration of FIR lies in the so called privileged zone of police but still it has to answer and fit

within the legal parameters, enshrined in substantive and procedural law.

Coming to the first section mentioned in FIR i.e section 500 IPC, its applicability depends completely on the "negative impact on the reputation of an individual". According to section 499 of IPC-

> Whoever, by words rather spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

Section 500 IPC provides for punishment for defamation and states that-

> Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Summarily, a defamatory act may encompass elements that are either spoken or intended to be read, as well as gestures and visual representations published or put up in the public domain, which could have a negative impact on the reputation of an individual. Under law of defamation, the test of defamatory nature of a statement is its tendency to incite an adverse opinion or feeling of other persons towards the victim. A statement is to be judged by the standard of the ordinary, right thinking members of the society at the relevant time. The words must have resulted in the victim being shunned or evaded or regarded with the feeling of hatred, contempt, ridicule, fear, dislike or

(disrespect) or to convey an imputation to him or disparaging him or his office, profession, calling, trade or business.

One of the defences available to accused in such cases is Public Good. Even if a person has spoken the truth, he can be prosecuted for defamation. Under the first exception to section 499, the truth will only be a defence if the statement was made for the public good, which is a question of fact to be assessed by the court. In Kanojia's case he runs the risk of proving that the video in question would serve public good. But this is question which needs to be decided on merits by the competent court. Here it would not be out of place to mention that this is an arbitrary and overbroad rule (defence of public good) that deters people from making statements regarding politicians or political events even which they know to be true because they run the risk of a court not finding the statement to be for the public good.[6]

Time and again, Criminal defamation has been used to curb people's freedom of speech and expression, which has instilled a fear of criminal sanction among people, forcing them to refrain from exercising their right to free speech. Important question is that whether comment on one's personal life be interpreted to compass within itself the concept of public order, to refrain the freedom of speech and expression? A glance at the Supreme Court's previous judgments helps understand that the term "reasonable" requires striking a proportionate balance between the degree to which free speech is infringed upon and the primary interest at stake. Defamation is essentially a private wrong, wherein only the person affected is concerned, whereas criminal wrongs are graver and affect the society at large. In

[6] *https://www.firstpost.com/india/prashant-kanojias-arrest-underscores-need-to-revisit-law-on-criminal-defamation-restrictions-on-right-to-free-speech-6789731.html*

present case, it will become a major question for adjudication that whether video, true or false, about the private life of the Chief Minister can be termed as causing "public mischief" by inciting persons to commit offences against the State or public tranquility.

Converting defamation into a criminal offence enforces a disproportionate restriction on free speech, and thus, cannot be used to curb the right guaranteed under Article 19 (1)(a) of the Constitution of India. Till a significant public element is not involved in making the restriction proportionate, freedom of speech should be given precedence over defamation.[7]

The U.P. police did not stop here only but also added section 66 of IT Act initially which provides for punishment for illegal or unauthorized access to a computer system without the permission or knowledge of the owner. Securing unauthorized or illegal access, downloading, copying, extracting data or information, introducing computer virus or computer contaminant, damage or causing damage, disruption or causing disruption, denial of access to a person authorised, assisting someone else to commit any contravention, theft of internet hours, destroying, deleting or altering any information in the computer and stealing, concealing, destroying or altering the information residing in the computer are some of the acts which are made contraventions under Section 43 of The Information Technology Act, 2000. Section 66 has provided a form of remedy for the victims of the acts committed against them under Section 43. It can be seen here that there is no specific allegation

[7] *https://www.firstpost.com/india/prashant-kanojias-arrest-underscores-need-to-revisit-law-on-criminal-defamation-restrictions-on-right-to-free-speech-6789731.html*

in any form, as mentioned above in the reference to section 43 of IT Act, against any of the four people booked for this incident.

Coming to further interesting developments of the case, the UP police resorted to damage control mode by issuing a press statement. The statement improved the initial case by adding that Kanojia made "obscene comments" and "spread rumours" on social media. Perhaps with the intention of making the arrest look legal, the statement mentioned two additional provisions - Section 505 of the Indian Penal Code and Section 67 of the Information Technology Act which are not stated in the FIR. Probably U.P Police tried to cover up the lacunae after noticing the intense outrage poured against the arrest of Kanojia.

Further, Section 505 IPC deals with making, publishing or circulating any statement, rumour or report, with intent "to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility". It also deals with statements which are likely to incite communal hatred. Essentially, Section 505 deals with statements which can lead to law and order issues, and is relatable to restrictions on free speech in the interest of "public order" under Article 19(2) of the Constitution. It does not take much thinking to hold that this is wholly inapplicable in the case. Section 67 IT Act, which is mentioned as an after-thought, provides that-

> Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard

> to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to 5 lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to 10 lakh rupees.

Procedural Lapses:

Whether sections 500, 501 and 505 of IPC and section 66 and 67 of IT Act are made out against Kanojia is a question of fact, to be decided by competent court. As the matter is Subjudice, the authors have decided to refrain substantively from commenting on maintain ability of relevant substantive provisions of law and focus more on the procedural mistakes committed and how the entire incident has been mishandled by police. Kanojia was unceremoniously taken away by men in civil dress on June 8 from his Delhi residence. It transpires that on June 7, police officials of Police Station Hazaratganj at Lucknow had lodged an FIR against him under sections 500 (criminal defamation) of the IPC and 66 of the Information Technology (IT) Act (both offences are bailable). A Habeas Corpus petition was filed by lawyers Nitya Ramakrishnan and Shadan Farasat on behalf of Kanojia's wife Jagisha Arora before Hon'ble Supreme Court alleging the arrest of Kanojia as "illegal" and "unconstitutional". The petition also stated that "posting a video clip in the public domain, which has been carried as a news item in major media outlets is no offence.

To understand the situation better, section 41 of the Code of Criminal Procedure needs a mention here. As per Section 41 of the Code of Criminal Procedure, arrest for offences which are punishable with imprisonment up to seven years can be made only in exceptional circumstances. According to Section 41(1)(b)(ii), Cr.p.c, before making arrest in such cases, the police officer has to record satisfaction in writing that arrest is necessary:

a. to prevent such person from committing any further offence; or
b. for proper investigation of the offence; or
c. to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
d. to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
e. unless such person is arrested, his presence in the Court whenever required cannot be ensured.

The import of this provision is that if a person is made accused for an offence which is punishable with less than 7 years imprisonment, police can make arrest only in extra-ordinary circumstances. Instead of arresting the person at the first instance, the police should serve notice on him under Section 41A Cr.p.c asking him to appear for investigation on prescribed dates. Arrest in such cases can be made only after police officer records exceptional reasons in writing. Section 41 A was incorporated in the Cr.p.c by 2009 amendment as a safeguard against arbitrary arrests. Emphasising the need for checks on

power of arrests, the Hon'ble Supreme Court has observed in *Arnesh Kumar vs. State of Bihar*,[8]

> Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation.

The arrest of Kanojia can never be justified if section 41 A is implemented in its true spirit. The police were bound to release Kanojia in Delhi itself as per the provisions of the Code of Criminal Procedure as the offences alleged were bailable. Even if it is assumed that the above mentioned charges are applicable, the arrest is still not recommended. None of these offences prescribe punishment of imprisonment for a term higher than seven years. The maximum punishment under Section 67 IT Act is five years, that too only in cases of repetitive incident. Therefore, all these sections fall under the class of offences

[8] *(2014) 8SCC273.*

where arrest should be an exception. Based on above reasoning, the Hon'ble Supreme Court on 11th June, 2019, while deciding the petition of Habeas Corpus, ordered immediate release of Prashant Kanojia. The bench rejected the state's stand, which it said was against personal liberty. The court said that-

> The court need not comment on the contents of the tweets. The question is, should the petitioner have been deprived of his liberty over them. The answer to that is prima facie in the negative. Fundamental rights under Article 19 and 21 are non-negotiable.

Hon'ble Supreme Court not only expressed its anguish on arrest of Kanojia but also expressed utter shock on the 11-day remand order of Kanojia, asking: "Is he accused of murder?". The statements made by Kanojia could be deeply disturbing to the CM. But that is not a justification for arrest without the authority of law. Further, to prosecute someone under the law on criminal defamation, there should be a complaint filed by an individual. The FIR in this case has not been filed by the person allegedly affected but suo moto by police. These flaws are sufficient to say that whatever justification U.P. police may give for their actions, it will always fall short of standards for giving them a clean chit.

Conclusion:

After all this discussion, Lord Acton's words "Power corrupts and absolute power corrupts absolutely" find rightly applicable to the incident in question. What comes to our mind is that were these substantive and procedural laws not in the knowledge of U.P police officials before they reacted to the tweets or comments of Kanojia or were they well aware of Lakshman Rekha but still they wished to cross it without having

any fear of law or the outrage which they will have to face for their negligent, callous and high headed attitude. This is a case of blatant use of power with malafide intention, which is bad in eyes of law. On the contrary, if it is not done intentionally by the police authorities then the ignorance of new judgments with regard to criminal justice system especially in reference to police procedures like arrest, detention, FIR etc. is a serious threat to public security. It is recommended that frequent workshops and seminars on latest judgments should be conducted for Police officers dealing operational duties. It would not be out of place to mention that Kanojia was lucky to have belonged to Media and his entire fraternity stood by him in times of distress but think of a normal man who does not have any support and faces all this harassment especially when he believes that Constitution has granted him freedom to express his views without any fear or pressure. This incident has again initiated a debate to relook and revisit the legal provisions to avoid such unfortunate instances in future and further to sensitize police officials to understand that their job is to implement law in its letter and spirit and not to sideline the same for ulterior motives.

Sardar Vallabhbhai Patel
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Criminal Law Review 42-54

Idol Theft Investigation: A study of the SOPs & Best Practices adopted by the Idol Wing, Tamil Nadu Police

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Introduction:

Indian iconography has always attracted world-wide attention and the high standard of refinement and skill exhibited on metal idols or sculptural work has repeatedly won the admiration of connoisseurs, museums, art galleries and exhibitions worldwide. Acquisition of these antiquities has become a lucrative competition and desirous buyers often resort to unscrupulous means to get hold of them. The state of Tamil Nadu has a rich heritage of stone sculptures (Pallava & Chola era), rock cut statues and figurines and most importantly Metal idols (Panchaloha-5 metals, Bronze, Gold, Emerald-Maragadham), which primarily belong to the Chola era (circa 900-1300 A.D.). Since the early 20th Century, Idol theft and illegal export of the antiquities has always been a matter of

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concern for the erstwhile Madras Presidency Police and later the TN Police, when it was alleged that the local British administrators used to siphon off these idols and place it in their native homes. Since the 1960s there was a sudden spurt of idol thefts in the then combined Thanjavur district with a whole network of idol lifters, accomplices, illicit art galleries and smugglers being identified and named by the Police in its annual reports.[1]

The attention of the world was fixed on this matter when the **Sivapuram Nataraja idol,** stolen in the 1960s, was recovered by the Police from the Norton Simon Foundation, USA in 1986 after decades-long struggle with the US & UK Law Enforcement Agencies and Courts. It was this case, which brought in to focus the dire need of constituting a special investigative wing to trace the stolen antiquities, bring the accused to justice in India and restore the stolen property to the rightful owner (Temple, Trust, and Government Museums etc). The Idol Wing of TN Police was thus constituted in the year 1983. This study looks in to the mandate and organisation of the Idol Wing (hereafter referred as the Wing), the SOPs followed by it, the laws under which the offences are charged against, the problems that crop up while dealing with a complex maze of local thieves, agents, traffickers, buyers and the legal formalities of the destination country, the system of preventive measures devised while linking with the important cases that were solved by the Wing.

Legal Framework in India & the Foreign Nations:

The illegality involved in theft and smuggling-illegal export of antique idols has some dimensions which were listed

[1] *Report on Idol Thefts, 1967, published by the Madras Government.*

out by Paul M. Bator.[2] As per this understanding there are three types of violations which may occur in an illegally exported work of art.

a. It may be clear and provable that no theft was involved and only the export regulations of the origin country were violated.
b. It may be clear and provable that theft was involved and article was smuggled with violations of export regulations as well.
c. The question of title may be ambiguous or mysterious as a matter of law or fact - articles taken during war or civil conflicts as in from Afghanistan in early 2000s and Syria after occupation of ISIS or those which were 'gifted' by erstwhile 'sovereigns' to a Paramount power (British Colonial India and the Princely States).

However, in international law it is an accepted principle that the possession of an art object cannot be lawfully disturbed in the destination country solely because it was illegally exported from another country. The only exception to this rule is the 1972 statute passed by U.S. Congress, which stated that a material which traces its origin to the Pre-Columbian period from the Americas cannot be imported in to the USA unless it is accompanied by a certificate showing that its export did not violate the law of country of origin. Art smugglers have often prepared forged and fake certificates in the name of Art galleries, as in the Certificate of Everest Gallery, London for the export of **Nataraja of Thiruvelvikudi to the Kimbell Art Museum, Dallas, USA in 1978**[3] and even obtained certificate from

[2] *An Essay on the International Trade in Art; Stanford Law Review, Vol. 34, No. 2 (Jan 1982), pp. 275-384; https://www.jstor.org/stable/1228349*

[3] *Refer Page 340 of the Publication "CB CID Tamil Nadu – A Retrospect"*

Department of Handicrafts, Govt. of Tamil Nadu in the cases involving Subhash Kapoor & Sanjivi Asokan network.[4]

In 1977, India ratified the United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970, which makes such transactions illegal and imposes responsibility on the importing country to check the veracity of the antique item through a certificate from host country and to assist the host countries in obtaining the antiques in case necessary evidence is provided to the importing country. It is to be noted that India has not yet enacted an enabling legislation to bring in to effect the provisions of the Convention.

However, **The Antiquities And Art Treasures Act, 1972** was enacted to regulate the export trade in antiquities and art treasures, to prevent smuggling of and fraudulent dealings in antiquities. Under this act, the various important sections are as follows:

- *Section 2(1) – Definition of 'Antiquities' –*
    a. *Articles which have been in existence for not less than 100 years Viz.*
    b. *Sculptures in stone, terracotta, metals, ivory.*
    c. *Painting in paper, wood, cloth, skin etc.*
    d. *Manuscripts*
- *Section 3: It is unlawful for any person, other than the Central Government or any authority authorized by Central Government to export antiquity or art treasure.*

[4] *https://frontline.thehindu.com/the-nation/the-great-indian-idol-robbery/article5548741.ece*

- *Section 5: Antiquities to be sold only under a licence.*
- *Section 14: Any person who owns controls or is in possession of any antiquity shall register the same before the registering officer and should obtain a certificate.*
- *Section 25: If any person exports or attempts to export any antiquity or art treasure, then he/she is liable for punishment for a term not less than 3 months which may extend to 3 years and with fine.*
- *Every dealer in antiquities had to obtain a license for carrying on the business of selling or offering to sale any antiquity.*

Various sections of **the Indian Penal Code, 1860** can be applied related to **Property Offences** (457(2), 380(2), 454(2), 411(2), 414), **Forgery** (465, 468, 471), **Cheating and Criminal Conspiracy** (420 & 120(b)). In order to bring a special provision for Idol and Antiquity thefts, the T.N. government brought an amendment to the Criminal Law through the **TN Act No. 28 of 1993**, wherein the relevant IPC sections were amended to get faster convictions on idol-theft specific offences, but as we shall see, the penalties were made less stringent and the Court was also given the option to award lesser sentences while recording reasons for the same.

Besides these laws, **The Ancient Monuments and Archaeological Sites and Remains Act, 1958** is in vogue, which was subsequently amended in 2010 setting up a National Monument Authority to classify the protected monuments. In Tamil Nadu, **the Madras Ancient Historical Monuments and Archaeological Sites and Remains Act, 1966** was passed for protection of locally recognised monuments and sites and the sculptures, carvings and objects contained/located within them.

Special aspects of Idol Theft Investigations in Tamil Nadu Police:

The Idol Wing CID was constituted in the TN Police vide the G.O. Ms. no. 2098 Home (Police IV) Dept dt. 7.10.1983 under the CB-CID and in 2010 it was brought under the Economic Offences Wing. At present authorisation, the Idol Wing CID is headed by IG-Idol Wing and assisted by one DSP and 5 Inspectors of Police. The unit functions from its Headquarters in Chennai and has a field office in Tiruchirappalli. The Primary functions of the Idol Wing CID are as follows[5]:

- To investigate cases of theft of idols and antiquities exceeding value of Rs. 5 Lakhs.
- To investigate idol theft cases referred to it by the State Government.
- To co-ordinate in the investigation of important idol theft cases handled by the District Police.
- Collection of intelligence on nefarious activities of antique dealers and art collectors.

The Standard Operating Procedure of the Idol Wing and the difficulties and delays in prosecution that are faced by it can be best understood by the example of the investigation in to the theft of 18 bronze idols dating to the 11th Century A.D., from the Varadaraja Perumal temple at Suthamalli village in Ariyalur District-referred to as the Suthamalli Idols case. The investigations revealed a complex web of local thieves, specialised recce men, transporters, forgers, exporters, intermediaries in Hong Kong/Dubai, receivers in New York and ultimate destination in Public Museums and Private Art

[5] *Refer http://www.tneow.gov.in/IDOL/IW_history.html*

Galleries. The case led to the arrest of local bigwig Sanjivi Asokan and an international art dealer of repute - Subhash Chandra Kapoor who ran an art gallery in New York and was listed as a highly estimated art dealer. Both of them are now undergoing the sentence of conviction in Puzhal Central Jail, Chennai.[6]

a. **Delayed report of idol theft cases:** The detection of idol thefts or replacement are sometimes discovered late due to the remoteness of some of the temples and sometimes, due to the complicity of the temple authorities. Local Police Stations often take time to file FIRs and commence investigation; however their lack of resources and dedicated manpower means the case reaches the Wing after delays of months, leading to loss of important evidence. In the meanwhile, the corpus delecti usually would have landed in a foreign country making its retrieval tedious and time-consuming.

   In the Suthamalli case, the idols were lifted on two successive days in February 2008 and exported in March 2008 to foreign agencies from Chennai via sea-route, while the matter was reported to the Local Police only in April 2008.

b. **Intelligence gathering:** The Wing relies on a network of informants who keep a tab on the art trade market through their grapevine, as also formal sources like the International Foundation for Art Research, New York and its Annual Report called the Index of Stolen Art and its monthly magazine called Stolen Art Alert. Recently, the

[6] *Reference is also made to the Case Law - Subhash Chandra Kapoor vs. Inspector of Police, Idol Wing, Crime Investigation Department (MANU/TN/0649/2012 - 03.04.2012 - MADHC).*

proactive role of a host of new-generation bloggers on the Internet[7] with their vast network of information on antique idols from curators, historians, journalists and investigation agencies across the globe has provided significant inputs to the police on the antique loot in Tamil Nadu's temples and elsewhere. An art-enthusiast group in Singapore called the India Pride Project tracks the movement of stolen Indian Art worldwide and provides inputs to the Wing[8].

c. **Variety of Modus Operandi:** As seen from case files of the Wing and available literature[9], the various M.O. used in the idol theft cases are:

- Removal of idols with the connivance of the Priest (as in the Pathur Nataraja case - Cr. No. 323/76 of Koradacheri P.S.) or ASI officer (Cr. No. 18/94 of Idol Wing) who filed the report to local police after 4-5 days of the theft, by when the object had left Indian shores
- Replacement of the antique idols with spurious one – Sivapuram Nataraja case – Cr. No. 109/69 of CB-CID
- Outright removal of the idol during dark night periods or rainy nights by local gangs after thorough reconnaissance – Sanjivi Asokan and his gang

[7] *Refer to the article - https://frontline.thehindu.com/the-nation/bloggers-on-the-trail/article5548768.ece*

[8] *Two blogs of interest are www.chasingaphrodite.com and http://poetryinstone.in*

[9] *"Theft of Idols and Antiquities" by Shri K.B. Vohra, Assistant Director (Law), NPA in 1975*

d. **Complex web of participants:** In the Suthamalli case, after the idols were lifted from the temple, forged documents of bill along with an application with a self affidavit and invoices were prepared in the name of one Jothi Arts and Crafts. These were then produced before the Assistant Director of Handicraft Development and the Commissioner, Ministry of Textiles to obtain a Handicraft certificate for export. The idols were then exported to Arcelia Gallery, Singapore and from there they made their final destination to the National Gallery of Australia in Canberra and the Art Gallery of New South Wales.

   Thus we see that a multi-layered network of researchers, spotters, recce personnel, burglar gangs, accomplices, temporary receivers, forgers, local dealers, export companies, shipping agencies, intermediary agencies in Foreign nations (Singapore, Hong Kong, Dubai), ultimate recipient of stolen idols in Western Nations who run galleries, unsuspecting and knowledgeable buyers like Art Galleries, Private Individuals, State Museums etc are involved in this lucrative trade, thus making the collection and recording of evidence against each one of them to be a laborious task.

e. **Intricate legal procedures:** The process of bringing an offender to justice involves sending out Look Out Circulars (LOC), Letters Rogatory, applications under Mutual Legal Assistance Treaties, Extradition applications and affidavits, involving Ministries of Home Affairs, Commerce, External Affairs, Art bodies and intervention at the highest level of administration. Again, repatriation of the stolen object involves personal deposition of the I.O. and experts from India in foreign

courts and satisfying their standards of evidence and proof.

In the Suthamalli case, Letters Rogatory were sent to Australia for the idols in Canberra and New South Wales; while, Subhash Kapoor was arrested at Cologne Airport at Germany, after a Red Notice was issued by the Interpol. The Ministry of External Affairs, Government of India then gave a request for extradition of Subhash Kapoor from the Federal Republic of Germany based on the request made by the Idol Wing and after ascertaining the records. A letter was also given to the Government of Germany to their Foreign office satisfying the conditions for extradition. He was subsequently brought to India in July 2012. The idols were handed over to India in a much-publicised ceremony between the Prime Ministers of India and Australia in September 2014.

Issues faced by the Idol Wing in safeguarding antiques and retrieving stolen properties and suggested remedies:

According to HR & CE Department report published in 2017, approximately 1200 ancient idols were stolen from the temples of Tamil Nadu from 1992-2007, of which 350 are untraceable while 18 have been retrieved and 50 located. A close study of the Wing followed by interaction with its officers revealed some shortcomings plaguing the ecosystem of idols and antiquities in the 36,000 odd temples in Tamil Nadu, for which some remedial measures may be undertaken:

a. An expansion of the Idol Wing, which is severely understaffed and lacks the necessary resources, is required urgently. Initially, it was supposed to have 100 police officers working on these cases, but the state has

sanctioned only 29 personnel for this wing, of which nine positions remain vacant[10].

b. The ASI and the Hindu Religious and Charitable Endowments (HR&CE) Department, under the Tamil Nadu government, manages and controls the various temples within the state. As per a recent report by the Comptroller and Auditor General of India (CAG), "security lapses" have resulted in the theft or loss of 37 art objects from site museums and 131 antiquities from monuments and sites under their care in the past five decades.

   Funds allotted to the HR&CE department for the temple maintenance is measly and comes from the budget rather than revenues from the temples. The State must spend more to maintain, preserve and protect these monuments or else smugglers will continue to steal and sell the state's heritage to the highest bidder.

c. The Wing is seeking the immediate repeal of amendments made in 1993 to four sections in the IPC, which diluted the terms of sentences in temple burglaries cases. A new provision should be introduced to try offences of idol burglary under the procedures of Summary Trial Cases (STC).

d. Amendment to the Antiquities and Art Treasures Act, 1972, pending since 2003, to make the Act more stringent to curb trafficking in antiquities, must be expedited.

e. It is proposed to request the Government to declare these offences in places of worship as offences that need to be tried exclusively by Sessions/Additional Sessions/Fast

[10] *Source: https://www.thenewsminute.com/article/infighting-tn-idol-wing-delaying-retrieval-stolen-statues-105430*

Track courts. For this purpose, it is also suggested that the Government may appoint two special judges and two prosecutors, in Madurai and Villupuram, to try the offences.

f. Strengthening the National Mission on Monuments and Antiquities, formed in 2007, which was given the ambitious mandate of preparing a National Register of Antiquities by documenting them from primary and secondary sources. The mission was also tasked with setting up State-level databases for better management of such cultural resources.
g. The Idol Wing wants a central digitised data bank of antique idols and artefacts in temples after classifying them on the basis of antiquity as more than 100 years to 300 years, 300 years to 700 years, 700 years to 1,000 years, and 1,000 years and above based on their physical, historical, metallurgical and cultural characteristics for future verification and preservation[11].
h. It is opined that obtaining a Clearance certificate from the Department of Handicrafts was not sufficient enough to decide the question of antiquity of an idol since idol lifters smuggled the idols by showing them as newly made and/or by preparing forged documents from non-existent/frontal agencies. A panel of experts, comprising officials from the HR & CE Board, the Idol Wing and experts from the State Archaeology Department should be formed to decide the question of antiquity of an idol.
i. The Temple Protection Force was formed in 1992, comprising of an initial sanctioned strength of 1,000

[11]*Source: https://frontline.thehindu.com/the-nation/for-an-action-plan/article5548777.ece*

Grade II constables and an additional force of 3,000 ex-service men. However, against the Government orders, they are being redeployed for works other than temple protection. Further, Monthly Co-ordination between the local ASP/DySP & the Asst./Dy. Commissioner of the HR&CE Department in sensitive areas is not happening. The mechanism needs to be streamlined for sharing of information and resources between the custodians and the protectors.

Conclusion:

The Idol Wing of the TN Police is a wonderful instance of the Police playing an active role in prevention of loss of the country's heritage and glory and helping in its restoration by investigating and prosecuting cases of burglaries and smuggling of antique idols. The Wing has a rich history of more than 50 years and can serve as a shining beacon to the Police Department of other States, where loot of valuable antiquities is becoming rampant now. As in any other system, the Idol Wing and its procedures of working need to be refined, strengthened and improved regularly so that the Wing continues to perform its yeoman service to the preservation of the nation's cultural richness in an effective manner.

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Criminal Law Review 55-66

Section 144 Cr.p.c: Striking a Balance Between Public Peace and Order and Private Rights

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Introduction:

On the intervening night of 4 June 2011 and 5 June 2011, the police authorities in Delhi clamped down on the protestors at the Ramlila Maidan agitating against the issue of black money and corruption while they were sleeping. The protest was led by Baba Ramdev. In the crackdown many people received injuries and an innocent woman lost life. The police authorities justified their action by taking resort to the common explanation of negating imminent threat to the public peace and order under the garb of section 144 Criminal Procedure Code. But is this application of section 144 really justified on the peacefully sleeping crowd? In this paper the author has tried to study the application of order under section 144 Cr.p.c. Before analysing the order passed under section 144 Cr.p.c, which is the subject of

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this article, let's have a look at the legal provisions and the various parameters which have to be considered while passing order under section 144 Cr.p.c.

Principles underlying section 144 Cr.p.c:

Under the Criminal Procedure Code (hereinafter the Code) wide powers have been conferred on an Executive Magistrate to deal with emergent situations. One such provision deals with the Magistrates powers to impose restrictions on the personal liberties of individuals, whether in a specific locality or in a town itself, where the situation has the potential to cause unrest or danger to peace and tranquility in such an area, due to certain disputes. In brief, Section 144 confers powers to issue an order absolute at once in urgent cases of nuisance or apprehended danger. Specified classes of magistrates may make such orders when in their opinion there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable. It requires the magistrate to issue the order in writing setting forth the material facts of the case and the order is to be served in the manner provided by section 134 of the Criminal Procedure Code. The wording of the section envisages a situation where in the power provided there under may be exercised on the assessment of the Magistrate himself - a subjective satisfaction.[1]

Hidayatullah, Chief Justice, stated in the celebrated case of Madhu Likaye vs S.D.M. Munger,[2] *that section 144 of the Criminal Procedure Code is not unconstitutional if properly applied and the fact that it may be abused is no ground for it*

[1] *http://www.legalservicesindia.com/article/1841/Analysis-of-Section-144-of-CrPC.html*
[2] *1971 AIR 2486*

being struck down. And the provisions of the Code properly understood are not in excess of the limits laid down in the Constitution for restricting the freedom guaranteed in it and for that reason section 144 Cr.p.c is valid and Constitutional. The direction by Magistrate can be given only in the three cases specified, namely, to prevent:

a. Obstruction, annoyance or injury to any person lawfully employed
b. Danger to human life, health or safety; or
c. Disturbance of the public tranquillity, or a riot or an affray.

The principles that must be borne in mind before applying this section-

a. The provision is to be used for maintaining public peace and tranquillity and considering the urgency of the situation.
b. Whenever there is a conflict between public interest and private rights, public interest should be given an upper hand.
c. Where property rights or personal rights have already been decided by the civil court then the Magistrate should exercise their power under section 144 for protection of those rights.
d. Questions of title to properties or entitlements to rights or disputes of civil nature are not open for adjudication in a proceeding under section 144.

e. The consideration should not be that restriction would affect only a minor section of the community rather than a large section more vociferous and militant.

Content of order under section 144 Cr.p.c:

Any order passed under section 144 must follow the following format-

a. Order must be in written form,
b. Order must be clear, definite, and free of ambiguity,
c. State material facts and
d. The act to do or not to do must be stated clearly.

Duration of the Order:

Every order issued under the section is to expire on completion of two months. In the case of *Govinda Chetti vs Perumal Chetti,*[3] it was decided-

> The Magistrate is not competent to revive or resuscitate his order from time to time. The grant of what in effect is an order for perpetual injunction is entirely beyond the Magistrate's powers.

In the case of Zila Parishad, *Etawah vs K.C.Saxena*,[4] it was decided-

> The state government can extend the time period of two months to a maximum of six months, if it finds it necessary for prevention of some situations causing disturbances of safety, health or peace. But the same power should not be used arbitrarily and should be used in a fair and just manner. The

[3] *(1915)ILR 38 MAD 489*
[4] *1977 CriLJ 1747*

> Sessions Judge or the High Court can revise the order under section 144 Cr.p.c in exceptional cases when there is unusual shortcoming in the procedure followed or manifested error on the issue of law and consequently blatant miscarriage of justice.

Any Magistrate may, either on his own or on the application of any aggrieved person, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office. In case of an application by an aggrieved person, the Magistrate or the State Government, shall provide an early opportunity of hearing to the applicant or his lawyer, and if the application is rejected wholly or in part, the reasons for the same should be recorded in writing.

Persons to whom order can be directed:

a. A particular person,
b. Persons residing in a particular area,
c. General Public -The place or locality related to the order under should be clearly defined to enable the public to know at once what the prohibited area is.

There is an exception to the general rule that the order shall be directed to a particular person. The effect of the order being in the interest of public order being in the interest of public order and the interests of the general public, occasions may arise when it is not possible to distinguish between those whose conduct must be controlled and those whose conduct is clear. A general order thus may be necessary when the number of persons is so large that mentioned in the section. The place or locality to which an order under this clause is applied should be so clearly defined as to enable the public to know at once what the prohibited area is.

Considering the principles underlying section 144 Cr.p.c., orders like prohibiting the giving of caste dinners, or preventing obstruction to catching of stray dogs or forbidding the conduct of a religious procession attended by music along public roads, or prohibiting the public from participating in procession within the limits of the city, have been held as invalid orders.

Constitutional Validity of Section 144 Cr.p.c:

The question of constitutional validity of section 144 has come up before the Hon'ble Supreme Court in the celebrated case of *Madhu Likaye vs S.D.M Munger,*[5] where it was observed that following points establish the constitutionality of section 144:

1. Although the Magistrate has a power under this section to pass orders ex-parte, however generally the procedure that is followed is to serve a notice to the person against whom the order is being passed. Only in cases of extreme critical situations the Magistrate has to resort to passing an ex-parte order.
2. Additionally, the persons aggrieved by the order have a right to challenge the order on the grounds they find appropriate. This supports the view that the power granted under this section is not arbitrary and has to be applied reasonably.
3. To substantiate the above, an opportunity for hearing and to show cause is also provided to the person challenging the order of the Magistrate. Therefore, the principles of natural justice are also complied and well covered under this section.

[5] *Ibid*

4. Next the court also stated that the fact that the aggrieved party has the right to challenge the propriety of the order, makes the action of the Magistrate more reasonable and to be based on cogent and convincing reasons.
5. Finally the High Court's power of revision under section 435 of the Code read with section 439 of the code also makes up for the condition that the order under section 144 is non-appealable. The High Court can either quash the order or ask the Magistrate for the material facts, therefore ensuring accountability of the Magistrate.

Validity of order under section 144 challenged in case of Ramlila Maidan Incident DT.4/5.06.2011 vs Home Secretary, Union of India and Others,[6]

Baba Ramdev called up his followers to join in the protest at the Ramlila Maidan, Delhi, for agitating against the issue of black money, on 5th June 2011. But on the intervening night of 4th and 5th June 2011, the police authorities in Delhi clamped down on the protestors at the Ramlila Maidan while they were sleeping. In the crackdown many people received injuries and an innocent woman namely Rajbala lost her life. The police authorities justified their action by taking resort to the common explanation of negating imminent threat to the public peace and order under the garb of section 144 Criminal Procedure Code. It was informed to the court that police had imposed three conditions on Baba Ramdev for holding his Yoga camp. These conditions were that permission from the owner of the property must be taken, there must be no obstruction to the free flow of

[6] *Decided on February 23, 2012*

the traffic in the area and sufficient number of volunteers must be deployed at the venue. The Ramdev's foundation-Bharat Swabhiman Trust argued that trust had taken prior permission from the Delhi Municipal Corporation for the use of Ramlila Maidan and police forces were deployed by the state and the police ensured that the people entering the maidan were thoroughly checked and also ensured that the gathering was not carrying any arms. The police could have restricted the crowd at the entrance itself, if necessary.

After considering the arguments, the Hon'ble judges held that the invoking of S.144 was not called for in this case and the police have failed to substantiate their reasons with sufficient material. This is welcome. But at the same time, they did not label the order malafide. The court held that the action of the police suffers from arbitrariness but every arbitrary action need not necessarily be malafide. Broad areas discussed by the Hon;ble Court were:

a. The time when the orders were passed, all the followers were peacefully sleeping. Section 144 is to be applied in cases where there is imminent threat to security. A peacefully sleeping crowd cannot be a threat. The police, if needed could order the followers to vacate the premises the next morning, by giving specific reasons. A notice to evacuate given at around 11:30 pm in the night cannot be said to be reasonable. There were a huge number of people and it is of common understanding that displacement of such a crowd (approximately 5000 members) will take a couple of hours, to say the least. At 11:30 p.m., finding alternate accommodation for a huge crowd is highly impossible.

b. Secondly, Section 144 can only be used in cases where there is a need for immediate prevention or there is a need for speedy remedy. Section 144 cannot be used for dangers which are foreseeable, but only in cases of imminent dangers. It is settled law that the order issued under section 144 must prescribe the material facts. A restriction on a constitutional right has to be used very sparingly and cautiously.
c. Nonetheless, it is accepted that the police was required to give adequate notice to people before resorting to any action and if the people did not cooperate, only then the police could have taken any action. In any country, especially a democracy, the balancing of interests must be ensured and no organ of the state should have unlimited or unguided powers. This is applicable equally to the public as well to the police.

Therefore, for invoking section 144 Cr.p.c., three conditions must be satisfied-

1. If there is immediate provocation and if there is a need for speedy remedy.
2. Police also have to state material facts in the order passed
3. Only prohibit certain acts.

Immediate provocation or any exigency situation could not be established by the police. The police deny resorting to lathi-charge and tear gas, but the video footage revealed otherwise. In addition to this, the justification by the police that the assembly would have caused communal tensions in the area was baseless and not backed by any evidence. The fact that it was not the first time that the Ramlila Maidan was used for such large gathering also must be noted.

The Apex Court also issued directions to the police that while considering "threat perception" as a ground for revoking permissions or passing an order under Section 144, the threat perception under section 144 must be real and not illusory. The Court said the police should have in place a complete and effective plan for dispersal, before evicting the gathering by use of force from a particular place. Such a plan did not exist in this case. The police only planned as to the accommodation and subsequent course only for Baba Ramdev. The followers were sent to the Delhi Railway Station area which is always in a rush.

In totality, it was concluded that Section 144 was abused by the state machinery and caused not only grievous hurt but also the death of an innocent lady Rajbala. Her family was held to be entitled to the ad-hoc compensation of Rs.5 lacs while persons who suffered grievous injuries and were admitted to the hospital would be entitled to compensation of Rs.50,000/- each and persons who suffered simple injuries and were taken to the hospital but discharged after a short while would be entitled to a compensation of Rs.25,000/- each.

Justice B.S. Chauhan in his opinion wrote that when police disturbed the crowd at night at 1:00 a.m., their right to sleep was violated. He held that right to sleep forms an essential part of Article 21 which guarantees personal liberty and life to all. Sleep forms an essential part of living a peaceful life, hence it is a fundamental right. The observations were:

> An individual is entitled to sleep as comfortably and as freely as he breathes. Sleep is essential for a human being to maintain the delicate balance of health necessary for its very existence and survival. Sleep is, therefore, a fundamental and basic

> requirement without which the existence of life itself would be in peril. To disturb sleep, therefore, would amount to torture which is now accepted as a violation of human right.

While passing the Judgment, the Hon'ble Court enforced the rule of Contributory Negligence and observed that negligence of the state and the trust was in the ratio of 3:1. It asked Ramdev's foundation-Bharat Swabhiman Trust – to pay 25 per cent of the compensation to the dead and the injured. However, the order of contributory negligence has been criticised especially on the ground that neither the imposition of section 144 nor the withdrawal of permission is lawful. The necessary procedures were not followed. The reasons in writing were not given. The existence of emergency situation was not proven. As commented by Mr. Arun Jaitely, it shakes the foundation of the Fundamental Right by laying down a highly doubtful proposition that once the right to protest is denied, the protester must meekly accept the denial or run the risk of a contributory negligence to the police oppression. If a protester is within his constitutional rights to organise a peaceful protest, he is equally within his rights not to accept an illegal order denying his right to protest. The ambit of fundamental rights is greater than that of the duties and such a decision is diluting the fundamental rights. If a person has a right to protest, so must he have an equal right to protect against any illegal order against his protest?

CONCLUSION

Though the judgment has its defects, it can be concluded that the *suo moto* action taken up by the Hon'ble Supreme Court was laudable in light of common interest. This reiterates the fact

that the Indian Judiciary has always been fundamental in upholding the fundamental rights of people. This judgement can be seen as a landmark one in protecting the rights of the protesters. The principles of law were discussed at length. The police have been held liable for the misuse of power under S.144 Cr.p.c. Right to Sleep was recognised as a fundamental right under Art.21 and ad-hoc compensation was awarded to the victims in furtherance of justice, equity and good conscience.

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Criminal Law Review 67-79

Confessions: When to Act Upon?

AMBRISH RAHUL*

Introduction:

The success of Criminal Justice System depends on successful prosecution which eventually means achieving conviction in a court of law. However, conviction rates in India are very low. The causes of such dismal conviction rates are many but the most important is the non acceptability of Confessions recorded during the Investigation Process. One of the crucial reasons for acquittal is the unsatisfactory understanding and appreciation of Indian Evidence Act by the Investigating Officers. Many of the evidences collected by Investigating Officers do not meet the standards prescribed by Indian Evidence Act and thus the case falls through and the accused is acquitted. Confession forms one of the important pieces of such incidences and procedural lapses in recording a confession makes it inadmissible in the courts. Similarly, in many cases, essential linkages need to be established to ensure

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that confession is admitted and relied upon by the courts but when such linkages are not duly established by Investigating Officers, the confession is not admitted. In this article, we will try to focus on important points that an Investigating Officer needs to keep in mind while dealing with confession. Before starting with the discussion, let's have a fast relook at the concept of confession and important provisions related to the same.

Confession is though covered by Indian Evidence Act but surprisingly there is no definition for the same under IEA. Sir James Fitzjames Stephen in his book *A Digest of the Law of the Evidence*[1] defined confession as

> "Confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime."

Lord Atkin in *Pakala Narayan Swami vs Emperor*,[2] defined confession as-

> "A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not in itself a confession"

Confession is something which is made by the person who is charged with any criminal offences and such statements conferred by him shall be suggesting a conclusion as to any fact in issue or as to relevant facts. The statements may infer any

[1] *Sir James Fitzjames Stephen, "A Digest of the Law of the Evidence", MacMillan and Company, 1876.*
[2] *A.I.R. 1939 P.C. 47*

reasoning for concluding or suggesting that he is guilty of a crime.[3] We may also define the confession in other words that the admission by the accused in the criminal proceedings is a confession. A confession is substantive evidence against its maker, if it has been duly recorded and suffers from no legal infirmity. It would be sufficient enough to convict the accused who made the confession, though as a matter of prudence, the courts usually expects at least some corroboration before acting upon it. The essential ingredients of a confession are it being true and voluntary. Before acting upon a confession, courts always satisfy itself that the confession is *voluntary* and *true*. Voluntariness depends upon whether there was any threat, inducement or promise. The truth is judged in the context of the entire prosecution case i.e. whether it fits into the proved facts and does not run counter to them. If these two conditions are satisfied, it usually becomes the most reliable piece of evidence against the maker.

A confession may be of different types depending on the persons before whom they have been made. Broadly confession is differentiated into two different types like- when the confession by the means of statements is given itself in the court of law then such confession will be considered as Judicial Confession, whereas, when the confession by the way of statements is produced at any place other than court then such confession will lead towards Extra Judicial Confession. The different sets of confession do not have the same evidentiary values as of others and hence their values degrade and upgrade by the circumstances that how, what and where these confessions are made. The exceptional feature of confession is that a conversation to himself also leads toward a confession and

[3] *https://blog.ipleaders.in/confessions-under-the-indian-evidence-act/*

this feature was highlighted in the case of *Sahoo v. the State of U.P.*,[4] where the accused has murdered his son's newly wedded wife, as he usually had serious arguments with her, and when the accused killed daughter-in-law it was seen and heard by many people living there that he was uttering words while stating that "I finished her and now I am free from any daily quarrels". The court observed in this case that the statement or the self conversation made by the accused shall be considered as a confession to prove his guilt and such confession should be recognized as a relevant piece of evidence in administering justice, and just being in the case that the statements are not communicated to any other person, other than him does not dilute the relevancy of confession. Therefore confessions made to himself is also quality evidence which will be considered as relevant evidence in a court of law.

Judicial Confession, is made in front of a judicial magistrate acting in his official capacity. Section 164 Cr.p.c deals with Judicial Confession. It prescribes the necessary steps that must be followed by a Judicial Magistrate before he proceeds with recording of confession. It also prescribes the format in which confession has to be recorded. All Judicial Confessions are admissible in the court of law. This is the best form of recording a confession. Even if the accused retracts from confession during trial, the court may still rely on the same and convict the accused on the basis of the same provided the original confession was voluntary and true. So, whenever the accused is ready to make a confession, the IO should make best efforts to get it recorded by a Judicial Magistrate. Only when it's not possible to get it recorded by the Magistrate that the IO should proceed to record on his own.

[4] *AIR 1966 S.C. 40*

Extra Judicial confessions are confessions made other than that to a Judicial Magistrate. It is of varied types. It is also not necessary that the confession should have been addressed to any definite individual. The confession may be in the form of a prayer. It may be a confession to a private person. It also can be a confession in front of a priest of the church. A man after the commission of a crime may write a letter to his relative or friend expressing his sorrow over the matter. This letter may amount to confession.

The general rule is that confession given to police is not admissible in the Court of law. Any confession made while in police custody to any other person except that of a Judicial Magistrate, acting under sec 164 Cr.p.c, is also not admissible. Section 25 and Section 26 of Indian Evidence Act is pretty clear about it. The probable reason is that there is established belief that police tortures an accused and force him to confess a crime which he might not have committed. A confession given to a police officer or in police custody is thus deemed to be involuntary and thus inadmissible in the court.

In *Kishore Chand v. State of Himachal Pradesh*,[5] an extra judicial confession was made to Pradhan who was accompanied by a Police Officer. The court inferred that the accused was in police custody and an extra judicial confession was recorded by Pradhan. It commented that instead, the police could have taken the accused to a Judicial Magistrate and requested him to record statement of accused under section 164 Cr.p.c. It would have more evidentiary value.

[5] *AIR 1990 S.C. 2140.*

In *Dagdu vs State of Maharashtra*,[6] Hon'ble Supreme Court opined

> "The police should remember that confession may not always be a short-cut to solution. Instead of trying to "start" from a confession they should strive to "arrive" at it. Else, when they are busy on this short route to success, good evidence may disappear due to inattention to the real clues. Once a confession is obtained, there is often flagging of zeal for a full and thorough investigation with a view to establish the case de hors the confession. It is often a sad experience to find that on the confession, later, being inadmissible for one reason or other the case founders in court."

However, section 27 Indian Evidence Act provides an exception to the above general rules. If the confession leads to discovery of any material fact or any other fact that are relevant to the present case the part of the confession which lead to the discovery is admissible in the court. Investigating Officer thus should make all possible efforts to make a discovery of a relevant fact on the basis of the confession.

In *Pandu Rang Kallu Patil v. State of Maharashtra*,[7] it was held by Supreme Court that section 27 of IEA was enacted as proviso to the provisions of section 25 and section 26 IEA which imposed a complete ban on admissibility of any confession made by accused either to police or to any one while in police custody. Nonetheless the ban would be lifted if the statement is distinctly related to discovery of facts. The object of

[6] *AIR 1977 S.C. 1579.*
[7] *AIR 2002 S.C. 733*

making provision in section 27 was to permit a certain portion of statement made by an accused to Police Officer admissible in evidence.

Section 27 lays down that when at any trial, evidence is led to the effect that some fact was discovered in consequence of the information given by the accused of an offence in custody of the police officer, so much of the information as relates to the facts discovered by that information, may be proved irrespective of the facts discovered by that information, may be proved irrespective of the facts whether that information amounts to confession or not. There are key ingredients to section 27 that Investigating Officer should keep in mind and present his evidences in such a way that they satisfy all these ingredients. These are -

a. The fact must be unknown and must be discovered, i.e. the police must not be aware of it and location of such a fact must not be known to police beforehand.
b. The fact must have been discovered in consequence of information received from the accused and not by the own act of accused. The IO should mention in the case diary that after recording of confession the accused took him to such and such place and pointed out the object to him which he then seized.
c. The person giving information must be an accused in the case. If the statement and the discovery was made before the person was made an accused, then it won't be treated as an evidence under section 27 of Indian Evidence Act.
d. He must be in custody of police. So, if the confession was made to some person before his arrest or before he came into police custody and there is a discovery of fact based on this confession it won't be admissible as evidence

under section 27 of Indian Evidence Act. For section 27 to apply the accused must be in police custody.

e. Only that portion of the confession which has led to the discovery of fact is admissible. Thus the Investigating Officer should only rely on that part of confession.
f. The fact discovered must relate to crime in the question. Any other discovery which may relate to commitment of crime other than the one in question will not be admissible and a separate confession may be recorded by Investigating Officer of that case.
g. The discovery of a fact in consequence of information received from an accused in custody must be deposed to. Investigating Officer or somebody else must depose in front of court that some article was discovered in consequence of information received from the accused.

In *Suresh Chandra Bahri v. State of Bihar*,[8] it is the discovery and the seizure of articles used in wrapping the dead body and the pieces of Sari belonging to the deceased was made at the instance of one accused. Articles recovered were neither visible nor accessible to the people but were hidden under the ground. No public witness was examined by the prosecution in this behalf. However, the evidence of Investigation Officer did not suffer from any doubt or infirmity. Articles discovered were duly identified by the witness. It was held that in these circumstances, failure of Investigating Officer to record the disclosure of statement was not fatal.

These procedural shields don't deplete the security offered to the accused. Though custodial admissions are allowable in part, it is still for the court to decide on its worthiness or

[8] *AIR 1994 S.C. 2420*

evidentiary or probative esteem. Under the appropriate, be that as it may, the evidentiary estimation of custodial admissions is held to be unimpeachable. It has frequently been contended that a confession being recorded by a cop is a powerless sort of confirmation and should dependably be authenticated before basing a conviction. In a progression of cases, the Supreme Court has held that once the confessional statement is observed to be intentional and honest, it ends up substantive confirmation and does not require any validation, and the creator of an admission can be sentenced on such uncorroborated admission.[9]

While dealing with extra judicial confession other than to a police officer Investigating Officer should take necessary steps depending upon the case in hand. Courts before relying on extra-judicial confession, ask questions such as whether the confession was actually made or why the accused reposed confidence in the witnesses stating about the confession. The prosecution must produce evidences answering these questions suitably. In a case when a person claims that the accused made a confession to him the Investigating Officer must be able to establish the fact that the person was sufficiently related to the accused for him (accused) to confide in him (witness)

As the courts are very cautious while dealing with such extra judicial confessions Investigating Officer needs to make sure that it establishes the trustworthiness of witness. If there is a person who has overheard the confession, the Investigating Officer should establish that the person was present when the accused was confessing. He should produce evidence that the said person had the reason and opportunity of being present at that moment at that place when the confession was made. Also

[9] *https://acadpubl.eu/hub/2018-120-5/2/123.pdf*

as the courts always have doubt with regards to ability of such witnesses to express the exact confession that was made to him the Investigating Officer should ensure that the witness is a competent witness. To make the prosecution case more strong the Investigating Officer should produce materials that corroborate such extra judicial confession. Also Investigating Officer should produce sufficient evidence to allay the fears of court that the witness was not a planted one.

In *State of Karnataka v. A. B. Nag Raj,*[10] there was allegation that the deceased girl was killed by her father and step-mother in the National park. The alleged extra-judicial confession was made by accused during detention in forest office. Nothing was mentioned about said confession in report either given to police nor any witnesses present there mentioned about the confession. As the proof that the confession was actually made was doubtful it was held that the confession was not reliable.

The Investigating Officer should also know that section 29 of Indian Evidence Act makes the confession admissible even if the confession was made under the promise of secrecy or while the accused was drunk or he was deceived into making the confession or he was not warned that such confession may be used against him. But the Investigating Officer needs to prove the circumstances in which the confession was made. For example, if the Investigating Officer claims that the accused confessed to the witness in a bar while he was drunk, Investigating Officer must prove that the witness was present in the bar that day and at that time. The accused used to have conversation with him while he was drunk. If the witness was

[10] *AIR 2003 S.C. 666*

not a person of the locality or he never visited the bar or the accused had never before had a conversation with him, it becomes very difficult for the courts to believe that the confession was actually made and the witness is not a planted witness.

A confessional statement made by a person to the police even before he is accused of any offence is equally not admissible. This means that even if the accusation is subsequent to the statement, the statement cannot be treated as confession.

The other important thing that the Investigating Officer should keep in mind is that the only voluntary confessions are admissible in the court. This implies that the confession should be free from inducement, threat or promise by a person in authority.

If it (confession) proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible.

The Investigating Officer thus should resist himself from making any kind of inducement or promise or threat. If the Investigating Officer promises that accused will be forgiven or makes a threat that he will be prosecuted and extract confession on this basis, then it will not be admissible. This means that the confession must not be obtained by any sort of threat or violence, not by any promise either direct or indirect, expressed or implied, however slight the hope or fear produced thereby, not by the exertion of an influence.

Other area which requires thorough understanding are confessions partly reflecting guilt of accused and partly reflecting his innocence. The part which reflects his guilt is called INCULPATORY PART and remaining part which proves

his innocence is called EXCULPATORY PART. A statement which is partly guilt and partly innocent cannot be regarded as confession. To understand this topic better it would be appropriate to discuss the two most relevant case laws decided by Hon'ble Supreme Court.

In the case of *Palvinder Kaur v State of Punjab*,[11] the Supreme Court approved the Privy Council decision in *Pakala Narayan* Swami case over two scores and held that-

> "Firstly, the definition of confession is that it must either admit the guilt in terms or admit substantially all the facts which constitute the offence.
> Secondly, that a mixed up statement which even thought contains some confessional statement will still lead to acquittal, is no confession. Thus, a statement that contains self-exculpatory matter which if true would negate the matter or offence, cannot amount to confession.
> It also held that confession and admission must either be admitted as a whole or rejected as a whole and the Court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible."

However in the case *Nishi Kant Jha V State of Bihar*,[12] the Supreme Court pointed out that

> there was nothing wrong or relying on a part of the confessional statement and rejecting the rest, and

[11] *AIR 1952 SC 354*
[12] *1959 SCR 1033*

> for this purpose, the Court drew support from English authorities. When there is enough evidence to reject the exculpatory part of the accused person's statements, the Court may rely on the inculpatory part.

Therefore, in confession covering the exculpatory as well as inculpatory part, the Investigating Officer shall try to locate evidences that dilute the exculpatory part or proves it false and fake. Once the exculpatory part is proved false, then the Court can separate both the parts and rely only upon the Inculpatory part.

Conclusion:

Investigating Officer must be thorough with section 24 to section 29 of Indian Evidence Act before he records a confession. If there is a possibility of recording a judicial confession the Investigating Officer must explore it and only when he fails to do so, he must proceed to record the confession on his own. He must ensure that there is a discovery of an unknown fact as a consequence of information received from the accused and only that part of the confession will be admissible. He should resist from making any inducement, threat or promise to the accused for getting his confession recorded. In all other cases of extra judicial confession where the confession is recorded by a witness other than the police, the Investigating Officer must prove that the witness is a competent witness and had the reason and opportunity to be present at that place and time when the accused made the confessional statement.

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Criminal Law Review 80-98

FIR: Registration not a Discretion but compulsion – A case Study

SHRADDHA PANDEY*

Introduction:

"Twinkle's family alleges that Aligarh police waited 32 hours before taking action on their complaint. According to Banwari Lal Sharma, he rushed to the Tappal police station soon after they discovered Twinkle missing, but no one listened to him.

"She must have gone to someone's house. She will return," he was allegedly told.

"Police took my contact number and told me that I should go home and they will call me in case they find her," he said.

"They did not take any written complaint, nor did they care to ask about the appearance of my daughter, what she was wearing. So, I thought, I will have to do this myself," he added.

So, he gathered a few of his friends and went to all temples and mosques in the

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vicinity, asking them to make announcements about his daughter being missing."[1]

Twinkle Sharma was a 2 year old girl from Aligarh's Tappal town. On 30th May 2019, she left her home at 8.30 A.M. to play with friends but didn't return. The complaint was given to local police but the police swung into action 32 hours later, when a decomposed body of the child was reportedly pulled out of a dustbin by dogs, merely 200 meters away from her house.[2]

This ghastly incident left the entire nation in shock. The apparent lackadaisical response of the police persons led to a rage and discontent in the nation. It put a question mark on about the role of police in filing an FIR. There were heated debates on social media, policy groups, judicial circles, civil society, thinkers, and law interpreters and among the general citizenry. There was only one question on everyone's lips: *Is it a discretionary power of police whether or not to register F.I.R. on receipt of information?*

F.I.R. is the first milestone in the criminal justice system which swings the investigative machinery into action. Time and again the courts of law have analyzed its importance. This paper aims to analyze the impact of one such landmark judgment namely **Lalita Kumari vs Govt.Of U.P.& Ors, 2013**.

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[1] *https://theprint.in/india/aligarh-two-year-old-was-beaten-up-for-8-hours-before-she-died/247502/*

[2] *https://swarajyamag.com/insta/in-solidarity-with-family-of-murdered-child-twinkle-sharma-lawyers-in- aligarh-say-no-one-will-appear-for-accused, https://www.google.com/search?q=twinkle+sharma+fir+police&rlz=1C1CHWA_enIN612IN612&oq=twi&aqs=chrome.0.69i59j0j69i59j69i57j0l2.2988j0j7&sourceid=chrome&ie=UTF-8, https://m.dailyhunt.in/news/india/english/rvcj-epaper-*

Requirements for registration of FIR:

The First Information Report is the most popular document when it comes to Indian Criminal Justice System. It can be said that even the most legally unaware adult has heard of this document. In fact, the F.I.R. is so popular in common culture that Bollywood and Tollywood have used it repeatedly among their thickening plots and twisted storylines. FIR stands for First Information Report. It is a written document prepared by Police when they receive information about a cognizable offence. It is registered under sub-section (1) of Section 154 Cr.p.c. The term is not mentioned anywhere in Code of Criminal Procedure. The judiciary went all out in spelling out the importance of F.I.R in the judgment of *Bhagirathi vs State Of M.P*,[3] by stating that-

> "It is a very important document. And as its nick name suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 Cr.p.c, as the case may be, and forwarding a police report under Section 173 Cr.p.c."

Section 154 in The Code Of Criminal Procedure, 1973

154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to

[3] *https://indiankanoon.org/doc/1068734/*

writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, inwriting and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

Section 154 Cr.p.c clearly shows that it is the bounden duty of police to record an F.I.R. in case a information of a cognizable office is received by them. They are also supposed to make an entry of this in the station house diary and provide a free copy of the same to the complainant. Further, a respite is provided for the cases where the police refuse to file and F.I.R. under section 154(3). By 154(3), this information can be

provided to the head of the district police who may take any action or direct the taking of any action so that justice is served.

If the language of the code is so clear in this matter then why wasn't an F.I.R. registered in case of Twinkle Sharma?

Section 156 in the Code Of Criminal Procedure, 1973

156. Police officer's power to investigate cognizable

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

The above section 156(3) has placed a high premium on giving redress to the information received in case of a cognizable offence. In case if a complaint is not taken up by police persons then it can be taken up to a magistrate who can direct that action be taken by policemen. This shows how much priority is given to F.I.R. by lawmakers. In fact in a recent judgment Calcutta High Court held that failure to register FIR within 24 hrs on the receipt of order attracts disciplinary and penal consequences.[4]

[4] *https://www.livelaw.in/news-updates/section-1563-failure-to-register-fir-within-24-hrs-calcutta-hc-146518*

Section 157 in The Code Of Criminal Procedure, 1973

157. Procedure for investigation preliminary inquiry.

If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-

(a)when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b)If it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2)In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the officer in charge of the police station shall state in his report his reasons for not

fully complying with the requirements of that sub- section, and, in the case mentioned in clause (3)(b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

Section 157 of the code states about prompt sending of copy of F.I.R. to Magistrate. Thus, an extra layer of security is created to give justice to complainant. This section again shows how important quick action is. So much so that, the magistrate herself is required to have information about the same in order to give proper directions under section 159, if required. Commenting on the importance of prompt dispatch of a copy of the FIR to the Magistrate having power to take cognizance of such an offence, the Supreme Court in *Alia China Apparao v. State of Andhra Pradesh,* has observed that the expression 'forthwith' used in Section 157 (1) does not mean that *"the prosecution is required to explain every hour's delay in sending the FIR to the Magistrate, of course, the same has to be sent within a reasonable time in the circumstances prevailing. Also, same cannot be a ground for throwing out the prosecution case if it is otherwise trustworthy upon appreciation of evidence which is found to be credible. However, if it is otherwise, an adverse inference may be drawn against the prosecution and the same may affect veracity of the prosecution case, more so when there are circumstances from which inference can be drawn that there were chances of manipulation in the FIR by falsely roping in the accused persons after due deliberations."*[5]

[5] *https://indiankanoon.org/doc/829043/*

The above sections clearly indicate how important the filing of F.I.R. at a correct time is and how seriously it is looked upon by makers and judiciary law. When the legal and judicial intent is so clear then what stopped the police persons of Tappal thana from taking quick cognizance of the missing child Twinkle Sharma.

Aspect of Delay in registration of FIR:

The delay in filing of F.I.R. is dealt in the case titled *Thulia Kali v. State of Tamil Nadu.*[6] The Hon'ble Court held that:

> *Delay* in lodging the first information report quite often results in embellishment, which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of colored version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.

This judgment is half a century old, yet it has been often observed that police follow delaying tactics even upon receipt of information of the occurrence of a cognizable offense. This was clearly observed in Twinkle Sharma. This is why along with lawmakers and judiciary, even the government has taken a firm stance when it comes to prompt action on receipt of information about the occurrence of a cognizable offense.

Such stance of lawmakers is observed in the following sections of the code:

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[6] *(1972) 3 SCR 622 at p. 627*

a. 154(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

b. 156(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

Such stance of government can be observed in case of the following steps that have been taken by the government. Let us look at some examples from U.P.

a. Dial 100 facility in many states like U.P. and M.P. are now centrally managed so that discretion is taken away from thanas. Every event comes to the notice of a central point and there is feedback mechanism for each response. So, police officers at thana level will be vary of following delaying tactics.
b. IGRS Integrated Grievance Redressal System, here complaints can be made to very high level person, for example to SSP, IG, ADG, DGP, Chief Secretary and even the Chief Minister. Strict monitoring ensures proper compliance.
c. Thana Diwas: Senior officers come to thana to listen to complainants directly.

d. Tehsil Diwas: All head of departments along with DM and SSP meet every week in a different block to solve all issues.

The casual attitude in treatment of F.I.R. is still seen by the police persons as seen in treatment of Twinkle Sharma case.

Mandatory Registration of FIR:

A very pertinent question is whether a police person can refuse/delay filing of F.I.R was dealt with in the *Lalita Kumari vs Govt.Of U.P. & Ors*,.[7] Let's us analyze few paragraphs of this judgment.

> *39) Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.* ***'Shall'***
>
> *40) The use of the word "**shall**" in Section 154(1) of the Code clearly shows the legislative intent that*

[7] *https://indiankanoon.org/doc/10239019/*

> *it is mandatory to register an FIR if the information given to the police discloses the commission of a cognizable offence.*

The above two paragraphs state clearly that registering an F.I.R. is not optional or matter of discretion. So was the Tappal police right in delaying registration of F.I.R. in case of Twinkle Sharma? Supreme Court in Lalita Kumari case further quoted the Khub Chand case to provide more clarity to the word shall. Further paras of this Judgment are also relevant and same are reproduced below:

> *41) In **Khub Chand (supra)**, this Court observed as under:*
>
> *"7…The term "shall" in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations..."*
>
> *42) Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable Offences", a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of*

the Code. If a matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

43) Therefore, the context in which the word "shall" appears in Section 154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register FIRs, all these factors clearly show that the word"shall" used in Section 154(1) needs to be given its ordinary meaning of being of "mandatory" character. The provisions of Section 154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer in-charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.

44) In view of the above, the use of the word 'shall' coupled with the Scheme of the Act lead to the conclusion that the legislators intended that if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer in-charge of the police station. Reading 'shall' as 'may', as contended by some counsel, would be against the Scheme of the Code. Section 154 of the Code should be strictly construed and the word 'shall' should be given its

natural meaning. The golden rule of interpretation can be given a go-by only in cases where the language of the section is ambiguous and/or leads to an absurdity.

45) In view of the above, we are satisfied that Section 154(1) of the Code does not have any ambiguity in this regard and is in clear terms. It is relevant to mention that Section 39 of the Code casts a statutory duty on every person to inform about commission of certain offences which includes offences covered by Sections 121 to 126, 302, 64-A, 382, 392 etc., of the IPC. It would be incongruous to suggest that though it is the duty of every citizen to inform about commission of an offence, but it is not obligatory on the officer-incharge of a Police Station to register the report. The word 'shall' occurring in Section 39 of the Code has to be given the same meaning as the word 'shall' occurring in Section 154(1) of the Code.

From paragraph 45 and 46 the Supreme Court has clearly set the rule that it is mandatory to file an FIR on receipt of a cognizable offence. But, the operative part of this judgment gives for preliminary enquiry in some cases.

Paragraph 111 holds that:

1. Registration of F.I.R.is mandatory in case of a cognizable offence.
2. If F.I.R. does not disclose cognizable offense then a preliminary enquiry may be conducted, if no cognizable offense is disclosed then closure report may be submitted to the complainant within 7 days.

3. Action is to be taken against the officers avoiding their responsibility of filing F.I.R. in cases where cognizable offense is disclosed.
4. A preliminary enquiry may be conducted in few cases to ascertain whether a cognizable offence has been committed. Duration of PE should not exceed 7 days. The category of cases in which preliminary inquiry may be made are as under:

    a) Matrimonial disputes/ family disputes

    b) Commercial offences

    c) Medical negligence cases

    d) Corruption cases

    e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

5. Proper maintenance of General Diary about each thing.

The Supreme Court has given the category of cases in which preliminary inquiry may be made but also mentioned that these are mere illustrations and shall not be taken as an exhaustive list. Some may say that the case of Twinkle Sharma case is a fit case for proviso and the police was right in the delay in this mater. However this matter was settled in the judgment of *Bachpan Bachao Andolan v. Union of India & Ors*, Writ Petition (Civil) No. 75 of 2012. This judgment A was followed by a framing of an SOP by the Ministry of Women and Child Development.1617 part of the SOP is reproduced below:

a. In case of complaint with regard to any missing children

made in a police station, the same should be reduced into a First Information Report and appropriate steps should be taken to see that follow up investigation is taken up immediately thereafter.

b. In case of every missing child reported there will be an initial presumption of either abduction or trafficking, unless, in the investigation, the same is proved otherwise.
c. Whenever any complaint is filed before the police authorities regarding a missing child, the same must be entertained under Section 154 Cr.p.c. However, even in respect of complaints made otherwise with regard to a child, which may come within the scope of Section 155 Cr.p.c., upon making an entry in the Book to be maintained for the purposes of Section 155 Cr.p.c., and after referring the information to the Magistrate concerned, continue with the inquiry into the complaint.

From the above, it is clear what a horrendous error was done in case of Twinkle Sharma murder case by the police persons and justice was in fact denied to the family of the victim.

Reality Check: Field Experience

The filing of F.I.R. on receipt of information is near zero. In many cases the complaint is taken from the complainant, he is made to go away but no action is taken. The paper of complainant may find itself in the waste paper basket without even a trail being generated that the complainant had ever visited the thana. There is a tendency to do an unofficial analysis about the offence before entertaining the complainant. This includes checking whether the complaint is tenable, ease of doing investigation, even speaking with senior officers before deciding whether the complaint must be registered. There is zero

awareness about preliminary enquiry as envisaged in the Lalita Kumari judgement.

The police still works on their will and wish. For example in district Muzaffarnagar, in the year 2018, 4689 IPC F.I.R were filed. Almost 1/5th of this number viz. about 959 cases were endorsed from the court. Out of this only 146 cases were filed as F.I.R. The fact that about a 1000 complaints had to go to judiciary gives a grim picture about their handling at thana level. About 64 cases were filed from F.I.R. counter in SSP office. But this is not the real picture of handling of complaints at thana level. At least 10 times this number of persons must be coming SSP office in the duration of 1 year. The most glaring example of this in the recent times is the action based on information received in the brutal murder of Twinkle Sharma. It is pertinent to repeat the lines which this paper opened with:

"Twinkle's family alleges that Aligarh police waited 32 hours before taking action on their complaint. According to Banwari Lal Sharma, he rushed to the Tappal police station soon after they discovered Twinkle missing, but no one listened to him.

"She must have gone to someone's house. She will return," he was allegedly told.

"Police took my contact number and told me that I should go home and they will call me in case they find her," he said.

These lines reflect the helplessness of the complainant even in the face of the most horrific circumstances. When the first step which moves the criminal machinery is stalled, we can say that justice is already denied.

A pertinent question to ask: Why is underreporting a reality in India? Answer can be found in Report on Police Reforms in India

which has cited the following facts about Underreporting of crime in India,[8]

> An expert committee under the Ministry of Statistics and Programme Implementation has noted that there is significant under-reporting of crimes under the NCRB for various reasons. For example, there could be suppression of data and low registration of crimes because the police know that their work is judged on the basis of this information. Also, sometimes victims of crime may decide against reporting the incident with the police because they are afraid to approach the police, or think the crime is not serious enough, etc. Also, note that the
> NCRB follows the 'principal offence rule' for counting crime. This means that if many offences are covered in a single registered criminal case, the NCRB will only count the most heinous of the offences. For instance, a case of murder and rape, will only be counted as a case of murder (i.e. principal offence) by the NCRB.

Further, this report also states that low government expenditure on policing, bad quality infrastructure; overburdening and lack of motivation have made police persons look at their job with less sensitivity. This was also displayed in findings of SPIR, 2018.[9] The following excerpt shows glaring realities of police public contact:

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[8] *https://www.prsindia.org/policy/discussion-papers/police-reforms-india*
[9] *https://www.commoncause.in/press_realease_show.php?id=16*

- The rich contacted the police the most (74%) while the police contacted the poor most (21%). Likelihood of police contacting the person is nearly twice as high amongst the poor (21%) as compared to the rich (12%).
- 44% respondents reported significant fear of the police/ torture in some form.

Expectations: Way Forward

The guidelines related to F.I.R. should be in Lalita Kumari judgment must be implemented. The following steps can be taken:

1. In case of the landmark judgment of D K Basu the court held that judgment must be prominently displayed. Similarly, Lalita Kumari is such a landmark judgment that its operative part must be displayed on the notice boards of thanas.
2. This must be done in vernacular language.
3. Regular workshops must be held to sensitize cutting edge police persons about the nitty gritty of provisions related to F.I.R.
4. A column must be introduced in F.I.R. (CCTNS) asking whether preliminary enquiry was conducted in a particular case.

Conclusion:

The police are the most public face of governance to any member of the citizenry. It is fair that a citizen would approach the police in any instance of breach of peace or crime. Further, he would expect that a cognizance of his grievance would be taken and he would get justice as soon as it legally possible. Lalita Kumari judgment, in fact, broadens the rights of police persons

by affording them an opportunity to conduct a preliminary enquiry before filing an F.I.R. A thorough understanding and implementation of the guidelines will serve to make the complainants as well as the police's misery less. It is a small step to ensure that no Twinkle Sharma in the future lies rotting in a garbage bin, whilst her parents search helter-skelter for her.

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Criminal Law Review 99-112

Violence against doctors: Threat of Defensive Medicine - Countering It

SHABARISH P*

Introduction:

'*Vaidyo Narayano Hari*'- This often comes to my mind when I think of a profession which is often described noble one. Yes, truly it's a privilege to be compared with God and who does not feel happy when he/she is said by someone that you are really God to us. But wait, here is the catch. Though the comparison is having brighter side which everyone likes, what is to be highlighted here is the darker side of it. When you are compared with God you are supposed to have some super natural powers which a MBBS degree does not offer. And as it's said a black dot on a clean white paper gets highlighted the same goes true with the medical profession where few cases of ill treatment masks the hard work and sacrifice that's put in by the doctor in relieving the sufferings of thousands of people and sometimes literally bringing back the life of the patient on death bed.

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Yes, I firmly believe that one has to be extremely cautious when dealing with the life of someone and especially Doctors, I believe, having worked for more than five and half years to get the degree will never go to a patient with an evil mind of ill-treating the patient and if really one is doing so he doesn't deserve to be called a doctor. The point that I am trying to highlight here is that there's an inherent risk associated with the profession and it has to be kept in mind while dealing with the medical negligence cases which is becoming a threat for healthcare in India.

Let me not bombard with the stats of ages. It would be sufficient to look at the 3 cases which happened recently - August 2016 when Dr. Abhijit Jawanjal and Dr.Sadiq Yunus were beaten up, March 2017 when Dr. Rohan Mhamokar was beaten up who lost his vision of left eye, May 2018 of Sion hospital incident and very recent one which happened in NRS Medical College, Kolkata where two interns received near fatal injuries at the hands of 200 strong mob. And the most common factor among all the cases here is the "alleged" medical negligence.

Further, a recent article published in Times of India highlights the survey conducted relating to the Medical Negligence. Just in 2 years (2013 & 2014) there have been 32 cases of workplace violence at AIIMS and as many as 8 doctors have been targeted. Almost 38% of violence witnessed was in Casualty and 'perceived injustice' was one of the key reasons. But the most horrifying fact is that in almost 91% of the cases the allegations of violence went unpunished. So where are we heading to?

Threat of defensive medicine:

Just imagine being a doctor and working in the environment where you are under constant fear of getting lynched by the mob and truly it's a threat to a Doctor-Patient relationship. In the present scenario, the threat of defensive medicine is fast underway if care is not taken in protecting the 'no-wrongdoers'. To define defensive medicine, it could be said as any deviation from 'standard of care' in order to avoid litigation.

The practice of defensive medicine is particularly common in countries where medical negligence cases are frequent occurrences leading to violence against doctors. This usually takes place in the form of diagnostic and therapeutic interventions to avoid medical liability rather than to benefit the patient. This is usually for the assurance of treating doctor. It may also occur in the form of doctors avoiding high risk procedures or circumstances. Once the fear of litigation increases among the doctors in community, the level of standard of care changes from being the one medically necessary for treatment of patient to intervention that covers the legal obligations of doctor. Obvious examples of practice of defensive medicine include performance of excessive imaging studies, unreasonably low threshold to perform Caesarean section rather than wait for natural birth. All of these translate to poor care for the patients and additionally they drive up the health care costs of the society. The fear of rising liability on doctors is also likely to make them hesitant in performing the role of Good Samaritan in emergency situations.

Countering the threat: By better awareness of what constitutes Medical Negligence.

To clearly ensure that guilty be punished and innocents are protected, one needs to have a clear understanding of what exactly constitutes medical negligence and civil and criminal liability of medical professionals.

Medical Negligence in India is a punishable offence under Indian Penal Code, Code of Criminal Procedure, Indian Contracts Act and Law of Torts. An act of omission by a medical practitioner is termed as negligence, which no reasonable practitioner would have ordinarily committed. It is expected that a medical practitioner possesses reasonable skill and practices that skill with ordinary care. Therefore any breach in such ordinary care resulting in injury or damages to the patient will amount to medical negligence. This study attempts to understand medical negligence in India and its consequent liabilities on the medical practitioners.

Any act of negligence by a medical doctor leading to any untoward consequences like death is punishable under section 304A of Indian Penal Code, therefore it is important to know the contents of the section.

> 304A. Causing death by negligence - Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

There are 3 main components of negligence:

a. A legal duty to exercise due care within the scope of such duty,
b. Breach of the said duty and,
c. Consequential damage

Therefore, in order to prove medical negligence, a patient/ plaintiff has to prove the following things against the doctor/ defendant:

a. The defendant owed a duty of care to the plaintiff,
b. The defendant made a breach of that duty,
c. The defendant suffered injury or damage as a consequence.

Duty of Care:

Duty is an obligation or commitment of an individual onto another for the benefit of the later. Legal duty, such as medical care, is different from moral social or religious duty as it has been recognized by law to avoid conduct fraught with any unreasonable risk of danger of life or safety to other. Thus, a person is only liable for negligence if he is bound by some legal duty to take care. Duty to take care also includes the duty to avoid or omit certain acts which may have negative consequences to others. It is essential to understand that, in all foreseeable damages, the defendant owes a duty to plaintiff to avoid such damages and failure to do so makes him liable. However, no liability can be fixed on the defendant, if in reasonable circumstances; it could be proved that the injury or the damages could not be foreseen.

Breach of duty:

This is the second important essential for the plaintiff to prove that the defendant not only owed him a duty of care but has also involved in breach of that duty. Negligence is a breach of duty caused by the omission of act which a reasonable man, under ordinary consideration regulating conduct of human affairs, would do. A reasonable man is a person of ordinary intelligence guided by prudence in his conduct. He is not required to display the highest skill of his specialization. Injury or damages due to breach of duty. The causal relationship between injury suffered by the plaintiff and breach of duty by the defendant must be proved to attribute medical negligence to the defendant. This burden of proof lies on the plaintiff.

Medical Negligence: Civil or Criminal Liability

Medical negligence is predominantly a civil matter, but the death of the patient may sometimes lead to criminal prosecution. Acts displaying simple lack of care give rise to civil liability which is punishable by imposing penalty on the erring medical practitioners or the hospital management. However, for a qualified doctor to be held criminally liable for negligence, the negligence must be of gross nature.

Therefore, it is said that, to prove criminal negligence, **the presence of 'mens rea' or guilty mind of the medical practitioner must be mandatory** and such negligence be of very high degree and gross, which would justify conviction under section 304-A IPC. Thus, it differentiates itself from a mere careless act or an error of knowledge and involves a reckless disregard for the lives or safety of public or an individual of a higher degree.

In a civil suit, it is adequate to prove neglect of duty by considering preponderance of possibilities. However, in criminal proceedings, it is essential to prove it beyond reasonable doubt. In a doctor-patient relationship, the presence of 'mens rea' is very rare except in rare situations. In *Syed Akbar v State of Karnataka* case,[1] the Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and criminal law. It opined that-

> there is a marked difference as to the effect of evidence, viz, the proof, in civil and criminal proceeding. In civil prosecution, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt, but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

Liability of Doctors under Criminal Law:

A doctor is expected to possess a reasonable degree of skill and knowledge and practices it with reasonable care which is neither too high nor too low. Therefore, he would be liable for negligence if his conduct falls below the standards of a reasonably or ordinarily competent practitioner in his field.

[1] *AIR 1979 SC 1848*

Protective Measures:

Benefit of certain exceptions, as provided under Indian Penal Code, is extended to doctors. They are discussed below:

a. Section 88 IPC, which provides exemption for acts, not intended to cause death, done by consent in good faith for person's benefit.
b. Section 92 IPC provides for exemption for acts done in good faith for the benefit of a person without his consent though the act cause harm to that person as that person has consented to suffer that harm.
c. Section 93 IPC saves doctors from criminality if certain communications are made in good faith .

Role of experts' opinion:

No case of criminal negligence should be registered without a medical opinion from Expert Committee of doctors. IMA (Punjab) has claimed that they have secured a directive from DGP Punjab that no case of criminal negligence can be registered against a doctor without a report from an Expert Committee.

Apex Court's Guidelines 2005:

In the case of *Dr. Suresh Gupta vs. Govt of NCT Delhi*,[2] the Full bench of the Supreme Court of India consisting of Chief Justice R.C. Lahoti, Justice G.P. Mathur, and Justice P.K. Balasubramanyam declared while reviewing the previous order that-

[2] *AIR 2004, SC 4091: (2004)6 SCC 42*

1. Extreme care and caution should be exercised while initiating criminal proceedings against medical practitioners for alleged medical negligence. In a well considered order, the apex court felt that bonafide medical practitioners should not be put through unnecessary harassment. The court said that doctors would not be able to save lives if they were to tremble with the fear of facing criminal prosecution. In such a case, a medical professional may leave a terminally ill patient to his own fate in an emergency where the chance of success may be 10% rather than taking the risk of making a last ditch effort towards saving the subject and facing criminal prosecution if the effort fails. Such timidity forced upon a doctor would be a disservice to society.

2. The court held that simple lack of care, error of judgment, or an accident is not proof of negligence on the part of a medical professional and that failure to use special or extraordinary precautions that might have prevented a particular incidence cannot be the standard for judging alleged medical negligence.

3. Statutory rules or executive instructions incorporating certain guidelines are to be framed and issued by the Government or State Government in consultation with the Medical Council of India while dealing with the complaints of medical negligence against a doctor.

4. A private complaint may not be entertained unless the complainant produces prima facie evidence before the court in the form of credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

5. Mandatory prima facie evidence: A private complaint would not be allowed unless complainant produces prima facie evidence before a court in form of an "opinion by another doctor".

The Supreme Court recently stated in *Dr Jacob Mathew's case*,[3] that in order to make a doctor criminally responsible for the death of a patient, it must be established that there was negligence or incompetence on the doctor's part which went beyond a mere question of compensation on the basis of civil liability. Criminal liability would arise only if the doctor did something in disregard of the life and safety of the patient. Certain directions have also been given in the case. The main question in the above case was whether different standards could be applied to professionals (doctors) alone, placing them on a higher pedestal for finding criminal liability for their acts or omissions.[4] The Court noted that as citizens become increasingly conscious of their rights, they are filing more cases against doctors in the civil courts, as also under the Consumer Protection Act, 1986, alleging 'deficiency in service'. Furthermore, doctors are being prosecuted under Section 304A of the IPC,[5] Section 337 IPC[6] or Section 338 IPC[7]. With this perspective in mind the Court went into the question as to what is actionable negligence

[3] *Jacob Mathew v. State of Punjab and another – 2005 SCCL.COM 456. Criminal Appeal No. 144-145 of 2004 decided by the Supreme Court on August 5, 2005.*
[4] *https://ijme.in/articles/supreme-court-judgement-on-criminal-medical-negligence-a-challenge-to-the-profession/?galley=html*
[5] *Causing death of any person by doing any rash or negligent act which does not amount to culpable homicide which is punishable with imprisonment for a term which may extend to two years.*
[6] *Causing hurt to any person by doing any rash or negligent act as would endanger human life*
[7] *Causing grievous hurt to any person by doing any rash or negligent act so as to endanger human life*

in the case of professionals. The law now laid down is as follows:

a. A simple lack of care, an error of judgment or an accident, even fatal, will not constitute culpable medical negligence. If the doctor had followed a practice acceptable to the medical profession at the relevant time, he or she cannot be held liable for negligence merely because a better alternative course or method of treatment was also available, or simply because a more skilled doctor would not have chosen to follow or resort to that practice.

b. Professionals may certainly be held liable for negligence if they were not possessed of the requisite skill which they claimed, or if they did not exercise, with reasonable competence, the skill which they did possess.

c. The word 'gross' has not been used in Section 304A of IPC. However, as far as professionals are concerned, it is to be read into it so as to insist on proof of gross negligence for a finding of guilty.

d. The maxim Res *ipsa loquitur* (Let the event speak for itself; no other evidence need be insisted) is only a rule of evidence. It might operate in the domain of civil law; but that by itself cannot be pressed into service for determining the liability for negligence within the domain of criminal law. It has only a limited application in trial on a charge of criminal negligence.

e. Statutory Rules or executive instructions incorporating definite guidelines governing the prosecution of doctors need to be framed and issued by the State and Central

governments in consultation with the Medical Council of India (MCI). Until this is done, private complaints must be accompanied by the credible opinion of another competent doctor supporting the charge of rashness or negligence. In the case of police prosecutions, such an opinion should preferably from a doctor in government service.

f. Doctors accused of rashness or negligence may not be arrested simply because charges have been leveled against them; this may be done only if it is necessary for furthering the investigation, or for collecting evidence, or if the investigating officer fears that the accused will abscond.

Directions in Matter of Arrest:

Doctor may not be arrested as a matter of routine. Arrest may be avoided unless required for further probe or collecting evidence or if there is chance for him to obstruct the probe or non cooperation with law enforcement agencies.

Proposed Guidelines for Arrest:

1. Whenever there is allegation of medical negligence against the doctor it must be supported by an opinion from another doctor. In cases of death, the IO must confirm the death and ask for autopsy by the Board of doctors (at least 3 comprising one from same specialty under which deceased was getting treatment, one forensic medicine expert).
2. SDM/ Executive Magistrate should hold an inquiry, as undertaken in cases of custodial death. Independent inquiry by IMA by board of doctors who are competent and respectable in the locality.

3. Proper consideration should be given to doctor's reputation, his experience and previous allegations, number of prospective and admitted patients under his care.
4. Adverse publicity should not be allowed.

Conclusion

To conclude I would like to reiterate the importance one should attach to a medical negligence case by quoting Apex courts judgment in Jacob Mathews case:

"*A Medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by committing to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.*

If the hands be trembling with dangling fear of facing a criminal prosecution in the possibility of failure for whatever reason-whether attributable to himself or not, neither can a surgeon successfully wield his life saving scalpel to perform an essential surgery, nor can a physician successfully administer the life saving dose of medicine. Discretion being a better part of valour, medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be at 10%(or so), rather than taking the risk of making a last ditch efforts towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

Criminal responsibility carries substantial moral overtones. Some of life's misfortunes are accidents for which no body is morally responsible, others are wrong for which responsibility is diffuse, yet others are instances of culpable conduct and constitutes grounds for compensation and at times for punishment. To distinguish between these categories requires careful, morally sensitive and scientifically informed analysis. And finally violence against doctors should be stopped and the need is to enhance the security provided to the doctors in work environment. After all, the Indian doctors deserve Right to safe work environment and lesson could be learnt from Singapore where even a taxi driver is given the right of safe work environment and passengers are penalised for violation.

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Criminal Law Review 113-131

Drug Walking - The Trails of Police Investigation

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Introduction:

Drugs are seeing a rampant rise in the state of Kerala, which otherwise boasts of brilliant development parameters and indices. The state has also been confident in the fact that its crime-reporting figures are more thorough and reliable, compared with others. So, there is a cause for real worry when a cursory glance at the Kerala Police's crime statistics for cases under special and local laws from 2008 to March 2019 show that one category of cases is on an alarming upward trajectory: cases registered under the NDPS Act.

The Narcotic Drugs and Psychotropic Substances (NDPS) Act is the main statute governing drug-related cases in the country. From a total of 508 cases registered in 2008, cases under the NDPS Act in Kerala have risen steadily over the years. In 2017, the provisional figure of cases filed was 9,242, and the first three months of 2018 saw 2,391 drug-related

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cases being filed. The table represents a better comparative picture:

Sl.No	Crime Heads	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018 (Provisionl-E&OE)	2019 (Up to April)	Trend
1	Arms Act	325	344	296	293	259	273	250	215	215	176	141	
2	NDPS Act	646	769	693	696	974	2239	4103	5924	9244	8700	3645	
3	Gambling Act	2659	3257	3601	4496	4394	3810	3691	3556	3112	2492	755	
4	Abkari Act	20213	37896	42747	52282	48828	51989	58197	65046	58994	38763	11837	
5	Explosive & Explosive substance Act	496	466	631	443	462	444	373	782	458	315	181	
6	Immoral Traffic (P) Act	314	309	197	210	180	140	138	121	52	14	12	
7	Railways Act	2	2	11	10	6	9	22	11	3	1	0	
8	Registration of foreigners Act	38	47	30	21	20	26	12	7	31	3	2	

Excise Commissioner Rishiraj Singh IPS had raised eyebrows in 2016 when he said Kerala could find itself in the same situation as Punjab was in with respect to drug trafficking and abuse within five years. The Crime in India-2016 report of the National Crime Records Bureau, which was released in late 2017, noted that Kerala's incidence rate for NDPS cases (cases per lakh people) was 16.6 per cent, second only to Punjab's 20.2 per cent (George, 2018). The serious contention as raised by officials is that despite seizure of an average of 100 kg of a variety of drugs each month, they have been unable to make a significant dent in the drug trade in Kerala. Further, as per British reports the drug-crime nexus there is growing out of proportion.

It includes activities like:

a. Serious and organised crimes
b. Widespread acquisitive crime by drug addicts to fund their habit
c. Violence generated by drug intoxication and dealers
d. Hidden social problems at homes, schools
e. Petty to dangerous crimes ranging from shoplifting to rapes and murders. (Bagchi, 2005)
f. Supporting the above, news bites from Kerala have begun painting a gory picture of the peace and security and also public order.

Along with the prevailing usage issue, another crucial pointer that probes further study in this topic is that Kerala has a literal double than average conviction rate as compared to the national scenario in IPC Cases. While the national conviction rate of IPC cases during 2016 was 46.8 per cent, in Kerala it was 84.6, according to Crime in India 2016, the latest publication of National Crime Records Bureau (The Deccan Chronicle). However when it comes with regard to downing it to NDPS Cases, whilst 4103 cases were registered in 2015 in Kerala, only 1319 were convicted. Taking it to 2016, around 5924 cases resulted in **comiction** registered only 2615 were convicted. This reflects a dismal conviction rate in Kerala for NDPS Cases hovering around 39% when seen as an average.

This brings us to probe into the efficacies of NDPS cases investigation involved in the registration, detection, investigation and charge sheet of these cases. It it necessary to understand the prevailing considerations under the act,

the existing lacunae and how these fault lines can be bridged to improve the conviction rate which does have a bearing on good investigation. Here it must be duly noted that as held in accordance to SC judgments, NDPS Investigation must generally comprise of the following steps:

a. Proceeding to the spot
b. Ascertainment of the facts and circumstances of the cases
c. Discovery and arrest of the suspected offender.
d. Collection of evidence relating to the commission of the offence in a duly mentioned manner, which also consists of witness examination and search of places for seizure.
e. Opinion formation as to whether the material collected has a serious offence so committed where it has to be placed before the magistrate for trial and if so necessary steps must be taken to file charge sheet. (Bagchi, 2005)

Authorities handing NDPS cases:

It is essential that a clear knowledge is available on who is authorised to look into the dealing of NDPS Cases. As per section 41, 42 and by virtue of section 4 of NDPS Act, the following have the authority:

a. State Police
b. Central excise department
c. Narcotics
d. Customs
e. Revenue intelligence

f. Narcotic control bureau (by notification no so 96 (E) dated 17.3.1986)
g. Any other department of central government including the para military forces or armed forces.

This reflects that with the involvement of several authorities our numbers of cases registered, cases detected, those convicted should rise stupendously. However, this creeps in the certain faulty techniques adopted in investigation, lack of coordination between various agencies that have painted a not a very nice picture of NDPS Investigation.

Specific considerations during Investigation of NDPS cases:

a. In all cases of NDPS detection, the detecting officer has to prove the culpable mental State of the accused. Every culpable mental State contains intention, motive, knowledge of the fact, and reason to believe a fact.
b. Usually in an offence to be committed, the 4 stages must be covered - Intention, Preparation, Attempt and Commission. In section 28 of NDPS Act, it is specific that even an attempt would be treated at par with the offence committed. Similarly even preparation is an offence as per section 30 of the Act, if read specifically with regard to 19,24, 27 of the Act and commercial quantity. This reflects that just commission of an offence is not an end in itself, as the very precursors to the same can trigger the criminal law into motion.

c. Moreover to make the investigation most effective, the IO has to prove the exclusive conscious possession of the alleged Drugs. In this case the panch witnesses play a crucial role during the search which is integrated into this point. The Supreme Court has held in the case of *Baldev Singh Vs. State of Haryana*,[1]:

> Once the physical possession of the contraband by the accused has been proved, Section 35 of the NDPS Act comes into play". Sec 35 of the Act stands for presumption of culpable mental state.

d. The Sealing and Sampling of the MOS is of utmost reverence. The sealing of the same must be done in two heat salted plastic bags and then kept in paper envelopes which in turn are sealed and marks as original and duplicate. Due consideration must be given to the test memo and sent to the laboratory. The contraband article must also be sent to the magistrate.
e. Chain of Custody has to be proved before the court of law. Chain of custody refers to the Chronological documentation and or paper trail showing the Seizure, Custody, Control, transfer, analysis and disposition of evidence, physical or electronic.
f. In most of the situation, the Police takes the service of gazetted officers from the Police department. This will cause the acquittal of the case. The Gazetted officers should not be the member of the raiding party. He should be independent. Any person being

[1] *(2015) 17 SCC 554*

searched has a right to be searched before a Gazetted Officer or a Magistrate.[2] The officer searching the person has to explain to the person that he has a right to be searched before a Gazetted Officer or a Magistrate and if the person wishes to be searched before a Gazetted Officer or a Magistrate he should be taken to the Gazetted Officer or the Magistrate and searched. However, if the officer has reason to believe that it is not possible to take him to a Gazetted officer or a magistrate without giving him a chance to part with the drug, controlled substance, etc., he can search him.[3]

g. Searches: As per Section 41 of the NDPS Act, Gazetted Officers of the empowered Departments can authorise searches. Such authorisation has to be based on information taken down in writing. As per Section 42, searches can be made under certain circumstances without a warrant (from a magistrate) or an authorisation (from a Gazetted Officer). In case of such searches, the officer has to send a copy of the information taken in writing or the grounds of his belief to his immediate official superior within 72 hours.
h. Arrests: The person who is arrested should be informed, as soon as may be, the grounds of his arrest.[4]If the arrest or seizure is based on a warrant issued by a magistrate, the person or the seized article should be forwarded to that magistrate.[5]

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[2] *Section 50*
[3] *Section 100 of the Cr. P. C., Section 50(5) and 50 (6) of NDPS*
[4] *Section 52 (1)*
[5] *Section 52(2)*

Prevailing lacunae in the Investigation:

A rise in NDPS cases being detected and a preliminary understanding based on readings of various judgments and interviews with ground level officers reflect a number of drawbacks on the side of the investigating teams. They have broadly been enlisted below, so as to draw our attention on the existing loopholes:

a. Inordinate delay is often noticed in Sending the FIR and connected records to the court in time which creates a doubt in the mind of the court with regard to the genuineness of the detection.
b. Police and excise relation- Though both the departments deal in the anti narcotic activities, it is often noticed that greater moves could be made in the matter of detection only by the Excise Department. This may be due to many reasons like, their Concentrated effort, plenty of sources, lack of heavy work load and pressure and Separate secret fund for the informants etc. The Police on the other hand, out of their innumerable other activities, often find difficulty in concentrating on the detection of NDPS cases. Though both department keeps cordial relations in the normal sense, there is an existing strain in regard to NDPS cases which leads to non-co-operation and counter- blaming. In the process, several cases go undetected and the criminals flourish on the same.
c. In most of the cases, the Source of NDPS can't be unearthed due to many reasons. The detection problem, the lack of timely information plays

spoilsport in such cases. In situations where the detection is effected at places where no independent witness are available, the whole task is vested on the detecting officer to prove the case beyond reasonable doubt. In situation where the detection is effected at places where law and order situation is prone to happen, full and justifiable detection will not be possible. In such cases there are chances of planting of the witnesses in the case.

d. Most of the Detecting officers are reluctant to take the Service of modern technology and forensic tools. The various drug detection kits are not adequately utilised for this purpose. As a result there exists concerns if the items so seized are of contraband nature, as based on just sensory impulses cannot be ground enough, especially as the nature of drugs used and seized are changing with changing times.
e. No Police officer takes pain to take steps against the NDPS Accused's illegally acquired property. This allows the proceeds of crime to thrive. This may be of no concern immediately to the IO but it not being addressed, lays fertile ground for the future of drug trails to prevail.
f. Most of the detecting officers are not aware of the minute formalities enshrined in the NDPS Act and naturally many procedural irregularities are prone to creep in. These irregularities will bring the case to acquittal. The lack of continuous training and up-gradation of nuances associated with NDPS investigation can affect the cases related with the act.

g. For offences involving Section 19, 24, 27A or for offences involving commercial quantity, a complaint (in case of non-police officers)/a charge sheet (in case of police officers) must be filed within 180 days and in all other cases 60 days from the date of arrest. However in the first category of the cases, the court may extend the said period up to one year upon sufficient cause shown by Drug Law Enforcement Officer through the Public Prosecutor. This knowledge gap of period extension in case of serious NDPS offences causes the IO to make a hastened charge sheet and could also signify shoddy, pieced up investigation (Field Officer's Handbook).
h. Inadequate records of when the contraband, seized article was delivered to the magistrate. The improper record maintenance of the delivery of the same, ie date, time and officer in charge, could reflect foully on the police side and could be taken up in the court of law.
i. Improper knowledge of the existing and new entrants to the category of contraband substances. Hence, even during vehicle checking - investigation falls short at the detection stage only because of poor database enhancement.
j. The seizing, sampling and labelling of the seized articles is also of poor nature. It is usually preferred that a dedicated weighing scale should be always available with the police party. However this is breached, where it is borrowed from vegetable vendors. Hence the weighing scale used has no authenticity that could be proved in the court. The sample should usually be taken before the magistrate

and in a prescribed format. However varying drug enforcement agencies use different sampling techniques that affects the trial process.[6]

k. The court has demanded in the *Mohinder Singh vs State of Punjab* that the prosecution must establish the quantity of contraband article seized - thereby establishing the NDPS Offence. The best specimen to prove this would be the court records as to the production of the contraband before the Magistrate and deposit of the same in the Malkhana. However poor police station record maintenance may fail the case at the trial stage. The police fail to realise the importance of records, which is quintessential in a law that is so procedural and strict in its own sense.

l. The destruction of the contraband articles is not done in the stated manner. The existence of a Drug Disposal Committee is as good as non existential or even if present, it's not actively triggered to do any action. Thus in the court of law, when methods associated with the destruction of the seized items are put forth by the defence, usually the prosecution tends to fumble.

m. The lack of knowledge of informing superiors within 72 hours of obtaining the information or the delay in the same, can be a point to be pondered upon. Here, records like the GD entry of the information so obtained are of importance. But preliminary knowledge of police station level work reflects inadequate focus and due attention being given to the GD maintenance.

[6] *Delhi Police Training College Study Material, 2005.*

n. A joined communication is usually given u/s 50 of the Act to two or more accused in a case. It purports the very purpose of the section and would affect conviction as stated in *State of Rajasthan vs Paramanand and another.*[7]

o. The seal if it is tampered with, could reflect malafide intentions of the investigation team. The improper handling of seals, it not being given to independent witnesses, different seals on different samples of the same case- could weaken the case.

p. Usually due to a nexus between the Gazetted officer and the police, they go hand in gloves where arm chair investigation could take place. Without actually going to the scene of crime, documents are forged of the presence of such officers. However when the defence checks on the CDR of the stated officers, improper match of the location and the time stated in records could be bad for the case.

q. Non compliance of section 57 of the NDPS Act also adds to reasons of acquittal as stated in the *Haider Ansari vs State*.[8] A report of the arrest and the seizure not being sent to the higher authorities within 48 hours could weaken the case. It must be noted that, though the non-compliance of the provisions of section 57 by itself is not mandatory but directory only, it may not vitiate the recovery of contraband substance single-handedly, but in case it is found that the accused has been caused prejudice by its non-compliance, it may adversely impact the

[7] *2014(2) RCR (Criminal) 40 (SC).*

[8] *Decided on 22 February, 2018*

case of prosecution. If delay occurs in compliance of this provision, that can be condonable but total non-compliance maybe taken to affect the accused adversely. Its non-compliance may have adverse impact on the probative value of evidence regarding arrest and search.

Plugging the investigation Loopholes:

In addition to addressing the above lacunae and building on the same, an overall analysis reflects that the following steps could be taken in, to improve conviction rates:

a. The investigating officer should be aware of the new generation drugs and pharmaceutical drugs.
b. Addition of the Drug Detection Kit: These kits assist the DLEO in forming a reasonable belief about a substance being a drug. The kit is a portable case containing different reagents that are used to test a small quantity of the substance recovered and determine the nature of the substance based on the colour range resulting from the reactions of the suspect substance with the reagents. There are three types of test kits used at present: *Narcotic Drugs Kit* to test traditional drugs like Ganja, Charas, Opium, Heroin, Cocaine, and the like; Precursor Chemicals kit to test Acetic Anhydride, Ephedrine, Pseudoephedrine etc. and *Ketamine Kit*. All these kits are very user friendly and come with an instruction sheet to guide the user draw appropriate inference. It is essential that the DLEO conducts the test, matches the resultant colour and forms a

reasonable belief that the substance gives positive colour pattern for a drug. This process must be recorded in the *Panchanama* (Field Officer's Handbook). In Meghalaya infact there are dedicated teams that are the carriers, testers and users of the Drug Addiction Kit. These special units being wholly dedicated ensure good quality assurance of the existence of the drug.

c. The latest changes in NDPS Act and the rulings of High courts and Supreme Court should be brought to the notice of the IOs. This can be done with PHQ circulars being printed in this regard and discussed with the various stakeholders, at frequent intervals. These add ons, amendments, enhancements in investigation alter with passing times. Thus these frequent up-gradation sessions are needed for refreshing the mindset.
d. Maximum digital evidence including CDR, voice records, Bank transactions etc. should be utilised in the investigation of the case to fit the accused with the case. However this should not be an end in itself. The adequate focus shall yet remain the physical seizure of the contraband articles, the vehicle that maybe transporting it. The digital evidence should infact be an additional component supplementing the investigation, thereby corroborating the same.
e. The destruction of the seized articles should be done by roping in the Drug Disposal Committee. This is done after an application which is sent to the Magistrate under the Notification of the Ministry of Finance, 2015 (The annexure is attached below). This application includes the inventory of the seized

items in accordance to section 52A of NDPS Act. This is then sent to the committee along with photographs, samples to decide the mode of disposal. Following this procedure ensures that a supervisory team exists to address the vulnerabilities of misuse, theft, substitution.

f. The seizing officer and the investigating officer of NDPS cases must be different. These are newly added directives which must be well publicised to ensure awareness of the same.
g. If the chain of evidence in the case could be proved beyond doubt before the court there is every chance for conviction. The chain of custody is the most pivotal in these cases hence the sampling, sealing must be properly adhered to as in accordance of stated procedures. At the onset, the IO has to prove that the detection was bonafide. This can be done by having timely GD entry of the information, passing on the information to the seniors in stipulated time-so as to hold the case true before the court of law. Need for coordination with the various departments. In fact, the excise department is a crucial arm in this regard. Joint raids, aiding in investigation trails must be positive fallouts of a healthy relationship. Regular NDPS coordination conferences must be held, and the information exchange would enhance the database of both the teams. Working in isolation is a loose situation for both the departments and a win for the offenders.
h. The seized items should be ensured that they are sent to the concerned FSL for analysis and report within 72 hours of seizure. The inventory of seized

items is of crucial importance for the trial process. If the sized items, packages, articles and documents recovered are large in number, separate inventories should be made for each type of item, giving details such as serial number allotted, description of the item, marks and numbers found thereon, quantity, weight etc. All the recovered and seized documents must be signed by the owner/occupier, witnesses and the DLEO himself (Field Officer's Handbook).

i. Each piece of the investigation process must fall in place. Hence, loopholes like movement of officers (as corroborated by CDR Analysis), signatures on seizure memos, photography of the sampling process may be followed.
j. Various authorities dealing with NDPS investigation must continuously brush their knowledge of the new techniques adopted by the offenders. A outdated understanding of the modus operandi of these criminals, can put us on the backfoot. Regular patrolling, strengthening the beat system, evolving the concept of Janmaitri policing to gather information from resident associations could be steps that could be considered. Local based intelligence collection is a crucial trigger point to put the law in motion.

Conclusion:

The Narcotic Drug and Psychotropic Substances (NDPS) Act is a procedural law. The more stringent its provisions are, the more well engrained punishment exists and an equally uptight trial process prevails. For the sake of conviction, every minute detail of investigation is of

immense importance for the prosecution to prove the case. The nature of crimes are changing along with the social conditions. As the menace of drugs is on the rise, and taking a terrible turn towards dooming the society - as law enforcers and also as citizens having certain moral obligations towards society, the police must look into these cases with all seriousness. Just following procedures with all due regard to the letter and spirit of the law, the court judgments would nab these nuisance creators and would reflect in our conviction rates.

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