

part eight

criminal justice





the tragic decline of criminal jurisprudence

The police have made shrewd use of the media. In concert, they have propagated the notion that the law and the judiciary are too lame to curb crime or deal with hardened criminals. Rather than identify the real weaknesses (shoddy police work and backward methods), the criminal justice system has yielded to the media's blind criticism and responded by boosting the conviction rate. This has been achieved at the expense of crucial Supreme Court precedents that once safeguarded the fundamental right to a fair trial.

In this article we analyse recent Supreme Court judgments that have vandalised criminal jurisprudence and overturned long-established principles. From condonation of torture, to admissibility of confessions made to police officers, the damage is widespread.

Over the last 15 years, criminal law protection of the accused has been steadily dismantled. It began with the misconceived perception within the highest levels of the judiciary that the rights of the accused were too extensive and in need of review.

This was fuelled in large part by a systematic media campaign conducted by senior police officers: They made national television-appearances to coincide with high-profile cases and capitalised on the public's frustration with the criminal justice system. In their statements, they relentlessly berated the judiciary claiming that having captured dreaded criminals and terrorists, the judiciary's hyper-technical application of human rights simply let them off at the drop of a hat. They claimed that the judiciary's tendency to grant bail or acquit criminals because of dogged adherence to notions of fairness further punished the victims of crime.

The police frequently presented false information to the public on various TV programmes. For example, they claimed that the rate of conviction in Indian penal code (IPC) cases was only 10 percent, the true figure being closer to 50

percent. They also misrepresented convictions in TADA (The Terrorist and Disruptive Activities (Prevention) Act 1987) cases, claiming that the conviction rate was a mere five percent. They neglected to mention that the vast majority of those accused under TADA are detained as “undertrials” for five years or more before their trials even begin. The low conviction rate actually reflects police propensity to misapply TADA to normal criminal cases, and innocent people.

The police successfully shook the confidence of the higher judiciary and consequently initiated the destruction of crucial safeguards within the criminal justice system.

Of course, judges would not appear on primetime TV and point out that most acquittals arise due to police corruption and their appalling standards of criminal investigation. The police’s view prevailed, unanswered, and their ideological campaign had the intended effect: Judges held public perception, rather than principles of criminal justice, uppermost in their minds. Embarrassed by the low conviction rate, this supposedly independent judiciary has irresponsibly and arbitrarily accelerated convictions, in a bid to appear tough on crime. Without regard to the rule of law or criminal jurisprudence, the judiciary did whatever was necessary to be seen putting criminals behind bars, denying bail and awarding the stiffest sentences. Judges were afraid to entertain reasonable doubt as to the guilt of the accused for fear of seeming weak.

The judiciary never considered that the constitutional rights of the accused could be preserved whilst repairing their image. Their hasty public relations exercise rallied to satisfy the upper-middle classes. The vast majority of the poor sees the criminal justice system as a great engine of oppression where widespread torture is condoned by the judiciary and innocent people are roped in while the rich get away scot-free. The Judiciary do not have the backbone to uphold the Constitution in respect of poor and working class people.

the dilution of criminal law

India has a common law system. The principle of binding precedent (?) demands that decisions of higher courts, and within them, of larger benches be adhered to and followed by lower courts and smaller benches respectively. It serves to limit the arbitrary power of the judiciary and increase legal certainty, thereby strengthening the rule of law.

In India, frequent decisions made by small benches of the Supreme Court have defied those of larger, even Constitutional (five judges or more), benches. Subsequently, their decision is followed in a series of cases in the lower courts, setting aside the earlier binding precedent. The smaller benches claim that the decision they ignore is “technical” or “only a rule of prudence” or “merely a rule of caution”.

However, criminal law is, at its core, a set of technical rules and procedures that require a judge to be prudent and cautious. Criminal jurisprudence lays down the path by which a judge is able to determine what constitutes “reasonable doubt”. Once these rules are discarded a judge’s discretion becomes unfettered. The “beyond reasonable doubt” criminal standard is discarded and a judge does what he likes. He is able to convict or acquit on the basis of gut feeling. The rule of law crumbles. The Indian judiciary has indeed set out on this treacherous course. See below for a survey of their most dangerous decisions.

vandalism of criminal jurisprudence

In this section, we survey the Supreme-Court-sponsored decay of standards in criminal trials. The criminal law reports are rife with examples of the negligent reduction in the quality of evidence expected from the police and prosecution.

The analysis deals with the following:

- 1 Condonation of torture
- 2 Blood tests
- 3 Dying declarations
- 4 Confessions
- 5 Lying witnesses
- 6 Sealing of articles associated with the crime
- 7 The first information report (FIR)
- 8 Arrest of females
- 9 Chance witnesses
- 10 Standard of proof lowered

condonation of torture

There is something seriously wrong when the highest court of the land, the Supreme Court of India, approves the use of torture by the police.

In *Kamalanathan vs. State of Tamil Nadu* (2005) the Supreme Court did not even whisper criticism of police who beat prosecution witnesses. This matter related to an unpleasant case of sexual assault on Ashram girls. The disgraceful dictum begins at paragraph 44 where the Supreme Court decided that the failure of the police to follow s160 CrPC was permissible. That section stipulates that a policeman may require attendance of witnesses at a police station for questioning, but that women must be questioned in their place of residence. The Ashram girls were taken to the police station for questioning, in breach of that section. At first glance, this seems reasonable, as it was held that:

At paragraph 44: “the Ashram cannot be the place for the purposes of Section 160 CrPC and the victim girls were rightly examined and inter-

rogated in women police stations. They were removed from the Ashram to erase the fear psychosis from them. It was for the safety and to serve the interest of justice, they were removed from the clutches of A-1."

However, the girls' safety interests are hardly served if they are subsequently beaten by police in the station during the interrogation.

At paragraph 58: *"In the police station, we were enquired about the character of Premananda Swami. Since Premananda has already kept us under threat, myself and others did not reveal anything to the police. After the police beat us, myself and other girls informed that we were raped by Premananda. Only at that time I came to know that Prem-ananda Swami was having sexual relationship with other girls."*

The Supreme Court, however, had no problem with this:

Paragraph 58 continued: *"It is in that context the high court holds that so-called beating could have meant to shake-off their inhibition and fear, to make them free to say what they wanted to say. In the given facts and circumstances of this case, beating will mean to remove the fear psychosis and to come out with truth. We do not find any infirmity in the concurrent findings recorded by both the courts below on this count."*

blood tests

In a long line of decisions, the Supreme Court has prudently acquitted the accused when the police investigation is found to be grossly deficient. For example, the failure of the police to show that blood, found on articles obtained from the accused, actually belonged to the deceased has rightly been excluded from the evidence.

In *Kansa Behera vs. State of Orissa* (1987), the Supreme Court gave a solid ruling, overturning a life sentence and conviction of murder that was based on circumstantial evidence:

At paragraph 12: *"As regards the recovery of a shirt or a dhoti [garment worn around the waist] with blood stains which according to the serologist report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the investigating officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is*

2 1987 (3) SCC 480

3 2003 (10) SCC 185

a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn.”

At paragraph 13: *“It is a settled rule of circumstantial evidence that each one of the circumstances have to be established beyond doubt and all the circumstances put together must lead to the only one inference and that is of the guilt of the accused. As discussed above the only circumstance which could be said to have been established is of his being with the deceased in the evening and on that circumstance alone the inference of guilt could not be drawn.”*

However, in a shocking display of naivety, a three-judge bench of the Supreme Court in *Subramani vs. State by Inspector of Police* (2003) upheld a conviction of rape and murder of a teenaged girl based purely on circumstantial evidence. Blood stains found on the accused's lungi (a garment worn around the waist) was found to be human but its blood group could not be matched to that of the deceased. The Supreme Court held at paragraph 8:

“...[the] deceased had suffered bleeding injuries and the lungis seized by the investigating agency from the accused contained bloodstains. The serologist has opined that the bloodstains are of a human being but was not able to establish the blood group. As noted above, learned counsel for the appellant had contended that in the absence of such identification of the blood group the stains found on the lungi would not in any manner inculcate the accused in the crime. We do not think this argument can be accepted. The accused has admitted that the lungis belong to him and were seized from him, for that matter he says he gave the lungis to the investigating officer but he has not explained how the bloodstains which are at least proved to be human blood came to be there on the lungis. The absence of any explanation in this regard would only strengthen the prosecution case that blood must have stained the lungis at the time of the attack on the deceased... These factors coupled with the fact that the appellant has failed to give any explanation as to how and when he parted company with the deceased, in our considered opinion leads to the one and the only conclusion that the charged of rape and murder of Vaishavi levelled against the appellant stands proved.”

dying declarations

Dying declarations are admitted in evidence on the controversial legal maxim

- 4 2007 (12) SCALE
- 5 1994 (Supp) 2 SCC 539
- 6 1999 (7) SCC 695

“nemo moriturus proesumitur mentiri – a man will not meet his maker with a lie in his mouth.” The evidentiary weight assigned by the courts to dying declarations is heavy. In *Dasrath @ Champa vs State of Madhya Pradesh* (2007):

At paragraph 12: *“Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no scope of cross-examination. Such a scope is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration.”*

The conditions required to “inspire full confidence of the Court” in the veracity of dying declarations has been progressively and outrageously degraded by a series of Supreme Court decisions.

Until recently, dying declarations were accepted on a cautious basis: A magistrate may record a dying declaration if a doctor is present and certifies that the injured was both: (1) conscious; and (2) in a fit state of mind, at the time the declaration was made.

In *Maniram vs State of Madhya Pradesh* (1994) the Supreme Court held:

At paragraph 3: *“...in a case of this nature, particularly when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. These are some of the important requirements which have to be observed.”*

7 1999 (9) SCC 562

8 2002(6) SCC 710

9 (THE) TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 (TADA)

Section 15. Certain confessions made to police officers to be taken into consideration.-

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a superintendent of police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made thereunder:

(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.

10 1994(3) SCC 569

In *Paparambaka Rosamma vs State of Andhra Pradesh* (1999), the Supreme Court stressed that it was the doctor, not the magistrate, who is the competent judge of both consciousness and fitness of mind. The distinction between those two elements was also emphasised:

At paragraph 8: “In our opinion, in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration.”

At paragraph 9: “In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below.”

Both decisions were made by a three-judge bench. Both were departed from by another three-judge bench of the Supreme Court in *Koli Chunilal Savji vs State of Gujarat* (1999):

At paragraph 7: “In the case of *Maniram vs State of MP* no doubt this court has held that when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor and after being duly certified by the doctor that the declarant was conscious and in his senses and was in a fit condition to make the declaration. In the said case the court also thought it unsafe to rely upon the dying declaration on account of the aforesaid infirmity and interfered with the judgment of the high court. But the aforesaid requirements are a mere rule of prudence and the ultimate test is whether the dying declaration can be held to be truthful one and voluntarily given.”

The Supreme Court thus upheld a conviction for murder based solely upon a dying declaration given without a medical certification that the injured person was in a fit state to make it.

Ultimately, a constitutional bench of the Supreme Court in *Laxman vs State of Maharashtra* (2002) clarified the law governing admissibility of dying declarations with astonishing carelessness. Referring to its decision in *Paparambaka’s* case, the constitutional bench decided that the requirement for a doctor’s certification that the injured person was in a fit state of mind to make his declaration was a view “too broadly stated and is not the correct enunciation of law” (paragraph 5). They deemed the distinction between consciousness and fitness of mind as a “hyper-technical view” and affirmed *Koli Chunilal’s* case.

confessions

A confession is a statement which is wholly or partly adverse to the person who made it.

confessions made to police officers are admissible under s15 TADA

Kartar Singh vs State of Punjab - a constitutional bench decision, decided the constitutionality of various provisions of TADA, enacted to deal with terrorism within India. The Act was passed against a backdrop of Punjab insurgency. It was allowed to lapse in May 1995 after intense criticism by human rights groups and ubiquitous evidence of abuse. However, cases instigated prior to that date continue to hold legal validity. The huge backlog of cases keep the issue of TADA alive in the judicial system today. The TADA jurisprudence started with the Supreme Court in Kartar Singh's case, where it disregarded its duty as a constitutional court and took an executive-like stance on terrorism. The Supreme Court neglected its intended role as a check and balance to executive power that all too readily crushes fundamental human rights when faced with issues of national security.

Elements of the judgment fall roughly into two equally unacceptable categories:

Category A: decisions that significantly undermine the rights of the accused; and

Category B: decisions that take a clear stand to protect those rights but have been so consistently ignored by inferior benches in subsequent judgments that they have had no positive precedential impact.

Category A: Section 15 TADA

There is no more striking an application of defunct logic than the Learned Judges' ruling on Section 15 of TADA, which makes confessions made to high-rank police officers admissible in evidence, regardless of provisions in the Evidence Act and the Code of Criminal Procedure which excludes them. The mere potential for abuse by police is sufficient to rule out the admissibility of confessions made solely to police officers. Such confessions have been held inadmissible throughout the period of British rule and up to the enactment of TADA. The judges' thought – process involved frank admissions that torture of the accused by the police is widespread in India:

At paragraph 251: "... we cannot avoid but saying that we – with the years of experience both at the Bar and on the Bench – have frequently dealt with cases of atrocity and brutality practised by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic meth-

ods of treating the suspects in their anxiety to collect evidence by hook or by crook and wrenching a decision in their favour. We remorsefully like to state that on a few occasions even custodial deaths caused during interrogation are brought to our notice. We are very much distressed and deeply concerned about the oppressive behaviour and the most degrading and despicable practice adopted by some of the police officers.”

At paragraph 365: *“It is heart-rending to note that day in and day out we come across with the news of blood-curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency.”*

However, at paragraph 254, the Supreme Court held:

“In view of the legal position vesting authority on higher police officer[s] to record the confession hitherto enjoyed by the judicial officer in the normal procedure, we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement...”

The combination of (1) the Supreme Court’s recognition that torture is the principle forensic tool of the police; and (2) their concurrent confirmation of the power of senior police officers to take admissible confessions, is absurd. To overturn such a deeply entrenched principle, significant evidence that showed senior police were less inclined to torture the accused would surely be required. No such evidence was presented to the Supreme Court and in fact, their own recent decisions demonstrate an increase in the use of torture and custodial violence.

Justice K Ramaswamy and Justice Sahai both made valiant and apt dissents:

Justice K Ramaswamy:

At paragraph 383: “Section 25 [of the Evidence Act, which excludes confessions made to police officers] rests upon the principle that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion.” (page 724).

At paragraph 399: *“While the Code [the Code of Criminal Procedure] and Evidence Act seek to avoid inherent suspicion of a police officer obtaining confession from the accused, does the same dust not cloud the vision of superior police officer? Does such a procedure not shock the conscience of a conscientious man and smell of unfairness? Would it be*

just and fair to entrust the same duty by employing non-obstante clause Section 15(1)? Whether mere incantation by employing non-obstante clause cures the vice of afore enumeration and becomes valid under Articles 14 and 21? My answer is "NO", "absolute no, no"....Conferral of judicial powers on the police will erode public confidence in the administration of justice... It not only sullies the stream of justice at its source but also chills the confidence of the general public and erodes the efficacy of the rule of law."

At paragraph 406: *It would, therefore, be clear that any officer not below the rank of the superintendent of police, being the head of the district police administration responsible to maintain law and order is expected to be keen on cracking down the crime and would take all tough steps to put down the crime to create terror in the heart of the criminals. It is not the hierarchy of officers but the source and for removal of suspicion from the mind of the suspect and the object assessor that built-in procedural safeguards have to be scrupulously adhered to in recording the confession and trace of the taint must be absent. It is, therefore, obnoxious to confer power on police officer to record confession under Section 15(1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and be normalised in grave crisis, such an erosion is anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the constitutional creases. It is, therefore, unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution." (page 734).*

Justice Sahai also dissented, saying:

At paragraph 442: *"Killing of democracy by gun and bomb should not be permitted by a State but in doing so the State has to be vigilant not to use methods which may be counter-productive. Care must be taken to distinguish between the terrorist and the innocent. If the State adopts indiscriminate measures of repression resulting in obliterating the distinction between the offender and the innocent and its measures are repressive to such an extent where it might not be easy to decipher one from the other, it would be totally incompatible with liberal values of humanity, equality, liberty and justice. ... Measures adopted by the State should be to create confidence and faith in the government and democratic accountability should be so maintained that every action of the government be weighed in the scale of rule of law."*

At paragraph 453: *"A police officer is trained to achieve the result irre-*

spective of means and method which is employed to achieve it. So long the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officers. A sub-inspector of the police may be uncouth in his approach and harsh in his behaviour as compared to a superintendent of police or additional superintendent of police or any higher officer. But the basic philosophy of the two remains the same. The inspector of police is as much interested in achieving the result by securing confession of an accused person as the superintendent of police. By their training and approach they are different. Procedural fairness does not have much meaning for them...dignity of the individual and liberty of person – the basic philosophy of Constitution – has still not percolated and reached the bottom of the hierarchy as the constabulary is still not accountable to public and unlike British police it is highly centralised administrative instrumentality meant to wield its stick and spread awe by harsh voice more for the executive than for the law and society.”

At paragraph 454: *“The defect lies not in the personnel but in the culture. In a country where few are under law and there is no accountability, the cultural climate was not conducive for such a drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confession to police officer was inadmissible. It has been the established procedure for more than a century and an essential part of criminal jurisprudence...”*

At paragraph 455: *“...Section 15 of the TADA throws all established norms only because it is recorded by a high police officer. In my opinion our social environment was not mature for such a drastic change as has been effected by Section 15. It is destructive of basic values of the constitutional guarantee.”*

Sadly, Justices Ramaswamy and Sahai were overruled by a 3:2 majority. As such, the Supreme Court, swept away a rule of law that governed criminal trials for over 100 years.

Category B: Rule 15 of TADA (Prevention) Rules

Rule 15 of the Terrorists and Disruptive Activities (Prevention) Rules, 1987 lays down in detail the method for taking and recording confessions, namely: the police officer must certify in writing that the confession was taken in his presence and that the record contains a full and true account of the confession and that it was voluntarily made.

Referring to the Acts and Rules regarding confessions, the Supreme Court in Kartar Singh's case held at paragraph 257:

“We strongly feel that there must be some severe safeguards which should be scrupulously observed while recording a confession under Section 15(1) so that the possibility of extorting any false confession can be prevented to some appreciable extent.”

At paragraph 263, those “severe safeguards” were set out. The guidelines assign a significant scrutinising role to the chief metropolitan magistrate (CMM) or the chief judicial magistrate (CJM):

“...we would like to lay down following guidelines so as to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a superintendent of police is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness.

1. The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;
2. The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the chief metropolitan magistrate or the chief judicial magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession...without unreasonable delay;
3. The CMM or CJM should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a medical officer...”

Not only do the CMM or CJM have to “scrupulously record the statement” and “get his signature”, they also offer the accused a crucial chance to make a complaint if torture has been used to obtain the confession.

However, the admirable stance of the Constitutional Bench plunges into irrelevance. Their unequivocal ruling has been ignored by smaller benches of the Supreme Court claiming that the safeguards and guidelines are merely directory, not mandatory. One such example is *Jameel Ahmed vs State of Rajasthan*. Here, a two-judge Bench of the Supreme Court reanalysed the admissibility of confessions under section 15 of TADA. The appellants rightly argued that a confession that had not been sent before the CMM or CJM was not admissible, as this obviated a mandatory step in Rule 15(5) of the TADA Rules. Without reference to the guidelines laid down above by the Constitutional Bench in *Kartar Singh’s* case, the inferior bench held at paragraph 34:

“Rule 15(5) does not ascribe any role to the CMM or the CJM of either

perusing the said statement or making any endorsement or applying his mind to these statements. It merely converts the said courts into a post office for further transmission to the Designated Court concerned, therefore, the object of the rule is to see that the statement recorded under Section 15 of the Act leaves the custody of the recorder of the statement at the earliest so that the statement has a safer probative value. In our opinion transmission of the recorded confessional statement under Section 15 of the Act to the CMM or the CJM under Rule 15(5) is only directory and not mandatory.”

The lower bench thereby downgraded the role of the CMM and CJM explicitly established by the Constitutional bench in Kartar Singh.

Confessions made to police officers are admissible under s32 pota

Following the attacks on New York and Washington on 11 September 2001, rushed anti-terrorism legislation was enacted all over the world. India responded with the Prevention of Terrorism Act, 2002 (POTA).

In Kartar Singh’s case, the Supreme Court decided the constitutional validity of TADA 1987. Even though TADA was permitted to lapse in May 1995, due to widespread abuse by the police and security forces, the ratio of Kartar Singh’s case still informed the Supreme Court’s analysis of POTA 2002 in the case of Peoples Union for Civil Liberties (PUCL) vs Union of India (2004). The judgement was handed down on December 16, 2003 in the midst of strong protests against the misuse of TADA and POTA and their persistent application to innocent people.

Like section 15 of TADA, section 32 of POTA makes confessions given to senior police officers admissible in evidence. We have already dealt with the absurdity of such a law above, in Justice Ramaswamy and Justice Sahai’s articulate dissents in Kartar Singh’s case. Nevertheless, POTA does give a statutory footing to the guidelines laid down by the Constitutional Bench in Kartar Singh’s case regarding the role of the magistrate. Section 32(4) and (5) POTA requires the maker of the confession to be sent before a magistrate. The Supreme Court in PUCL held:

At paragraph 63: *“While enacting this section, parliament has taken into account of all the guidelines, which were suggested by this Court in Kartar Singh’s case (supra)...In our considered opinion the provision that requires producing such a person before the magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the magistrate’s responsibility to record the statement*

11 2003(9) SCC 673

12 2004 (9) SCC 580

and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer.”

So, the Supreme Court has applauded the guidelines laid down in Kartar Singh’s case, recognising the magistrate’s role as a valuable safeguard in relation to section 32 of POTA. And yet, in relation to an almost identical provision (section 15 of TADA), two-judge benches of the Supreme Court have decided that those same guidelines were merely “directory and not mandatory”(Note 11 supra). That such different rulings should apply to largely identical police powers illustrates the chaos of criminal law jurisprudence.

The Supreme Court noted at the beginning of the hearing that:

At paragraph 15: *“The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and Court’s responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating.”*

At paragraph 22: *“Another issue that the petitioners have raised at the threshold is the alleged misuse of TADA and the large number of acquittals of the accused charged under TADA. Here we would like to point out that this Court cannot go into and examine the “need” of POTA. It is a matter of policy. Once legislation is passed the government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, we would like to point out that this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional.” (page 598)*

Just as in Kartar Singh’s case, the Supreme Court chose to ignore the well-known reality of police practice in India. The PUCL decision was not made in the context of a “mere possibility of abuse”. Documented and indisputable evidence of persistent and rampant abuse by police flowed from the rising number of TADA and POTA acquittals and newspaper reports. The Supreme Court knew that human rights were indeed being violated in the process of combating terrorism.

The petitioners demonstrated that the statute and its abusive application were so intrinsically interwoven that it was impossible for the Court to deal with one and not the other. Was it permissible for the Supreme Court to dismiss the challenge and ignore the blatant evidence of widespread misuse of the statute in such a summary manner? Ultimately, the Government of India itself accepted that POTA was widely misused and recognised public dissatisfaction with the Act. The Act was repealed. POTA was banished, as was TADA, to a black period of criminal law jurisprudence. Yet the Supreme Court, in regard to both op-

pressive statutes, awarded constitutional approval. And, criminal cases initiated under these statutes continue to be heard today.

S15 tada contaminates the rules of confession in normal criminal law

Section 15(1) TADA clearly states that confessions made under that section “shall be admissible in the trial of such person for an offence under this Act.”

The legislation does not widen the admissibility of section 15 of TADA confessions to criminal charges under other Acts, as correctly interpreted by the Supreme Court in *Bilal Ahmed Kaloo vs. State of AP*. In that case, Mr. Kaloo was prosecuted under both TADA and the Indian Penal Code (IPC). The designated court acquitted Mr Kaloo of the TADA charges but found him guilty of sedition under the IPC. The confessional statement given by Mr Kaloo under section 15 of TADA was correctly held to be inadmissible in relation to the IPC charge.

However, the wisdom of the Supreme Court in *Bilal Ahmed Kaloo* was overruled in the *Rajiv Gandhi assassination case - State vs. Nalini*. At paragraph 83, the three-judge bench held:

“Section 15 of the TADA enables the confessional statement of an accused made to a police officer specified therein to become admissible “in the trial of such a person.” It means, if there was a trial of any offence under TADA together with any other offence under any other law, the admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences.”

Distracted by public thirst for convictions in the wake of a national tragedy, the judges in *Nalini*’s case were evidently unable to read to the end of the sentence in section 15 of TADA, to cover the words “for an offence under this Act.”

After *Nalini*’s case, a three-judge bench of the Supreme Court doubted the correctness of the decision:

*“We are, however, constrained to record our doubt as regards the state of law as declared by the three-judge bench of this Court in *Nalini* (supra). The issue, therefore, is whether the confessional statement would continue to hold good even if the accused is acquitted under TADA offences and there is a clear finding that TADA Act has been wrongly taken recourse to or the confession loses its legal efficacy under the Act and thus rendering itself to an ordinary confessional statement before the police under the general law of the land. *Nalini* (supra), however, answers this as noticed above, in positive terms but we have some*

13 (1997) 7 SCC 431

14 (1999) 5 SCC 253

doubts pertaining thereto since the entire justice delivery system is dependent upon the concept of fairness. It is the interest of justice which has a pre-dominant role in the criminal jurisprudence of the country. The hallmark of justice is the requirement of the day and the need of the hour. Once the court comes to a definite finding that invocation of TADA act is wholly unjustified or there is utter frivolity to implicate under TADA, would it be justified that section 15 be made applicable with equal force as in TADA cases to book the offenders even under the general law of the land. There is thus doubt as noticed above!!”

The matter was transferred eventually to a five-judge Constitutional Bench in Prakash Kumar vs. State of Gujarat. They irresponsibly upheld the ratio of Nalini’s case through exquisitely poor construction of the TADA legislation.

Confessions to a police officer were only made admissible in evidence under TADA to meet the exigencies of terrorism in India. This shocking interpretation of law upheld in Prakash Kumar’s case has established a critically unjust state of affairs in the criminal justice system: Even if TADA offences are not substantiated, the associated confessional statements continue to be admissible in evidence for prosecution under normal criminal law. Had TADA not been applied, such evidence would have remained inadmissible under the Code and the Evidence Act.

This judgement has an obvious effect: It encourages the police to apply TADA to ordinary criminal law matters and indulge in dispensations from procedural safeguards. This much was forewarned in Kartar Singh’s case:

At paragraph 352: *“It is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the courts invoke the provisions of the TADA. This kind of invocation of the provisions of TADA in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police.”*

This passage was indeed noted in Prakash Kumar’s case, but naively dismissed at paragraph 44:

“In our view the above observation [in Kartar Singh’s case] is eloquently sufficient to caution police officials as well as the presiding officers of the designated courts from misusing the Act and to enforce the Act effec-

15 (2005) 2 SCC 409

16 AIR 1952 SC 159

tively and inconsonance with the legislative intendment..."

Confessions used against the co-accused

Imagine the following scenario: X and Y are accused of murder. X confesses to the murder and also implicates Y as an accomplice. Y does not confess and maintains his innocence. To what degree should X's confession be relied on in evidence supporting the prosecution's case for Y's conviction?

In the three-judge bench decision of the Supreme Court in *Kashmira Singh vs State of Madhya Pradesh* (1952), it was noted that a confession against a co-accused was "obviously evidence of a very weak type" (paragraph 8) and "such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence." (paragraph 9)

This was followed by three-judge benches in *Nathu vs State of UP* (1956) and in *Ram Chandra vs State of UP* (1957) where the Court held that "confession of a co-accused can only be taken into consideration but is not in itself substantive evidence."

All of these cases were approved and their ratios re-iterated by the Constitutional Bench of the Supreme Court in *Haricharan Kurmi vs State of Bihar* (1964) where it was held:

At paragraph 13: "...in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilty which the judicial mind is about to reach on the said other evidence."

At paragraph 17: "...it has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence."

Directly contrary to this line of binding precedent stands an outrageous decision

17 AIR 1956 SC 56

18 AIR 1957 SC 381

19 AIR 1964 SC 1184

of a two-judge bench in *K Hashim vs State of Tamil Nadu* where the Supreme Court held:

At paragraph 25: “If it is found credible and cogent, the court can record a conviction even on the uncorroborated testimony of an accomplice.”

Recording of confessions

In normal criminal law, in other words, non-TADA and non-POTA offences, section 164, 281 and 463 of the Code of Criminal Procedure (CrPC) govern the recording of confessions. Section 164 CrPC stipulates that confessions must be recorded in a specific manner by a magistrate. Amongst various safeguards is section 164(2) which stipulates that the magistrate shall explain to the person making the confession that he is under no compulsion to make it, and that if he does make a confession, it may be used against him. The magistrate must also believe that the confession is voluntarily made. All dialogue between the magistrate and the maker of the confession must be recorded by the magistrate at the time, pursuant to section 281(2), which applies by virtue of section 164(4). This means that when the magistrate warns the confession maker under section 164(2), a record of the questions and answers which (a) constitute that warning; and (b) substantiate the magistrate’s belief that the confession is voluntary, must be made. Section 463 applies when section 164 and 281 have not been complied with. It cures defects in the procedure used by the magistrate and permits admission of the confession in evidence if “such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded.”

In the case of *Nazir Ahmed vs. King Emperor* (1936) the Privy Council held that confessions recorded in any way other than those specified by section 164 of the Code were not admissible. This was on the administrative principle that statutory powers were to be exercised in the manner prescribed by statute, or not at all. In that case, the magistrate had not recorded the confession as required by law and instead tendered his oral evidence of the confession made by the accused. The confession was held inadmissible and the accused was acquitted. This decision was followed by the three-judge bench in *State of UP vs. Singhara Singh* (1964).

In *Tulsi Singh vs. State of Punjab* (1996), a magistrate recorded a confession without any record of fulfilment of the two steps of section 164(2), other than his oral evidence at the trial. The two-judge bench of the Supreme Court admirably rejected the validity of the confessional statement holding:

20 2005(1) SCC 237

21 AIR 1936 PC 253

22 AIR 1964 SC 358

23 1996 (6) SCC 63

At paragraph 5: *“Though the learned magistrate testified that before recording the confession he satisfied himself that the accused (appellant) was making a voluntary statement and that after giving due caution he recorded it, the confession does not anywhere indicate as to whether before recording the same he gave him the requisite caution and put questions to satisfy himself that it was being made voluntarily. These are the basic pre-requisites for recording a confession under sub-section (2) of Section 164 CrPC and a mere endorsement in accordance with Sub-section (4) after recording it would not fulfil the requirements of the former sub-section. Since none of the two requirements of section 164(2) CrPC has been complied with we are left with no other alternative to hold that the special court was not at all justified in entertaining the confession as a voluntary one.”*

However, recent smaller benches of the Supreme Court have disregarded the precedent set in Nazir Ahmed's case and Tulsi Singh's case to a such a degree that the safeguards of section 164 CrPC may as well be repealed. These slack judgements have relied on a wide application of section 463 CrPC, using it to cure extensive defects in the confession recording procedure. The very purpose of such a procedure is to increase the likelihood that confessions are voluntarily made and can therefore be relied upon.

For example, the two-judge bench of the Supreme Court in Ram Singh v Sonia (2007) admitted a confession in evidence when the magistrate had failed to record that he had asked the maker of the confession whether she was “under any pressure, threat or fear” to make the confession. Instead, the magistrate gave oral evidence in court stating that he had asked her and had only taken the statement once satisfied that the confession was voluntary.

At paragraph 20: *“Of course, he failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement, but PW.62 [the magistrate] having stated in his evidence before the Court that he had asked the accused orally whether she was under any pressure, threat or fear and he was satisfied that A-1 [the maker of the confession] was not under any pressure from any corner.”*

At paragraph 21: *In our view, Nazir [supra] has no application to the facts of the present case as the failure of PW.62 [the magistrate] to record the question put and the answer given in the confessional statement has not caused prejudice to the accused in her defence and is a defect that is curable under section 463.*

24 2007 (3) SCC 1

25 1972 3 SCC 759

26 1977 (4) SCC 452

27 2007 (3) SCC 1

This finding directly contradicts the clear ratios in Tulsi Singh's and Nazir's case. Yet the bench held:

At paragraph 23: *"...decisions relied upon by the learned counsel for the accused in the cases of Nazir (supra),...and Tulsi (supra) are of no help to the accused."*

Extra-judicial confessions

How much weight should be given to a statement from a prosecution witness claiming that the accused confessed to him that they had committed the crime? Such a confession, in the absence of a magistrate or any other ostensibly independent party, is not a solid foundation for a conviction.

A long line of binding precedents from the Supreme Court has held, as in the two-judge bench of Rahim Beg vs. State of UP (1972) that, "the evidence of extra judicial confession is a weak piece of evidence." (Paragraph 18)

However, the rapid regression of this prudent standard can be traced through the following judgements.

A two-judge bench in Piara Singh v State of Punjab (1977) held that

At paragraph 10: *"The learned sessions judge regarded the extra-judicial confession to be a very weak type of evidence and therefore refused to rely on the same. Here the learned sessions judge committed a clear error of law. Law does not require that the evidence of an extra-judicial confession should in all cases be corroborated."*

The potential injustice and room for abuse of uncorroborated extra-judicial confessions is obvious. Nevertheless, in Ram Singh vs. Sonia (2007), the Supreme Court cited Madan Gopal Kakkad v. Naval Dubey (1992), and interpreted it as holding that:

At paragraph 42: *"...the extra-judicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration."*

The judges did not consider how difficult it is to actually establish, beyond reasonable doubt, the absence of coercion in its many forms. The alarming tendency of the superior courts to upgrade the weighting of extra-judicial

28 1992 (3) SCC 204

29 1974 (3) SCC 664

30 1979 (4) SCC 725

31 2003 (7) SCC 749

confessions to that of substantive evidence in criminal convictions has further undermined the rights of the accused.

lying witnesses

In case after case, the Supreme Court has rightly held that if a witness is found to be lying, then placing any reliance on his evidence, while at the same time rejecting the discredited part, would be very hazardous. This follows the well-regarded legal maxim: “falsus in uno, falsus in omnibus”. The notion of separating the wheat from the chaff is alien to criminal law jurisprudence. It cannot be used in the context of lying or exaggerating witnesses and certainly not in the case of witnesses whose testimony has been found to be substantially false. This used to be the Supreme Court’s position.

In the case of *RP Thakur vs State of Bihar* (1974) the Supreme Court took the admirably sceptical approach to a witness found to be lying:

At paragraph 6: *“If Nakuldeo could involve one person falsely, one has to find a strong reason for accepting his testimony implicating the others.”*

Similarly in *Suraj Mal vs State (Delhi Administration)* (1979), the Supreme Court held:

At paragraph 2: *“It is well-settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses...In other words, the evidence of witnesses against Ram Narain and the appellant was inseparable and indivisible.”*

This approach mirrors that of most democratic jurisdictions, where the evidence of untrustworthy witnesses would never form the basis of a conviction. It would be discarded in its entirety.

However, not in modern India. In their desire to boost conviction rates, the Supreme Court has negligently increased the law’s tolerance of lies and embellishments in witness statements. In their view, such defects no longer taint the admissibility of witness statements brought against the accused in criminal trials.

32 2002 (8) SCC 381

33 1995 (Supp) 3 SCC 217

34 2001 (9) SCC 1

35 2002(1) SCC 731

36 2003 (10) SCC 21

In SA Gaffar Khan vs VR Dhoble (2003) the Supreme Court held:

At paragraph 26: *“The maxim “falsus in uno falsus in omnibus” has no application in India and the witnesses cannot be branded as liars... It is merely a rule of caution... The doctrine is a dangerous one especially in India for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main... The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate an exaggeration, embroideries or embellishment.” (Page 764)*

In Gangadhar Behera & Ors vs. State of Orissa (2002), the Supreme Court held that:

At paragraph 16: *“Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained.”*

sealing of articles associated with the crime

Historically, the Supreme Court has applied common sense when setting the standards required for sealing weapons and other articles recovered at crime scenes. For instance, in Amarjit Singh vs State of Punjab (1995) a three-judge bench of the Supreme Court decided that sealing of weapons must be done on the spot by the investigating officer, otherwise it cannot be relied upon in evidence. The Supreme Court overturned a conviction under section 5 of TADA:

“...the conviction was reversed on the ground that the non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon, which was crucial evidence, cannot be ruled out.”

This well-established rule was discarded by a two-judge bench of the Supreme Court in State of Maharashtra vs. Bharat Chaganlal Raghani & Ors. (2001). Once again, a long line of conflicting judgements were ignored. The case dealt with a contract killing of two prominent businessmen in Mumbai. Pistols and AK assault rifles allegedly recovered from the accused were displayed, unsealed, at a press conference. The Supreme Court criticised the trial court's

37 AIR 1976 SC 2423; AIR 1980 SC 638

38 1994 (5) SCC 188

39 2006 (9) SCC 272

40 AIR 2001 SC 3173

wise approach as “technical”:

At paragraph 61: *“Holding that the only seized weapons were shown to the press, the trial court committed a mistake and it has unnecessarily tried to make a mountain out of a molehill on such a frivolous ground.”*

Thereafter in *Ganesh Lal vs State of Rajasthan (2002)*— a similar observation of law is recorded:

At paragraph 8: *“In such a situation, merely because the articles were not sealed at the places of seizure but were sealed at the police station, the recovery and seizure do not become doubtful.”*

Similarly in *Rajendra Kumar vs. State of Rajasthan (2003)*, where a submission was made by counsel for the accused that bangles allegedly recovered were not sealed, the Court held:

At paragraph 7: *“We do not think much importance can be attached to the fact that these bangles were not sealed at the time when recovery was made.”*

the first information report

An FIR is produced when a complaint is made at a police station regarding the commission of an offence. It is the first step in initiating criminal proceedings and a vital part of prosecution evidence. Procedural safeguards are required to prevent abuse of FIRs.

Slackening of the s157 crpc procedural safeguard

When an officer-in-charge of a police station receives information regarding the commission of an offence and records an FIR, section 157 CrPC requires him to “forthwith send a report” to the magistrate. This is designed to safeguard against the police creating a false FIR in retrospect, after deliberation and consultation. The Supreme Court has consistently recognised that a suspicion of retrospective FIRs arises when there is delay in dispatch of the report to the magistrate.

In *Meharaj Singh vs. State of UP* the Supreme Court dealt with a suspicion that the FIR had been “ante-timed” to artificially frame the accused:

At paragraph 12: *“FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appre-*

41 1980 (4) SCC 425

42 2003 11 SCC 519

43 2003 (8) SCC 546

ciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local magistrate. If this report is received by the magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local magistrate.”

However, in *State of J&K vs S Mohan Singh* (2006), the police have been given unreasonable benefit of the doubt. In that case, the crime is said to have occurred on July 23, 1985 at 6 pm The FIR was lodged at 7.20 pm and a copy of the FIR was received by the Magistrate on the next day at 12.45 pm The Supreme Court held:

At paragraph 10: *“In our view, copy of the first information report was sent to the magistrate at the earliest on the next day in the court and there was no delay, much less inordinate one, in sending the same to the magistrate.”*

Similarly in *Anil Rai vs State of Bihar* (2001) the Supreme Court introduced a new concept of “extraordinary delay”. Without reference to the previous case law, the Court altered the law surrounding s157 CrPC in the following way:

At page 3174: *“Extraordinary delay in sending the copy of the FIR to the magistrate can be a circumstance to provide a legitimate basis for suspecting that the first information report was recorded at much later day than the stated day affording sufficient time to the prosecution to introduce improvements and embellishment by setting up a distorted version of the occurrence. The delay contemplated under section 157 of the Code of Criminal Procedure for doubting the authenticity of the FIR is not every delay but only extraordinary and unexplained delay. However, in the absence of prejudice to the accused the omission by the po-*

44 AIR 1953 SC 459

45 2005 (9) SCC 103

46 AIR 1964 SC 1184

47 2003 1 SCC 21

lice to submit the report does not vitiate the trial.”

Names of witnesses omitted in the FIR

The Supreme Court has held repeatedly that if the name of the witnesses are omitted in the FIR, unless a plausible explanation is given, the omission could be treated as a ground to doubt the evidence.

In *Marudanal Augusti vs State of Kerala (1980)*, the Supreme Court acquitted the accused because, though it was submitted in Court that prosecution witnesses had seen the assault, they were not mentioned at all in the FIR.

“The FIR contains graphic details of the entire occurrence and care has been taken not to omit even the minutest detail. The names of PWs 4, 5 and 6 as having witnessed the assault are not mentioned at all in the FIR ... any number of witnesses could be added without there being anything to check the authenticity of their evidence.”

However, in *Rajkishore Jha vs. State of Bihar (2003)*, the Supreme Court held:

At paragraph 10: *“The high court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence.”*

arrest of females

Traditionally, women cannot be arrested at night, nor in the absence of a female constable. The object of these safeguards is clearly to protect the woman from abuse at the hands of male policemen. In another staggering gift of power to the police at the expense of the accused, the Supreme Court in *State of Maharashtra vs Christian Community Welfare Council of India (2003)* withdrew these restrictions:

At paragraph 9: *“Herein we notice that the mandate issued by the high court prevents the police from arresting a lady without the presence of a lady constable. The said direction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the high court in sub-para (vii) of the operative part of its judgement, we think a strict compliance with the said direction, in a given circumstance, would cause practical difficulties to the investigating agency and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the police from police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore,*

we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the arresting authority that while arresting a female person, all efforts should be made to keep a lady constable present but in the circumstances where the arresting officers are reasonably satisfied that such presence of a lady constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation, such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable."

chance witnesses

A witness who just happens to be present at a crime scene, but has no other apparent connection, is known as a "chance witness". Ever since the Supreme Court decision of *Puran vs. State of Punjab*, testimony from chance witnesses has been viewed with caution, due to the frequent discovery that they have either been recruited by the accused, or have vested interests in the outcome of the case. In *Puran*, a three-judge bench held, at paragraph 4:

"In cross-examination he [the chance witness] admitted that there was a dispute between him and the accused's father about a wall built by him on a site claimed by the father of the accused ... In these circumstances it could not be said that the sessions judge was in error when he rejected the evidence of this witness and described him as a chance witness. Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence."

In *State of UP vs Farid Khan*, a two-judge bench of the Supreme Court took the contrary view, neglected preceding case law and accepted the evidence of a chance witness. They focused more on the fact the witness had a criminal record, and held that if his evidence was corroborated by other witnesses, that criminal background was not important. The Supreme Court made their startling reversal at paragraph 4:

"...the high court disbelieved his evidence on two counts – firstly on the ground that he was previously convicted in a criminal case and was sentenced to four years' imprisonment. This, according to the High Court, was a valid ground to discard his evidence. Another ground to disbelieve the evidence of PW 2 Sharif was that he must have been a chance witness and his explanation that he was going to the shop of Safi may not have been true as there were several other "beedi" manufacturers in that

locality nearest to his house. Of course, the evidence of a witness, who has got a criminal background, is to be viewed with caution. But if such an evidence gets sufficient corroboration from the evidence of other witnesses, there is nothing wrong in accepting such evidence. Whether this witness was really an eye witness or not is the crucial question. If his presence could not be doubted and if he deposed that he had seen the incident, the court shall not feel shy of accepting his evidence."

standard of proof lowered

The Constitutional Bench in Haricharan Kurmi vs. State of Bihar (1964) categorically upheld the standard of proof in criminal law:

"In criminal trials, there is no scope for applying the principle of moral conviction." (Page 1184)

In a disturbing departure from the entrenched and internationally recognised standard of proof of "beyond reasonable doubt" for criminal cases, the Delhi High Court lowered it to that of "moral certainty." A two-judge bench of the Supreme Court noted this outrageous dictum but refrained from comment when it had the chance in Alamgir vs. State (2003):

At paragraph 11: "Incidentally, the high court did emphasise on the true and correct meaning of the phraseology "reasonable doubt" to be attributed thereon and it is on this score, the high court records:

"Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the judge."

At paragraph 12: "We are, however, not expressing any opinion with regard thereto."

conclusion

India's criminal justice system is in dire need of reform. Reform requires transparency, consultation and deliberation. It is not up to individual judges to depart from decades of well established law and procedure. Their sloppiness brings about change in an arbitrary and ad hoc fashion that undermines criminal law jurisprudence itself.

Reform of the criminal justice system should not mean a slackening of standards. It demands a higher quality of police and public prosecutors that are able to meet the criteria set by the Supreme Court in its earlier judgements. Sadly, the judiciary seems resigned to the fact that the police and public prosecutors will continue to be inept and corrupt. They have accepted that police standards

of investigation will remain appallingly low and have merely focussed on speeding up the system and increasing the rate of convictions nonetheless. The judiciary has lost a marvellous opportunity to radically reform the quality of police investigations. Instead, the high standards of criminal law jurisprudence have simply been downgraded to meet those set by the police.

Such regression has endangered both the accused and the public at large. The risk of indiscriminate arrests, misplaced prosecutions and wrongful convictions using coercive methods is higher than ever. Whatever little desire there was within the police force to increase their professionalism has dissipated in this climate, free from judicial pressure.

The Indian judiciary must urgently recall its constitutional role. It must uphold the rule of law, provide a check and balance on the executive and protect human rights. The Indian government must urgently initiate the legislative agenda required to reform the criminal justice system, in a responsible and consultative manner. This must include legislative repair of the damage done by the judiciary to criminal jurisprudence as demonstrated in this article. The people of India deserve nothing less.

This article was written by Colin Gonsalves in association with Dhairyasheel Patil, Former Chairperson of the Bar Council of India Robert Rothkopf, Graduate of Brasenose College, University of Oxford

trial by media

The heated debate over whether Ram Jethmalani ought to take up the defence of Manu Sharma has mercifully raised the issue of trial by media. Media undoubtedly played a sterling role in pointing out criminal appeals, which were languishing for long periods of time. Media also played an important role in a recent case where a person was sought to be sentenced to death on the basis of no evidence at all. But this is where the line must be drawn. The Parliament attack case raised the issue of trial by media as never before.

Afzal was handcuffed in the office of the special cell and the media was called in by the ACP Rajbir Singh. His confession to the nation was broadcast on prime time. The public could not see the handcuffs keeping him to his chair nor the large contingent of policemen surrounding him. All they could see was a confession apparently made freely. The trial judge viewed these tapes. Undoubtedly it influenced all the witnesses and the entire legal community. Since no test identification parade was done immediately after arrest, the identification in court after the televised confession was a farce. Had this trial been conducted in Europe or America, Afzal would have walked free.

ACP Rajbir Singh in his evidence in court stated, "I allowed media to interview Afzal in my office under the consent of my senior officer, namely the DCP". The DCP Ashok Chand in his cross-examination stated, "I am not aware if accused Afzal was produced before the media to tell the media about his role in the attack on Parliament." ST Khan, principal correspondent of the Aaj Tak TV channel said in his evidence "three channel people were called with the permission of top officials of Delhi Police."

The high court rejected the plea for a retrial but nevertheless held "it has indeed become a disturbing feature as is being noticed by us repeatedly that the accused persons are brazenly paraded before the press and interviews are being allowed. In cases where test identification parade or the accused person being identified by witnesses arise, the case of the prosecution is vulnerable to be attacked on the ground of exposure of the accused persons to public glare, weak-

ening the impact of the identification.”

In Rajindra’s case the Supreme Court held that “trial by press, electronic media or public agitation is the very antithesis of the rule of law.” In Allenet’s case the European Court on Human Rights set aside the trial because prosecution lawyers in a press conference encouraged the public to believe that the accused was guilty. In Rideau’s case where the accused confessed to robbery and murder and the confession was broadcast, the trial court held that the community was “overwhelmed and saturated” by the televised confession and that the psychological impact on the jurors rendered the decision of guilt illegal. “For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau’s trial – at which he pleaded guilty to murder.” In Regina’s case the Appellate Court held “...bias is such an insidious thing that even though a person in good faith believes that he was impartially, his mind may unconsciously be affected by bias.” The effect on a judge was that “...his mind had become so clogged with prejudice that he was unable to try the case impartially.” The court rejected the prosecution’s argument that the retrial would take three years to begin and that the effect of the media would fade, saying, “the people do not forget”. In Leslie’s case where the police released press statements which were extensively publicised stating that the accused had confessed to six murders, the US Supreme Court held that the detention and sentence of death was in violation of the Constitution. Similarly in Samuel’s case the US Supreme Court held that it was not necessary to demonstrate unfairness where “television has exposed the community repeatedly to the spectacle of the accused personally confessing to the crime.” The Court cautioned “the trial courts to take strong measures to ensure that the balance is never weighed against the accused.” As a result, in case after case, where trial by media had prejudice the accused, retrials were ordered. However, in Taylor’s case where the interference with the trial was deep and pervasive, the court held that the press coverage was sufficient reason not to order a retrial and the accused was acquitted. The Court lamented “if the impossibility of having a fair trial becomes national and continuing then there is quite literally, nowhere to go.”

Where the media suggests that the accused is guilty and should be given the death sentence, a fair trial becomes nigh impossible. It is very hard for a sessions judge to acquit an accused in the case of a heinous crime even if there is no evidence against him, particularly when an orchestrated campaign against the accused is widely covered by the media. The man may be guilty but he is entitled to a fair trial. And a trial by media in the long run is against public interest because it ought to result in a retrial or the acquittal of the accused. Similarly, when a lawyer is berated for taking up a high profile and unpopular case, prejudice is caused to the accused because every accused, particularly in a capital case is entitled to “competent advocates, equal to handling complex cases, not patronising gestures to raw entrants at the bar” as in Wasawa’s case.

How we uphold the rule of law in unpopular and seemingly “open and shut” cases is the test of our democracy.



in defence of afzal

When I was brought in to defend Afzal Guru in the Delhi High Court and I studied the trial court proceedings, it was clear that apart from the appreciation of evidence, his case rested on two gross infirmities. The first was trial by media, which rendered the doing of justice to Afzal impossible, and the second was that the trial court denied him a lawyer. Afzal was handcuffed in the office of the special cell and before his trial could begin and the police called in the media to broadcast a nationwide 'confession' on primetime television. Such a 'confession', though inadmissible in evidence had a huge impact in the country and a fair trial thereafter became nigh impossible.

Prior to making such statements, Afzal was not informed that he could consult a lawyer nor was he permitted to do so. He had a right to a lawyer from the moment of arrest. Any lawyer would have advised his client not to speak to the media. As a result of this trial by media, I argued that both the trial court and the Amicus had been biased. Bias is insidious. The subconscious is affected. Trial by media is the anti-thesis of the rule of law and makes a fair trial impossible. ACP Rajbir Singh in the testimony stated, "I allowed media to interview accused Afzal in my office under the consent of my senior officer, namely the DCP."

The high court dealt with these arguments in detail setting out not only the Indian decisions cited by me but also the judgements of the European Court of Human Rights and also the US Supreme Court.

Though my arguments for a retrial were rejected, the high court observed, "It has indeed become a disturbing feature that the accused persons are brazenly paraded before the press and are exposed to public glare in cases where test identification parade arise, weakening the impact of identification. What is fundamentally disturbing is the fact that custody is given by the court. This custody is not to be misused."

legal aid

Afzal was not given a lawyer in the trial court. He wrote to the judge saying that he needed a competent senior advocate and suggested four names. The judge enquired from two of the advocates present in court, who declined, and did not pursue the enquiry any further. He then appointed a lawyer for Afzal. When Afzal empathically said that he did not want this lawyer to represent him and the lawyer himself informed the court that he wished to withdraw, the court appointed the lawyer to assist the court. Assisting the court is one matter. A defence lawyer for the accused is another. Afzal's trial then proceeded without a defence lawyer.

Since he had no defence lawyer, many prosecution witnesses testifying directly against Afzal were discharged without effective and competent cross-examination. No cross-examination was conducted of many witnesses regarding recoveries, including of the mobile phones and sim cards said to be implicating Afzal. No cross-examination was done of prosecution testimony showing Afzal allegedly identifying the dead terrorists. No cross-examination was done on seizure memos and alleged renting of rooms in Delhi. No cross-examination was done on the manner of the identification of the accused, alleged purchases of chemicals or the pointing out memos. The cross examination in respect of Afzal's arrest at Srinagar was done contrary to Afzal's case. On several dates presence of the advocate is not recorded. On some dates opportunity to examine the witness is not recorded. Critical questions regarding the media interview and the recording of the confession were not put to the investigating officer. As a result, counsel did not consult with defendant Afzal on critical aspects of the trial, made no objections as to inadmissible evidence, made cursory closing arguments, did not make written submissions, presented no case law and often did only a formal cross examination.

It is inexplicable why the trial court insisted on the advocate continuing with the case once the accused had emphatically said that he did not want to be represented by him. It is unfair both to the accused as well as to the lawyer. No lawyer should be compelled to proceed with a trial, especially in a capital case, against his wishes.

The final arguments on behalf of Afzal in the high court covers the illegality of the written confession, the illegal way in which the accused was identified by the prosecution witnesses, the non-sealing of crucial evidence, the failure of the prosecution to call material witnesses, that testimony about the mobile phones and sim cards was fabricated and unreliable, that Afzal's fingerprints do not appear on a computer said to be recovered from him and so on.

death penalty

The Constitution permits the sentence of death provided there is a law to that effect. This law is to be found in 354 (5) of the CrPC which permits life to be

taken but only by hanging. If this section is struck down by any court as constituting 'cruel, inhuman or degrading treatment', then there will be no law by which life can be taken and consequently the sentence of death cannot be imposed. The argument that 354 (5) CrPC was unconstitutional was made several years ago in Bachan Singh's case and rejected on the basis that there was no medical evidence then to show that death by hanging was cruel, inhuman and degrading. The challenge to this section was again pleaded in Afzal's case with a view to having the section declared null and void so that if there is no law allowing for the death sentence, the sentence of death cannot be executed. The striking down of death by hanging and the consequent result of commutation to life has happened in several US states and in other countries as well. No argument was made that a new section ought to be introduced. As long as a statute enabling the taking of life does not exist subsequent to a court pronouncement declaring it void, the result is that even a person sentenced to death cannot be executed.

No argument was made in Afzal's case that he be given the lethal injection. There is no reference to this in the 250 page final arguments. There is no reference to this in the high court order. I cannot understand why persons who showed no interest in Afzal's fate over all these years of trial and appeal, have, at this critical stage, chosen to spread the canard that I asked for his death by lethal injection. It distracts from the presentation that must be made before the President and does disservice to Afzal.

clemency/commutation

Afzal's case before the President must be made on the basis of truth. It needs no embellishments. It certainly needs no falsehoods. The record of the trial court shows undoubtedly that he did not receive a fair trial. The arguments before the President should proceed on the basis of the evidence on record that would shock anyone's conscience.



time limit for criminal trials: the criminal amendment takes us backwards

The Code of Criminal Procedure (Amendment) Act, 2005 has been welcomed in the national media as heralding the release of 50,000 undertrials many of whom have been languishing in jails for years without their trials even beginning. Nothing could be further from the truth. The amendment is in fact a reversal of the Supreme Court decisions from 1996 onwards in the Common Cause and the Raj Deo Sharma cases.

In the Common Cause cases in 1996, the Supreme Court found that in many cases where the persons were accused of minor offences, proceedings were kept pending for years. The poor languished in jail for long periods because there was no one to bail them out. The criminal justice system operated as an engine of “oppression”. The Supreme Court then directed that, depending on the seriousness of the alleged crime, those in jail for a period of six months to one year would be released either on bail or personal bond, provided their trials were pending for one to two years.

The Supreme Court then issued directions for the closure of cases and the discharge of the accused. Cases where trials had not commenced for specific periods of time were to be closed. Cases relating to corruption, smuggling, terrorism and the like were exempted. It was clarified that the accused would not be permitted to deliberately delay the criminal proceedings and then take advantage of the time limits fixed.

In the Raj Deo Sharma case in 1998 the Supreme Court referred to its 1980 decision in the Hussainara Khatoon case where the Supreme Court held that “financial constraints and priorities in expenditure would not enable the government to avoid its duty to ensure speedy trial to the accused.” The Court thereafter proceeded to issue guidelines for the closure of prosecution evidence

and the release of the accused on bail after a certain period of time. It was clarified that “no trial could be allowed to prolong indefinitely due to the lethargy of the prosecuting agency.”

Despite these directions given by the Supreme Court ten years ago, the criminal courts failed to release persons on bail and close trials.

The law was reviewed by a Constitutional Bench of the Supreme Court in P. Ramachandra Rao’s case in 2004 where the directions relating to the closure of cases and the fixing of time limits for trials were set aside saying that it was “neither advisable nor practicable” to do so. As a result, the rot in the criminal justice system deepened and from time to time pathetic stories emerged in the national media on undertrials languishing in jails for decades, but nothing was done. The present criminal amendment is a reversal of the guidelines laid down in the Common Cause and the Raj Deo Sharma cases, first of all because the guideline makes no reference to any time limit for a criminal trial to end. Secondly, whereas in the earlier decision an accused was entitled to be released on bail or personal bond after being in jail for six months to a year depending upon the seriousness of the crime alleged, now that has been enhanced to half the period of possible incarceration i.e. one-and-a-half to three-and-a-half years. If under the earlier decisions of the Supreme Court undertrials were not released there is no reason for us to believe that under a more stringent regime, justice will be done.

There are over 250,000 undertrials languishing in jails even though the law presumes them innocent unless convicted. In many cases, the trials have not begun. Seven out of every ten persons in jail are in this situation. Overcrowding in jails is routine in some jails as high as 300 percent. Inmates sleep in shifts. Possibly no country in the democratic world keeps its people behind bars in the manner India does. The overwhelming majority of those incarcerated are poor, Dalits, Adivasis and Muslims. That the system operates harshly against these sections is an understatement. It operates only against these people.

The reluctance of the State to clear the jails of the poor is more by design rather than accident. The arbitrary powers to keep a person confined without a guilty verdict is necessary for a State and its police that rules by terror. The criminal justice system is not really interested in the determination of truth ensconced in the final verdict, rather it is a massive arbitrary system of preventive detention where the ultimate verdict is of no concern as long as the accused picked up by the police languish many years in jail prior to acquittal. Those who criticise the State for the low rate of conviction miss this point; that conviction was never the intention of the police in the first place. This accounts for the sloppy state of forensic investigation and the reliance placed on the lathi over the law.

The other changes brought about by the criminal amendment are also equally

vague or dangerous. The amendment in 50-A of the CrPC introduces the Supreme Court's guidelines in DK Basu's case but leaves out the crucial element of giving notice to the family of the person being arrested in writing. This was important because the police routinely lie about giving notice verbally. The amendment to section 53 is positively dangerous because it seeks to introduce in a sly manner lie detector and narco analysis tests as admissible in evidence. In most democratic countries, these tests are deemed to be of dubious merit and are not admissible. The amendment to section 122 seeks to strengthen police power in chapter cases by incarcerating people purely on the basis of suspicion. As the law stands today such persons are to be released after they sing a bond for good behaviour. Now the magistrate will be empowered to ask for sureties which is complicated and difficult for the accused to obtain. Tens and thousands of poor people are languishing in jail under this section. Section 291-A is designed to prevent the magistrate who supervises the test identification parade, the cornerstone of a criminal trial, from being summoned to give evidence in court. These are the negative changes sought to be introduced by the criminal amendment.

A better way out for the State is to declare an amnesty and to clear the jails of 100,000 poor prisoners on Independence Day.

