Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 223 OF 2008

Rattiram & Ors. .....Appellant

Versus

State of M. P. Through
Inspector of Police .....Respondent

WITH

CRIMINAL APPEAL NO. 458 OF 2008

Satyanarayan & ors. .....Appellant

Versus

The State of Madhya Pradesh Through
Incharge, Police Station Cantt. .....Respondent

J U D G M E N T

Dipak Misra, J.

Perceiving divergent and contradictory views as regards the effect and impact of not committing an accused in terms of Section 193 of the Code of Criminal Procedure (for short 'the Code') in cases where charge-sheet is filed under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of

Atrocities) Act, 1989 (for brevity 'the Act') and cognizance is directly taken by the Special Judge under the Act, a two-Judge Bench thought it apposite to refer the matter to a larger Bench and on the basis of the said reference, the matter has been placed before us. At this juncture, it is requisite to clarify that the real conflict or discord is manifest in ***Moly and Another* v. *State of Kerala***[1] and ***Vidyadharan* v. *State of Kerala***[2] on one hand wherein it has been held that the conviction by the Special Court is not sustainable if it has *suo motu* entertained and taken cognizance of the complaint directly without the case being committed to it and, therefore, there should be retrial or total setting aside of the conviction, as the case may be, and the other in ***State of M. P.* v. *Bhooraji & Ors.***[3] wherein, taking aid of Section 465 (1) of the Code, it has been opined that when a trial has been conducted by the court of competent jurisdiction and a conviction has been recorded on proper appreciation of evidence, the same cannot be erased or effaced merely on the ground that there had been no committal proceeding and cognizance was taken by the Special Court inasmuch as the same does not give rise to failure of justice.

---

[1] AIR 2004 SC 1890
[2] (2004) 1 SCC 215
[3] AIR 2001 SC 3372

2. The necessitous facts required to be adumbrated for the purpose of answering the present reference are that the appellants were charge sheeted under Section 3 (1) (x) of the Act but eventually, charges were framed under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code (for short, 'the IPC'). The learned Trial Judge vide judgment dated 31.08.1996 in Sessions Trial No. 97 of 1995 convicted all the accused persons barring Mohan for the offences under Section 302 read with Section 149 IPC and sentenced them to imprisonment for life with a fine of Rs. 1000/-, in default of payment of fine, to suffer further rigorous imprisonment for three months and sentenced to one month rigorous imprisonment under Section 147 of the IPC. The accused Mohan was convicted for the offence under Sections 148 and 302 of the IPC and was sentenced to undergo one month rigorous imprisonment on the first score and to further life imprisonment and pay a fine of Rupees 1000/-, in default of payment of fine, to suffer further R.I. for three months on the second count.

3. Being dissatisfied with the judgment of conviction and the order of sentence, the appellants along with others preferred

Criminal Appeal No. 1568 of 1996 before the High Court of Judicature of Madhya Pradesh at Jabalpur. Apart from raising various contentions on merits, it was pressed that the entire trial was vitiated as it had commenced and concluded without committal of the case to the Court of Session as provided under Section 193 of the Code. Heavy reliance was placed on ***Gangula Ashok and Another*** **v.** ***State of Andhra Pradesh***[4] and ***Moly and Another*** (supra) and ***Vidyadharan*** (supra) but the Division Bench placed reliance on ***Bhooraji*** (supra) wherein ***Gangula Ashok*** (supra) was distinguished keeping in view the stage of the case and regard being had to the provision contained in Section 465 of the Code and treated the same to be a binding precedent in view of the special Bench decision of the High Court of Madhya Pradesh rendered in ***Jabalpur Bus Operators Association and Another*** **v.** ***State of Madhya Pradesh and Another***[5] and repelled the contention accordingly. Thereafter, as the impugned judgment would reveal, the Bench proceeded to deal with the matter on merits and eventually sustained the conviction and affirmed the sentence as has been indicated hereinbefore.

---

[4] AIR 2000 SC 740
[5] 2003 (1) MPJR 158

4. We have heard Mr. Fakhrudin, learned senior counsel and Mr. Anis Ahmed Khan for the appellants in both the appeals and Ms. Vibha Datta Makhija, learned counsel for the respondent-State.

5. At the very outset, we shall advert to the jurisdiction or authority of the Special Court to take cognizance of the offence under the Act regardless of the interdict stipulated in Section 193 of the Code. Section 193 of the Code reads as follows:

> "**193. Cognizance of offence by Court of Session-** Except as otherwise expressly provided by this Code or by any other law for the time being in force, no court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this code."

On a plain reading of the aforesaid provision, it is clear as noon day that no Court of Session can take cognizance of any offence as a court of original jurisdiction except as otherwise expressly provided by the Code or any other law for the time being in force.

6. The questions that emanate, as a natural corollary, for consideration are whether the Special Court as constituted under

the Act is a Court of Session; and whether there is any special provision in the Act enabling the said court to take cognizance.

7. In ***Gangula Ashok*** (supra), a two-Judge Bench of this Court, after taking note of Section 6 of the Code and Section 14 of the Act, came to the conclusion that the intendment of the legislature is to treat the Special Court under the Act to be a Court of Session even after specifying it as a Special Court and it would continue to be essentially a Court of Session and not get denuded of its character or power as a Court of Session. The Court scanned the anatomy of the Act and analysed the postulates contained in Sections 4 and 5 of the Code and thereafter, referring to the Constitution Bench decisions in ***A. R. Antulay*** **v.** ***Ramdas Sriniwas Nayak and another***[6] and in ***Directorate of Enforcement*** **v.** ***Deepak Mahajan and another***[7], expressed thus:

> **"16.** Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid down before the Special Court under the Act.

[6] (1984) 2 SCC 500
[7] (1994) 3 SCC 440

8. In ***Vidyadharan*** (supra), the Court delved into the said issue and eventually proceeded to state as follows:

> "23. Hence, we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid down before the Special Court under the Act. We are reiterating the view taken by this Court in ***Gangula Ashok* v. *State of A.P***. [(2000) 2 SCC 504 : 2000 SCC (Cri) 488] in the above terms with which we are in respectful agreement. The Sessions Court in the case at hand, undisputedly, has acted as one of original jurisdiction, and the requirements of Section 193 of the Code were not met."

The aforesaid view was reiterated in ***Moly*** (supra). In ***M. A. Kuttappan* v. *E Krishnan Nayanar and another***[8], another two-Judge Bench ruled that the Special Judge under the Act cannot entertain a complaint filed before it and issue process after taking cognizance without the case being committed to it for trial by the competent Magistrate. It is apt to mention here that similar view has been spelt out in ***Bhooraji*** (supra).

9. After careful perusal of the aforesaid decisions, we have no scintilla of doubt that the view expressed which has a base of

[8] (2004) 4 SCC 231

commonality is absolutely correct and there is no necessity to dwell upon the same more so when there is no cavil or conflict in this regard and there has been no reference on the said score. Additionally, no doubt has been expressed relating to the exposition of the said view, and irrefragably correctly so.

10. The demonstrable facet of the discord is that if cognizance is directly taken by the Special Judge under the Act and an accused without assailing the same at the inception allows the trial to continue and invites a judgment of conviction, would he be permitted in law to question the same and seek quashment of the conviction on the bedrock that the trial Judge had no jurisdiction or authority to take cognizance without the case being committed to it and thereby violated the mandate enshrined under Section 193 of the Code.

11. To make the maze clear, it is profitable to note that in ***Gangula Ashok*** (supra), the appellants had called in question the legal substantiality of the order passed by the Single Judge of the High Court of Andhra Pradesh who, after expressing the view that the Special Judge had no jurisdiction to take cognizance of the offence under the Act without the case being

committed to it, set aside the proceedings of the Special Court and further directed the charge-sheet and the connected papers to be returned to the police officer concerned who, in turn, was required to present the same before the Judicial Magistrate of Ist Class for the purpose of committal to the Special Court. That apart, the Single Judge further directed that on such committal, the Special Court shall frame appropriate charges in the light of the observation made in the order.

12. The two-judge Bench accepted the view as far as it pertained to setting aside of the impugned order but did not approve the direction issued for the steps to be taken by the Special Judge for framing of charges as it was of the view that no direction could have been issued to the Special Court as it was open to the appellants therein to raise all their contentions at the stage of framing of charge if they wished to advance a plea for discharge. Thus, it is evident that the accused-appellants had challenged the order of framing of charge and sought quashing of the same before the High Court. They did not wait for the trial to commence and the judgment of conviction to visit them.

13. After the dictum in ***Gangula Ashok*** (supra), the High Court of Madhya Pradesh was dealing with an appeal, ***Bhooraji*** (supra), wherein the appellants were convicted under Sections 148, 323, 302/149 IPC and sentenced to various punishments including imprisonment for life. It is worth noting that they were tried by the Special Judge under the Act as charge-sheet was filed under Section 3 (2) of the Act along with other offences of the IPC. When the matter came up before the Division Bench of the High Court, the learned Judges commenced the judgment with the prelude that the case had sluggished for more than nine years and the end was not in sight as direction for retrial seemed inevitable because of the decision rendered by this Court in ***Gangula Ashok*** (supra).

14. Be it noted, cognizance was taken directly by the Special Judge in the said case also. The anguish and the helplessness expressed by the High Court was taken note of when the State of Madhya Pradesh approached this Court. This Court laid emphasis on the fact that it was a case where the accused neither raised any objection when they were heard at the time of framing of the charge nor did they raise such a plea at any stage either before or after the evidence was recorded by the trial Court

but, a significant one, proponed such a contention only after the conviction was recorded and that too after the decision in ***Gangula Ashok*** (supra) was rendered.

15. As is perceptible, the Bench posed the question whether the High Court necessarily should have quashed the trial proceedings to be repeated only on account of the declaration of the legal position made by this Court concerning the procedural aspect about the cases involving the offences under the Act. The Bench referred to the provisions contained in Sections 462 and 465 of the Code and adverted to the concept of "a failure of justice" and held thus:

> "15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.
>
> xxx xxx xxx xxx xxx
>
> 17. It is an uphill task for the accused in this case to show that failure of justice had in fact

occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. The normal and correct procedure, of course, is that the case should have been committed to the Special Court because that court being essentially a Court of Session can take cognizance of any offence only then. But if a specified Sessions Court, on the basis of the legal position then felt to be correct on account of a decision adopted by the High Court, had chosen to take cognizance without a committal order, what is the disadvantage of the accused in following the said course?

18. It is apposite to remember that during the period prior to the Code of Criminal Procedure 1973, the committal court, in police charge-sheeted cases, could examine material witnesses, and such records also had to be sent over to the Court of Session along with the committal order. But after 1973, the committal court, in police charge-sheeted cases, cannot examine any witness at all. The Magistrate in such cases has only to commit the cases involving offences exclusively triable by the Court of Session. Perhaps it would have been possible for an accused to raise a contention before 1973 that skipping committal proceedings had deprived him of the opportunity to cross-examine witnesses in the committal court and that had caused prejudice to his defence. But even that is not available to an accused after 1973 in cases charge-sheeted by the police. We repeatedly asked the learned counsel for the accused to tell us what advantage the accused would secure if the case is sent back to the Magistrate's Court merely for the purpose of retransmission of the records to the Sessions Court through a committal order. We did not get any

> satisfactory answer to the above query put to the counsel."

16. After so stating, the Court proceeded to deal with the stance whether the Special Judge as a Court of Session would remain incompetent to try the case until the case is committed and, after critical ratiocination, declined to accept the said stand and opined that the expression "a Court of competent jurisdiction" as envisaged in Section 465 of the Code is to denote a validly constituted court conferred with the jurisdiction to try the offence or offences and such a court could not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance with the procedural requirement. The Bench further proceeded to lay down that the inability to take cognizance of an offence without a committal order does not mean that a duly constituted court becomes an incompetent court for all purposes. It was also ruled that had an objection been raised at the earlier stage, the Special Judge could have sent the record to the Magistrate for adopting committal proceeding or return the police report to the Public Prosecutor or the police for presentation before the Magistrate. In essentiality, it has been laid down that

the bar against taking cognizance of certain offences or by certain courts cannot govern the question whether the Court concerned is a "Court of competent jurisdiction" and further the condition precedent for taking cognizance is not the standard to determine whether the Court concerned is "a Court of competent jurisdiction". In the ultimate eventuate, ***Bhooraji*** (supra) ruled that when the trial had been conducted by a Court of competent jurisdiction, the same cannot be annulled by such a lapse and, accordingly, remitted the matter to the High Court for disposal of the appeal afresh on the basis of evidence already on record. It needs no special emphasis to highlight that in ***Bhooraji*** (supra), the controversy had emerged on the similar set of facts and the legal issues had emanated on the common platform and were dealt with. Therefore, unquestionably, it was a precedent operating in the field.

17. It is seemly to note that the decision in ***Bhooraji*** (supra) was possibly not brought to the notice of their Lordships who have decided the cases in ***Moly*** (supra) and ***Vidyadharan*** (supra). In ***Moly*** (supra), later two-Judge Bench set aside the judgment of conviction and remitted the matter as cognizance

was directly taken by the Special Court. In ***Vidyadharan*** (supra), the Bench held thus:-

> "24. The inevitable conclusion is that the learned Sessions Judge, as the undisputed factual position goes to show, could not have convicted the appellant for the offence relatable to Section 3(1)(*xi*) of the Act in the background of the legal position noted supra. That is, accordingly, set aside. However, for the offence under Sections 354 and 448 IPC, custodial sentence for the period already undergone, which as the records reveal is about three months, would meet the ends of justice considering the background facts and the special features of the case."

As is perceivable, in one case, the matter was remitted and in the other, the conviction under Section 3 (1)(xi) was set aside and no retrial was directed.

18. At this stage, we may proceed to x-ray the ratio of ***M. A. Kuttappan*** (supra). In the said case, the challenge was to the order passed by the High Court under Section 482 of the Code wherein the learned Judge had quashed the order of the Special Judge taking cognizance of the offence under Section 3 (1)(x) of the Act. The two-Judge Bench referred to the authorities in ***Gangula Ashok*** (supra) and ***Vidyadharan*** (supra) and gave the

stamp of approval to the order passed by the High Court and eventually, while dismissing the appeal, observed as follows:-

> "However, it will be open to the appellant, if so advised, to file a complaint before a competent Magistrate who shall consider the complaint on its merit and then proceed in accordance with law. The learned Special Court as well as the High Court have made certain observations touching on the merit of the controversy. We make it clear that in case a complaint is filed by the appellant before a competent Magistrate, he shall proceed to consider the matter in accordance with law uninfluenced by any observation made either by the learned Special Judge or by the High Court. Nothing said in this judgment also shall be construed as expression of opinion on the merit of the case."

19. It is apposite to note that in the said case, the assail was different and the Bench was not considering the effect of non-committal under Section 193 of the Code after conviction was recorded. Though it referred to the authority in ***Vidyadharan*** (supra), yet that was to a limited extent. Hence, the said pronouncement cannot be regarded or treated to be one in line with ***Vidyadharan*** (supra) and is, therefore, kept out of the purview of conflict of opinion that has emerged in the two streams of authorities.

20. Before we advert whether ***Bhooraji*** (supra) was correctly decided or ***Moly*** (supra) and ***Vidyadharan*** (supra) laid down the law appositely, it is appropriate to dwell upon whether ***Bhooraji*** (supra) was a binding precedent and, what would be the consequent effect of the later decisions which have been rendered without noticing it.

21. In ***Union of India and Another* v. *Raghubir Singh (dead) by L. Rs. And Others***[9], the Constitution Bench, speaking through R. S. Pathak, CJ, has held thus:-

> "We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court"

22. In ***Indian Oil Corporation Ltd.,* v. *Municipal Corporation and Another***[10]**,** the Division Bench of the High Court had come to the conclusion that the decision in ***Municipal Corporation, Indore* v. *Smt. Ratna Prabha & Ors.***[11] was not a binding precedent in view of the later decisions of the co-equal

---

[9] (1989) 2 SCC 754
[10] AIR 1995 SC 1480
[11] AIR 1977 SC 308

Bench of this Court in ***Dewan Daulat Rai Kapoor*** **v.** ***New Delhi Municipal Committee***[12] **and** ***Dr. Balbir Singh*** **v.** ***Municipal Corporation Delhi***[13]. It is worth noting that the Division Bench of the High Court proceeded that the decision in ***Ratna Prabha*** (supra) was no longer good law and binding on it. The matter was referred to the Full Bench which overruled the decision passed by the Division Bench. When the matter travelled to this Court, it observed thus:-

> "The Division Bench of the High Court in 1989 MPLJ 20 was clearly in error in taking the view that the decision of this Court in Ratna Prabha (AIR 1977 SC 308) (supra) was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal Bench of this Court did not and could not do."

23. In ***Chandra Prakash and Others*** **v.** ***State of U.P. and Another***[14], a subsequent Constitution Bench reiterated the view that had already been stated in ***Raghubir Singh*** (supra).

24. Thus viewed, the decision in ***Bhooraji*** (supra) was a binding precedent, and when in ignorance of it subsequent decisions have been rendered, the concept of *per incuriam* would come into play. In this context, it is useful to refer to a passage from ***A. R.***

[12] AIR 1980 SC 541
[13] AIR 1985 SC 339
[14] (2003) SCC (L & S) 827

Antulay (supra), wherein, Sabyasachi Mukharji, J (as his Lordship then was), while dealing with the concept of *per incuriam,* had observed thus:-

> ""*Per incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

Again, in the said decision, at a later stage, the Court observed:-

> "It is a settled rule that if a decision has been given *per incuriam* the court can ignore it."

25. In ***Punjab Land Development & Reclamation Corporation Ltd.* v. *Presiding Officer, Labour Court, Chandigarh & Ors.***[15], another Constitution Bench, while dealing with the issue of *per incuriam,* opined as under:-

> "The Latin expression *per incuriam* means through inadvertence. A decision can be said generally to be given *per incuriam* when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court."

26. In ***State of U. P. And Another* v. *Synthetics and Chemicals Ltd. And Another***[16], a two-Judge Bench adverted in

[15] (1990) 3 SCC 682
[16] (1991) 4 SCC 139

detail to the aspect of *per incuriam* and proceeded to highlight as follows:-

> "'Incuria' literally means 'carelessness'. In practice *per incuriam* appears to mean *per ignoratium.* English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority'. (*Young v. Bristol Aeroplane Co. Ltd.*[17]). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

27. Recently, in ***Siddharam Satlingappa Mhetre* v. *State of Maharashtra and Ors.*** [18], while addressing the issue of *per incuriam*, a two-Judge Bench, speaking through one of us (Bhandari, J.), after referring to the dictum in ***Bristol Aeroplane Co. Ltd.*** (supra) and certain passages from *Halsbury's Laws of England* and ***Raghubir Singh*** (supra), has stated thus:-

> "149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments

[17] (1944) 1 KB 718 : (1944) 2 ALL ER 293
[18] AIR 2011 SC 312 : (2011) 1 SCC 694

> mentioned in paragraphs 135 and 136 are by two or three judges of this Court. These judgments have clearly ignored a Constitution Bench judgment of this Court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of Code of Criminal Procedure Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.
>
> 150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength."

28. The sequitur of the above discussion is that the decisions rendered in ***Moly*** (supra) and ***Vidyadharan*** (supra) are certainly *per incuriam*.

29. Presently, we shall proceed to address which view should be accepted as just and flawless. The centripodal issue, as we understand, is whether non-compliance of the interdict as envisaged and engrafted under Section 193 of the Code nullifies the final verdict after the trial and warrants its total extinction resulting in retrial, or it is incumbent on the part of the convict to exposit and satisfy that such guillotining of the interdict has occasioned in 'failure of justice' or culminated in causation of

prejudice to him for the purpose of declaring that the trial was vitiated.

30. In ***Bhooraji*** (supra), the Bench has referred to Sections 462 and 465 of the Code which occur in Chapter 35 of the Code. Section 465 reads as follows:-

> "**465. Finding or sentence when reversible by reason of error, omission or irregularity. -** (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.
>
> (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

31. On a studied scrutiny of the anatomy of the said provision, it is luculent that the emphasis has been laid on a 'court of competent jurisdiction' and 'error, omission or irregularity in the

complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial' and 'a failure of justice has in fact been occasioned thereby'. The legislative intendment inhered in the language employed is graphically clear that lancination or invalidation of a verdict after trial is not to be taken recourse to solely because there is an error, omission or irregularity in the proceeding. The term 'a failure of justice' has been treated as the *sine qua non* for setting aside the conviction.

32. The submission of Mr. Fakkruddin and Mr. Anis Ahmed Khan, learned counsel for the appellants, is that it is not a mere irregularity but a substantial illegality. They have placed heavy reliance on paragraph 11 of ***Moly*** (supra) wherein the Bench has used the expression 'that Section 193 imposes an interdict on all courts of Session against taking cognizance of an offence as a Court of original jurisdiction' and have also drawn inspiration from paragraph 17 of the said decision which uses the words 'lack of jurisdiction'. The question posed by us fundamentally relates to the non-compliance of such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that

defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.

33. In ***Mrs. Kalyani Baskar* v. *Mrs. M. S. Sampoornam*** [19], it has been laid down that 'fair trial' includes fair and proper opportunities allowed by law to the accused to prove innocence and, therefore, adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed and the courts should be zealous in seeing that there is no breach of them.

34. In this regard, we may fruitfully reproduce the observations from ***Sidhartha Vashisht* v. *State (NCT of Delhi)*** [20] wherein it has been so stated: -

> "In the Indian Criminal jurisprudence, the accused is placed on a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places

[19] (2007) 2 SCC 258
[20] (2010) 6 SCC 1

> human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."
>
> [Underlining is ours]

35. It would not be an exaggeration if it is stated that a 'fair trial' is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by Rule of Law. Denial of 'fair trial' is crucifixion of human rights. It is ingrained in the concept of due process of law. While emphasising the principle of 'fair trial' and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases, because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred. The seminal issue is whether protection given to the accused under the law has been jeopardised as a

consequence of which there has been failure of justice or causation of any prejudice. In this regard, it is profitable to refer to the decision in ***Gurbachan Singh* v. *State of Punjab*** [21] wherein a three-Judge Bench has opined thus:-

> "This court in '*Willie (William) Slaney v. The state of Madhya Pradesh*[22] elaborately discussed the question of the applicability of Section 537 and came to the conclusion that in judging a question of prejudice, as a guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.
>
> [Emphasis added]

36. Having dealt with regard to the concept of 'fair trial' and its significant facets, it is apt to state that once prejudice is caused to the accused during trial, it occasions in 'failure of justice'. 'Failure of justice' has its own connotation in various jurisprudences. As far as criminal jurisprudence is concerned, we may refer with profit to certain authorities. Be it noted that in ***Bhooraji*** (supra), the Court has referred to ***Shamnsaheb M.***

---

[21] AIR 1957 SC 623
[22] 1956 CriLJ 291 : AIR 1956 SC 116

Multtani* v. *State of Karnataka[23] wherein it has been observed as follows:-

> "23. We often hear about "failure of justice" and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in Town Investments Ltd. vs. Department of the Environment[24]). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."
>
> [Emphasis supplied]

37. In ***State by Police Inspector* v. *T. Venkatesh Murthy***[25], the High Court of Karnataka had upheld an order of discharge passed by the trial court on the ground that the sanction granted to prosecute the accused was not in order. The two-Judge Bench referred to Sections 462 and 465 of the Code and ultimately held thus:-

---

[23] (2001) 2 SCC 577 : 2001 SCC (Cri) 358
[24] (1977) 1 All ER 813
[25] AIR 2004 SC 5117

> "13. In State of *M.P.* v. *Bhooraji and Ors.* (2001) (7) SCC 679, the true essence of the expression "failure of justice" was highlighted. Section 465 of the Code in fact deals with "finding or sentences when reversible by reason of error, omission or irregularity", in sanction.
>
> 14. In the instant case neither the Trial Court nor the High Court appears to have kept in view the requirements of sub-section (3) relating to question regarding "failure of justice". Merely because there is any omission, error or irregularity in the matter of according sanction that does not affect the validity of the proceeding unless the Court records the satisfaction that such error, omission or irregularity has resulted in failure of justice. The same logic also applies to the appellate or revisional Court. The requirement of sub-section (4) about raising the issue, at the earliest stage has not been also considered. Unfortunately the High Court by a practically non-reasoned order, confirmed the order passed by the learned trial judge. The orders are, therefore, indefensible. We set aside the said orders. It would be appropriate to require the trial Court to record findings in terms of Clause (b) of Sub-section (3) and Sub-section (4) of Section 19."

38. We have referred to the said authority only for the purpose of a failure of justice and the discernible factum that it had concurred with the view taken in ***Bhooraji*** (supra). That apart, the matter was remitted to adjudge the issue whether there had

been failure of justice, and it was so directed as the controversy pertained to the discharge of the accused.

39. In ***Central Bureau of Investigation*** **v.** ***V. K. Sehgal***[26], it was observed: -

> "10. A court of appeal or revision is debarred from reversing a finding (or even an order of conviction and sentence) on account of any error of irregularity in the sanction for the prosecution, unless failure of justice had been occasioned on account of such error or irregularity. For determining whether want of valid sanction had in fact occasioned failure of justice the aforesaid sub-section (2) enjoins on the court a duty to consider whether the accused had raised any objection on that score at the trial stage. Even if he had raised any such objection at the early stage it is hardly sufficient to conclude that there was failure of justice. It has to be determined on the facts of each case. But an accused who did not raise it at the trial stage cannot possibly sustain such a plea made for the first time in the appellate court."

The concept of failure of justice was further elaborated as follows:-

> "11. In a case where the accused failed to raise the question of valid sanction the trial would normally proceed to its logical end by making a judicial scrutiny of the entire materials. If that case ends in conviction there is no question of failure of justice on the mere premise that no valid sanction was accorded for prosecuting the public servant because the very purpose of

[26] (1999) 8 SCC 501

> providing such a filtering check is to safeguard public servants from frivolous of mala fide or vindictive prosecution on the allegation that they have committed offence in the discharge of their official duties. But once the judicial filtering process is over on completion of the trial the purpose of providing for the initial sanction would bog down to a surplusage. This could be the reason for providing a bridle upon the appellate and revisional forums as envisaged in Section 465 of the Code of Criminal Procedure."

40. Adverting to the factum of irregular investigation and eventual conviction, the Constitution Bench in ***M. C. Sulkunte* v. *State of Mysore***[27] opined thus: -

> "It has been emphasized in a number of decisions of this Court that to set aside a conviction it must be shown that there has been miscarriage of justice as a result of an irregular investigation."

41. After adverting to the concept of failure of justice, it is obligatory to dwell upon the aspect whether there is or can be any failure of justice if a Special Judge directly takes cognizance of an offence under the Act. Section 209 of the Code deals with the commitment of case to Court of Session when an offence is triable exclusively by it. The said provision reads as follows: -

> "**209. Commitment of case to Court of Session when offence is triable exclusively by it**. –

[27] AIR 1971 SC 508

> When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall –
>
> (a) Commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;
>
> (b) Subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;
>
> (c) Send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;
>
> (d) Notify the Public Prosecutor of the commitment of the case to the Court of Session."

42. Prior to coming into force of the present Code, Section 207 of the Code of Criminal Procedure, 1898 dealt with committal proceedings. By the Criminal Law Amendment Act, 1955, Section 207 of the Principal Act was substituted by Sections 207 and 207A. To appreciate the inherent aspects and the conceptual differences in the previous provisions and the present one, it is imperative to reproduce Sections 207 and 207A of the old Code. They read as under:

"207. In every inquiry before a magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the magistrate, ought to be tried by such Court, the magistrate shall, -

(a) In any proceeding instituted on a police report, follow the procedure specified in section 207A; and

(b) In any other proceeding, follow the procedure specified in the other provisions of this Chapter.

207A. (1) When, in any proceeding instituted on a police report the magistrate receives the report forwarded under Section 173, he shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date of the receipt of the report, unless the magistrate, for reasons to be recorded, fixes any later date.

(2) If, at any time before such date, the officer conducting the prosecution applies to the magistrate to issue a process to compel the attendance of any witness or the production of any document or thing, the magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(3) At the commencement of the inquiry, the magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the came to be so furnished.

(4) The magistrate shall then proceed to take the evidence of such persons, if any as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and if the magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.

(5) The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them.

(6) When the evidence referred to in sub-section (4) has been taken and the magistrate has considered all the documents referred to in section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him unless it appears to the Magistrate that such person should be tried before himself or some other magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(8) As soon as such charge has been framed, it shall be read and explained to the accused and a copy thereof shall be given to him free of cost.

(9) The accused shall be required at once to give in, orally or in writing, a list of the persons, if any, whom he wishes to be summoned to give evidence on his trial:

Provided that the magistrate may, in his discretion, allow the accused to give in his list or any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this sub-section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the State a further list of the persons whom he wishes to be summoned to give evidence on such trial.

(10) When the accused, on being required to give in a list under sub-section (9), has declined to do so, or when he has given in such list, the magistrate may make an order committing the accused for trial by the High Court or the Court of Session, as the case may be, and shall also record briefly the reasons for such commitment.

(11) When the accused has given in any list of witnesses under sub-section (9) and has been committed for trial, the magistrate shall summon the witnesses included in the list to appear before the Court to which the accused has been committed:

Provided that where the accused has been committed to the High Court, the magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the State and such witnesses may be summoned accordingly:

Provided also that if the magistrate thinks that any witness is included in the list for the purpose of vexation of delay, or of defeating the ends of justice, the magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

(12) Witnesses for the prosecution, whose attendance before the Court of Session or High Court is necessary and who appear before the magistrate shall execute before him bonds binding themselves to be in attendance when called upon by the Court of Session or High Court to give evidence.

(13) If any witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or High Court is required, when the magistrate shall send him in custody to the Court of Session or High Court as the case may be.

(14) When the accused is committed for trial, the magistrate shall issue an order to such person as may be appointed by the State Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge; and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or where the commitment is made to the High Court, to the Clerk of the State or other officer appointed in this behalf by the High Court.

> (15) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.
>
> (16) Until and during the trial, the magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant to custody."

43. On a bare perusal of the above quoted provisions, it is plain as day that an exhaustive procedure was enumerated prior to commitment of the case to the Court of Session. As is evincible, earlier if a case was instituted on a police report, the magistrate was required to hold enquiry, record satisfaction about various aspects, take evidence as regards the actual commission of the offence alleged and further was vested with the discretion to record evidence of one or more witnesses. Quite apart from the above, the accused was at liberty to cross-examine the witnesses and it was incumbent on the magistrate to consider the documents and, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him by the prosecution and afford the accused an opportunity of being heard and if there was no ground for committing the accused person for trial, record

reasons and discharge him. Thus, the accused enjoyed a substantial right prior to commitment of the case. It was indeed a vital stage. But, in the committal proceedings *in praesenti*, the magistrate is only required to see whether the offence is exclusively triable by the Court of Session. Mr. Fakhruddin, learned senior counsel, would submit that the use of the words "it appears to the magistrate" are of immense signification and the magistrate has the discretion to form an opinion about the case and not to accept the police report. To appreciate the said submission, it is apposite to refer to Section 207 of the 1973 Code which lays down for furnishing of certain documents to the accused free of cost. Section 209(a) clearly stipulates that providing of the documents as per Section 207 or Section 208 is the only condition precedent for commitment. It is noteworthy that after the words, namely, "it appears to the Magistrate", the words that follow are "that the offence is triable exclusively by the Court of Session". The limited jurisdiction conferred on the magistrate is only to verify the nature of the offence. It is also worth noting that thereafter, a mandate is cast that he "shall commit". Evidently, there is a sea of difference in the proceeding for commitment to the Court of Session under the old Code and

under the existing Code. There is nothing in Section 209 of the Code to even remotely suggest that any of the protections as provided under the old Code has been telescoped to the existing one.

44. It is worth noting that under the Code of Criminal Procedure, 1898, a full-fledged Magisterial enquiry was postulated in the committal proceeding and the prosecution was then required to examine all the witnesses at this stage itself. In 1955, the Parliament by Act 26 of 1955 curtailed the said procedure and brought in Section 207A to the old Code. Later on, the Law Commission of India in its 41st Report, recommended thus:-

> "18.19. After a careful consideration we are of the unanimous opinion that committal proceedings are largely a waste of time and effort and do not contribute appreciably to the efficiency of the trial before the Court of Session. While they are obviously time-consuming, they do not serve any essential purpose. There can be no doubt or dispute as to the desirability of every trial, and more particularly of the trial for a grave offence, beginning as soon as practicable after the completion of investigation. Committal proceedings which only serve to delay this step, do not advance the cause of justice. The primary object of protecting the innocent accused from the ordeal of a sessions trial has not been achieved in

> practice; and the other main object of apprising the accused in sufficient detail of the case he has to meet at the trial could be achieved by other methods without going through a very partial and ineffective trial rehearsal before a Magistrate. We recommend that committal proceedings should be abolished."

We have reproduced the same to accentuate the change that has taken place in the existing Code. True it is, the committal proceedings have not been totally abolished but in the present incarnation, it has really been metamorphosed and the role of the Magistrate has been absolutely constricted.

45. In our considered opinion, because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance of the same and raising of any objection in that regard after conviction attracts the applicability of the principle of 'failure of justice' and the convict-appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be

deduced from procedural lapse or an interdict like commitment as enshrined under Section 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial.

46. At this juncture, we would like to refer to two other concepts, namely, speedy trial and treatment of a victim in criminal jurisprudence based on the constitutional paradigm and principle. The entitlement of the accused to speedy trial has been repeatedly emphasized by this Court. It has been recognised as an inherent and implicit aspect in the spectrum of Article 21 of the Constitution. The whole purpose of speedy trial is intended to avoid oppression and prevent delay. It is a sacrosanct obligation of all concerned with the justice dispensation system to see that the administration of criminal justice becomes effective, vibrant and meaningful. The concept of speedy trial cannot be allowed to remain a mere formality (see

Hussainara Khatoon and Ors. **v.** ***Home Secretary, State of Bihar***[28], ***Moti Lal Saraf*** **v.** ***State of Jammu & Kashmir***[29] and ***Raj Deo Sharma*** **v.** ***State of Bihar***[30]).

47. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in ***Mangal Singh and Anr.*** **v.** ***Kishan Singh and ors.***[31] wherein it has been observed thus: -

> "Any inordinate delay in conclusion of a criminal trial undoubtedly has highly deleterious effect on the society generally and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence."
>
> [Emphasis supplied]

48. It is worthnoting that the Constitution Bench in ***Iqbal Singh Marwah and another*** **v.** ***Meenakshi Marwah and another***[32], though in a different context, had also observed that delay in the prosecution of a guilty person comes to his

[28] (1980) 1 SCC 81
[29] AIR 2007 SC 56
[30] AIR 1998 SC 3281
[31] AIR 2009 SC 1535
[32] AIR 2005 SC 2119

advantage as witnesses becomes reluctant to give evidence and the evidence gets lost.

49. We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused. Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple pie order in carrying out the adjective law, would only be sound and fury signifying nothing.

50. In the case at hand, as is perceivable, no objection was raised at the time of framing of charge or any other relevant time but only propounded after conviction. Under these circumstances, the right of the collective as well as the right of the victim springs to the forefront and then it becomes obligatory on the part of the accused to satisfy the court that there has

been failure of justice or prejudice has been caused to him. Unless the same is established, setting aside of conviction as a natural corollary or direction for retrial as the third step of the syllogism solely on the said foundation would be an anathema to justice. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice.

51. We may state without any fear of contradiction that if the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be

given a privileged place on the pulpit. It would, with unnecessary interpretative dynamism, have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage. It is to be borne in mind that the Legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intendment of the Legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial.

52. Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance of Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in ***Bhooraji*** (supra) lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused. The decisions rendered in

Moly (supra) and ***Vidyadharan*** (supra) have not noted the decision in ***Bhooraji*** (supra), a binding precedent, and hence they are *per incuriam* and further, the law laid down therein, whereby the conviction is set aside or matter is remanded after setting aside the conviction for fresh trial, does not expound the correct proposition of law and, accordingly, they are hereby, to that extent, overruled.

53. The appeals be placed before the appropriate Bench for hearing on merits.

.....J.
[Dalveer Bhandari]

.....J.
[T. S. Thakur]

.....J.
[Dipak Misra]

New Delhi;
February 17, 2012.