punishment in the departmental inquiry, there was hardly any justification for not releasing the arrears of salary for the period of suspension in addition to the subsistence allowance already drawn by him.

(7) Consequently, the impugned orders Annexures P/11 and P/14 to P/17 are hereby quashed as the action of the Punjab State Electricity Board in reopening the matter is wholly violative of the principles of natural justice. As a result thereof, a writ of *mandamus* is hereby issued against the respondents to grant to the petitioner the following relief forthwith:—

(1) Arrears of salary (difference between the actual salary and the subsistence allowance already drawn during the period of suspension from 3rd May, 1973 to 25th April, 1975); and

(2) Fixation of pay by adding annual increments from 1973 onwards, subject, of course, to the consideration of his service record for the purposes of crossing the efficiency bar, etc.

The departmental proceedings sought to be initiated in pursuance of the fresh charge-sheet are also hereby quashed and the respondents are restrained from reopening the matter against the petitioner.

(8) In the result, the writ petition succeeds and is hereby allowed. In the circumstances of the case, there is no order as to costs.

H.S.B.

FULL BENCH

Before : *D. S. Tewatia, C.J., S. S. Kang and M. R. Agnihotri, JJ.*

BIMAL KAUR KHALSA,—*Petitioner.*

versus

UNION OF INDIA and others,—*Respondents.*

Civil Writ Petition No. 3761 of 1986

October 20, 1987

Constitution of India, 1950—*Articles* 14, 19, 21, 22, 50, 226, 227, 228, 233 and 235—*Terrorist and Disruptive Activities (Prevention) Act (XLVI of* 1987)—*Sections* 9, 10, 11(2), 16, 19 *and* 20(4), (7) *and*

(8)—*Code of Criminal Procedure (II of 1974)—Sections* 167, 169, 227, 327 *and* 438—*Powers of the High Court under Articles* 226, 227 *and* 228 *with regard to orders and judgments of the Designated Court—Whether taken away by Sections* 9 *and* 19 *of the Act—Sub-Section* 4 *of Section* 9 *of the Act providing for the appointment of a Judge of a Designated Court with the concurrence of the Chief Justice instead of the High Court—Aforesaid provision—Whether violative of Article* 233(1) *of the Constitution—Provision for allowing the Presiding Officer of a Designated Court to continue in office after the age of superannuation—Whether subversive of judicial independence—Section* 10 *of the Act authorising the sitting of a Designated Court at a place other than the ordinary place of sitting—Whether valid—Provision for proceedings under the Act to be held in Camera under section* 16(1) *of the Act—Whether* ultra vires *Article* 14 *of the Constitution—Section* 16(2) *providing for the keeping of the identity of the prosecution witnesses secret—Whether reasonable, just and fair—Section* 20(4)(*a*) *entitling the investigator to produce for remand an accused charged for an offence under the Act either before the Judicial Magistrate or the Executive Magistrate—Said provision—Whether* ultra vires *Articles* 14 *and* 22 *of the Constitution of India—Section* 20(4)(*b*) *providing for an extended period of remand for a person accused of a terrorist offence—Whether* ultra vires *Articles* 14 *and* 21 *of the Constitution—Section* 20(7) *of the Act prohibiting the grant of anticipatory bail to person accused of a terrorist act—Whether* ultra vires *Article* 14 *of the Constitution of India—Requirement of Section* 20(8)(*b*) *that the Court before granting bail must record a finding that the accused was not likely to commit any offence while on bail—Whether unreasonable—Section* 20(8)(*b*)—*Whether liable to be struck down as* ultra vires *the Constitution.*

Held, that neither Section 9 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 nor any other provision of the Act including Section 19 thereof which confers exclusive appellate jurisdiction over the judgments and orders of the Designated Court in the Supreme Court of India, in any manner, takes away the powers of the High Court under Articles 226, 227 and 228 of the Constitution of India, 1950, in regard to the orders and judgments passed by the Designated Courts.

(Para 39).

Held, that Section 9(4) of the Act does not envisages the appointment of a District Judge. It envisages manning of Designated Court by the District Judge or Additional District Judge and, therefore, the provisions of Article 233 is not attracted. It is no doubt true that the expression 'Chief Justice' is not synonymous with the expression 'High Court', but it cannot be ignored that the right of being consulted does not confer effective power on the

High Court. The provision of sub-section (4) of section 9 of the Act, however, confer effective power on the Chief Justice of the High Court, because the expression used in this provision is 'with the concurrence' which means, that no person exercising the functions of the Sessions Judge or Additional Sessions Judge under the jurisdiction of a given High Court could be appointed a Judge or Additional Judge of a Designated Court by the State Government unless the Chief Justice gives his concurrence. Moreover, the powers enjoyed by the High Court under Article 235 is not taken away by Section 9 or any other provision of the Act, and the administrative control of the High Court over the Designated Courts remains in tact. As such the provisions of sub-section (4) of section 9 of the Act is not violative of Article 233(1) of the Constitution.

(Paras 42, 43 and 44).

Held, that the powers enjoyed by the High Court under Articles 235 of the Constitution is not taken away by Section 9 or by any other provision of the Act. The administrative control of the High Court over the Designated Court remains in tact. The continuance of the District Judge or the Additional District Judge of the Designated Court after the age of superannuation is not entirely dependent upon the pleasure of the executive Authority. It is no doubt true that after the age of superannuation the judicial officer is not assured of a tenure for a fixed or specified period, but in our view, by necessary implication, the manner of the termination of the tenure of the Designated Court would be the same as its appointment. Hence as and when the tenure of the Judge is to be brought to an end after the age of superannuation, it would be done with the concurrence of the Chief Justice which would work as a bulwark against the erosion of the judicial independence of the Presiding Officer. Therefore, permitting the Judge of a Designated Court to continue as such after the age of superannuation is not subversive of judical independence.

(Paras 44 and 46).

Held, that the provisions of Section 10 of the Act provide for the place of sitting of the Designated Court at a place other than its ordinary place of sitting is justified even in view of the provisions of Section 327 of the Code. One can take judicial notice of the fact that there have been incidents of Presiding Officers being attacked with fire-arms and killed while holding Court, the accused facing trial for offences under the Act have been freed and rescued by their companions after storming the Court premises and after resorting to firing with Machine Guns and Sten-Guns,

resulting in murder of Police Personnel and other innocent civilians in such incidences. The Legislature, in our view, rightly enacted the provision like Secton 10 of the Act, enabling the Designated Courts to hold court at any place other than the usual place of sitting, if circumstances, to be detailed in its order, justify such an action. Hence this provision cannot be considered in any manner to be unreasonable, unjust and unfair to the accused and is valid.

(Paras 85, 86 and 87).

Held, that the open trial is not only necessary in the interest of justice, but is also essential in the interest of the community and serves an important social purpose. For not only the accused is entitled to receive justice, but the community at large is interested that an innocent person is so pronounced within the public gaze. Since the provisions of Section 16(1) of the Act leaves no discretion to the Court in the matter of deciding as to whether the Court is to be held in public or in camera and also does not provide any guidelines to instruct the public prosecutor as to in what cases he should demand open trial and the said provision is arbitrary and violative of the provision of Article 14 of the Constitution.

(Paras 91 and 97).

Held, that the provisions of Section 16(2) of the Act regarding production of witnesses at the trial the Legislature has left the matter to the discretion of the Court. The Court in the exercise of its discretion shall on the one hand try to ensure that the witness is able to depose in Court free from all mental constraints and fears, it would also at the same time ensure that the accused is put in a position to effectively cross-examine the witnesses. Neither the government can ensure total safety to a prosecution witness. A witness deposing in a criminal trial supposedly does so from a sense of public duty, is to be performed even at some risk to one-self. Within the aforementioned constraint, the Court can take such steps as may stop the dissemination of information regarding the address and identity of a prosecution witness by ensuring that his name and address and the identity are not given publicity by the media and that in public record he is merely mentioned as PW 1, PW 2 etc. and the documents identifying as to who the witness is are kept confidential in sealed cover by the Court barring access of the same to the public. The court would also be within its right to allow the shielding of a witness from public gaze when he is brought to the court room where he would be made to depose openly and not from behind the *purdah* and in any case where the trial is in open Court, the identity of the witness shall not be screened from the accused, his counsel and the Court. Since it has been left to the Court to decide upon as to how to keep the

identity and address of any witness secret, so while doing so it would act in a manner as to ensure to the accused effective opportunity of cross-examining the witness by seeing to it that the name and address and identity of the witness are disclosed to him well before the start of the trial. When so interpreted it has to be held that the provisions of section 16(2) of the Act are reasonable, just and fair.

(Paras 103, 105 and 106).

Held, that a perusal of clause (a) of sub-section (4) of Section 20 of the Act would show that a person accused of an offence under the Act at the sweet will of the investigator could be produced for the purpose of remand either before the Judicial Magistrate or before the Executive Magistrate. The norm is that a person accused of a crime has to be produced before a Judical Magistrate for remand purposes. For any departure therefrom there should exist a rational reason. The aforesaid provision, however, contains no guidance even of a nature as does sub-section (2A) of Section 167 of the Code of Criminal Procedure, 1974. Clause (c) of Section (2A) of Section 167 of the Code seeks deemingly to omit sub-section (2A) of Section 167 of the Code. That means the investigating officer may decide to seek remand from an Executive Magistrate without the power of the Judical Magistrate being conferred upon him and that too not necessarily for the reasons of absence of the Judicial Magistrate. Moreover, the mandate of Article 50 of the Constitution having been implemented by enacting the revised Code of Criminal Procedure in 1973 the expression Magistrate occurring in Article 22(1) of the Constitution would mean the one who belong to a separate judical service of the State. In other orders "the Judical Magistrate. Clause (a) when read alongwith clause (1) of sub-section (4) of Section 20 of the Act entrusts the investigating officer with unguided and arbitrary power to seek remand in one case from the Executive Magistrate and in another case from the Judicial Magistrate is, therefore, violative of Articles 14 and 22 of the Constitution.

(Paras 78 and 79).

Held, that the period of remand extended by Section 20(4) (b) of the Act can reasonable justify the period of police remand and judicial remand. Since the commission of the terrorist acts being on the increase, making in turn heavy demands on police not only for the purpose of investigation of such offences, but also for the purpose of providing security to threatened citizens and the Government functionaries, it may be difficult for the Police to conclude investigation of the case within the period of 15 days originally stipulated by Section 167 of the Code. Such circumstances can reasonable justify the extension of the period of remand.

Moreso, the provision envisaging such a period of remand does not imply that the Court is bound in every case to grant remand for the period envisaged by Section 20(4) (b) of the Act. The court in each case must with full sense of responsibility, assure itself about the existence of the necessity of an extended remand, before further remanding the accused to police or judicial custody. As to the unconstitutionality of Section 20(4) (b) of the Act on the ground of discrimination between those who are accused of the offences contained in the Indian Penal Code is also without any basis. Hence Section 20(4) (b) is not ultravires Articles 14 and 21 of the Constitution of India.

(Paras 82, 83 and 84).

Held, that the person charged with the commission of terrorist act fall in a category which is distinct from class of persons charged with commission of offence under the Penal Code and the offences created by other statutes. The enforcing agencies find it difficult to lay their hands on persons indulging in terrorist acts. Unless the police is able to secure clue as to who are the persons behind this movement, how it is organized, who are its active members and how they operate, it cannot hope to put an end to this movement and restore public order. The Police can secure this knowledge only from the arrested terrorists after effective interrogation and if the real offenders apprehending arrest are able to secure anticipatory bail then the police shall virtually be denied the said opportunity. As such, Section 20(7) of the Act prohibiting the grant of anticipatory bail to persons charged with the commission of terrorists act is not ultravires the provisions of Article 14 of the Constitution.

(Para 108)

Held, that the provisions of sub-section (8) of Section 20 of the Act imposes restrictions on the granting of bail to a person accused of an offence under the Act. It may be observed that neither public policy nor the supposed interest of the society would justify the ban on the Designated Court or the High Court to grant bail *inter alia* only if it is in a position to give a finding that when on bail, the accused is not likely to commit any offence. This would amount of making an impossible demand on the court, more so for the reason that an investigating officer while releasing the accused on bail in exercise of provision of Section 169 of the Code is not required to entertain any such plea of the future behaviour of the accused nor when the Designated Court decides to discharge the accused in terms of the provisions of Section 227 of the Code. Where an accused is produced before the Court alongwith the first information report and the case diaries and where the first information report discloses the given offence nor do the case diaries

established any connection between the accused and the commission of the supposed offence, and the court is satisfied that on the basis of the material with the police, the accused is not guilty of the offence he is charged with, yet the accused would not be entitled to be enlarged on bail unless the court further certifies that he would not commit any offence if enlarged on bail, places the innocent citizens at the mercy of the police. A police officer out of enmity or to wreak personal vengeance on an innocent person would be able to keep him in jail, even though not a shred of evidence/material is placed before the Court for connecting the accused with the supposed crime, because the court even in such a situation may not be in a position to say with certainty and a clear conscience that the accused, if released on bail, would not commit an offence. Hence the portion of Section 20(8)(b) which reads "and that he is not likely to commit any offence while on bail" is liable to be struck down as *ultravires* Article 14 of the Constitution.

(Paras 109 and 110).

Case referred by Division Bench consisting of Hon'ble Mr. Justice D. S. Tewatia and Hon'ble Mr. Justice M. R. Agnihotri on 24th February, 1987 *to a larger Bench as the case contains an important question of law. The Larger Bench comprising of Hon'ble the Chief Justice Mr. D. S. Tewatia, Hon'ble Mr. Justice S. S. Kang and Hon'ble Mr. Justice M. R. Agnihotri decided the case finally on 20th October,* 1987.

Amended petition under Article 226 *of the Constitution of India praying that this Hon'ble Court may be pleased to :—*

(a) *issue an appropriate Writ, order or direction under Articles* 226 *of the Constitution of India striking down the Terrorist and Disruptive Activities (Prevention) Act,* 1985 *(Act No.* 31 *of* 1985 *of Indian Parliament) and Terrorist and Disruptive Activities (Prevention) Ordinance* 1987 *as ultravires the Constitution of India.*

(b) *pending trial decision on this petition stay of the operation of the Act may kindly be granted;*

(c) *exempt the petitioner from serving the advance notice of motion on the respondents;*

(d) *pass any other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case;*

(e) *also the petitioner may kindly be awarded the costs of this petition against the respondents;*

B. S. Khoji, Advocate with Miss V. P. Brar, Advocate, *for the Petitioner.*

Anand Swaroop, Senior Advocate (Ajai Tewari, Advocate with him), *for Respondents No.* 1 *and* 3.

H. S. Riar, D.A.G. (Punjab), *for Respondent No.* 2.

K. P. Bhandari, Additional A.G., Punjab, with Himinder Lal, Advocate.

JUDGMENT

(1) Petitioner Smt. Bimal Kaur Khalsa, wife of Sardar Beant Singh, deceased, has through Civil Writ Petition No. 3761 of 1986, questioned the vires of some of the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1985.

(2) The vires of some of the provisions of the said Act have similarly been challenged through Civil Writ Petitions Nos. 1629 and 4674 of 1986 and Criminal Writ Petitions Nos. 827, 884 and 888 of 1986.

(3) The provisions of the said Act, the vires whereof had been challenged are — section 3(2)(i), section 7, section 8, sub-section (2) of section 9, sub-section (1) sub-section (2) and sub-section (3) of section 13, section 16 and clauses (a) and (b) of sub-section (2), sub-section (3), sub-section (4) and clause (b) of sub-section (5) of section 17 of the Act.

(4) Soon after the judgment in this case was reserved, the Terrorist and Disruptive Activities (Prevention) Ordinance, 1987 (Hereinafter referred to as 'the Ordinance of 1987') was promulgated, which came into force with effect from 24th May, 1987. This was brought to our notice. The case was re-listed for hearing. The petitioner expressed desire to amend the petition, so as to bring to challenge the relevant provisions of the Ordinance of 1987. The petitioner was permitted to file an amended petition, which she did and the respondent-Union of India put in reply thereto.

(5) The parties re-argued the case and the judgment was reserved. Before the reserved judgment in the amended petition could be announced, the Ordinance of 1987 came to be repealed and

replaced by the Terrorist and Disruptive Activities (Prevention) Act, 1987. Smt. Bimal Kaur Khalsa (the petitioner in Civil Writ Petition No. 3761 of 1986) through Civil Miscellaneous Application No. 3332 of 1987 filed under section 151, Code of Civil Procedure, sought to affect certain amendments in the earlier amended petition.

(6) In paragraph 6 of the said application, it has been mentioned that the submissions advanced on her (petitioner) behalf of the Bar by her counsel, regarding the constitutional validity of some of the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1985, and the corresponding provisions of the Ordinance of 1987 remain the same. Ii paragraph 7 of the application, she further mentions that the submissions advanced on her behalf at the Bar by her counsel in regard to the provisions of the Ordinance of 1987 as mentioned in paragraph 6 be taken to be reiterated *qua* the corresponding provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and for the same reasons the said parallel provisions of this Act may be struck down. Under paragraph 6 of the application, the entire provisions of the Ordinance of 1987 and the corresponding provisions of the entire Terrorist and Disruptive Activities (Prevention) Act, 1987 have been enumerated.

(7) Since the attack to the vires of the Ordinance of 1987 was limited in regard to only some of its provisions and the challenge thus did not extend to all the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987, so, Mr. B. S. Khoji, the learned counsel for the petitioner, by way of clarification made a statement at the Bar and identified the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987, the challenge to the validity thereof would be directed. These provisions of this Act are — sections 9, 10, 11(2), 16, 19 and section 20, sub-section 14)(7) and (8).

(8) Mr. Khoji also reiterated that on an earlier occasion in the wake of the Ordinance of 1987, the arguments were advanced regarding only such of the provisions of the said Ordinance, as corresponded to the aforementioned provisions of sections 9, 10, 16, 19 and section 20, sub-sections (4) (7) and (8). He further stated at the Bar that the provisions of these very sections of the Terrorist and Disruptive Activities (Prevention) Act, 1987 be read in the writ

petition for the corresponding provisions of sections of the Ordinance of 1987 and that the writ petition be treated to be amended as such and only to the extent, indicated above.

(9) On behalf of Union of India, a reply was filed to this petition, in which an objection was taken to the manner of effecting amendment in the writ petition through the application (Civil Miscellaneous No. 3332 of 1987). By a separate order, this application has been allowed and the writ petition therefore has to be taken as amended to the extent suggested in the application and clarified at the Bar by the counsel for the petitioner.

(10) While the counsel for the petitioner merely stated that the submissions advanced by him on earlier two occasions be treated as reiterated, the counsel for the Union of India addressed additional submissions, which are being duly taken note of.

(11) It is not necessary to refer to in any detail the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 by way of comparison with the corresponding provisions of the Terrorist and Disruptive Activities (Prevention Act, 1985). It would suffice to say that the relevant provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1985, the vires whereof had been initially challenged and which have been just taken notice of in the above paragraph, have been retained in the Terrorist and Disruptive Activities (Prevention) Act, 1987, as it is and the only substantial change that has been made is in the provision of clause (i) of sub-section (2) of section 3 and in section 6 of the Terrorist and Disruptive Activities (Prevention) Act, 1985, whereas the former provision, in this Act provided death sentence as the only punishment for the Act, mentioned therein, the corresponding provision in the Terrorist and Disruptive Activities (Prevention) Act, 1987, provided death or life imprisonment for the very offence. And whereas section 6 of the Terrorist and Disruptive Activities (Prevention) Act, 1985 provided for enhanced penalties for the offences under the Acts specified therein, if committed in the area notified by the State Government, the corresponding provision of the Terrorist and Disruptive Activities (Prevention) Act, 1987, which is its section 6, envisages enhanced penalties for the given offence only, if the given offences had been committed with intent to aid any terrorist or disruptionist. Provision of section 6 of the Terrorist and Disruptive Activities (Prevention) Act, 1985 and section 6 of

the Terrorist and Disruptive Activities (Prevention) Act, 1987, also differ in regard to the measure of punishment, which circumstance, however, is not relevant for the purpose of testing the vires of the provision already mentioned.

(12) In view of the above, reference to the relevant provision from the Terrorist and Disruptive Activities (Prevention) Act, 1987, is to be made, reference to the corresponding provision of the Terrorist and Disruptive Activities (Prevention) Act, 1985 shall be made only when comparison with the provision of this Act becomes necessary. Nevertheless, it would be in order to indicate as to which provision of the Terrorist and Disruptive Activities (Prevention) Act, 1985, corresponds to the challenged provision of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These are as indicated below:—

The Terrorist and Disruptive Activities (Prevention) Act, 1985.		*The Terrorist and Disruptive Activities (Prevention) Act, 1987*
Section 7	...	Section 9
Section 8	...	Section 10
Section 9(2)	...	Section 11(2)
Section 13	...	Section 16
Section 16	...	Section 19
Section 17(2)	...	Section 20(4)
Section 17(4)	...	Section 20(7)
Section 17(5)	...	Section 20(8)

(13) Since common questions of law are involved in the aforesaid petitions, so a common judgment is proposed for all these petitions. Reference to facts wherever considered necessary primarily

would be made from Civil Writ Petition No. 3761 of 1986. Facts of any other writ petition would be mentioned only if it becomes necessary for the purpose of dealing with any point peculiar to the given writ petition.

(14) The circumstances that led the petitioner Smt. Bimal Kaur Khalsa to file the said writ petition and question the vires of the already noticed provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1985, in the first instance, may first be recapitulated briefly.

(15) Two criminal cases were registered against the petitioner—(i) at Police Station E-Division, Amritsar,—*vide* F.I.R. No. 129, dated 4th June, 1986, for offence under sections 302/307/148/149, Indian Penal Code, and section 25, Arms Act, 1959 (Act No. 54 of 1959) and sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1985; (ii) at Police Station (East) Chandigarh,—*vide* F.I.R. No. 46, dated 3rd February, 1986, for offences under sections 124-A, 153-A and 506 of the Indian Penal Code, and under sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1985.

(16) An effort on the part of the Police Authority to arrest the petitioner in connection with the said offences led her to file the aforementioned three petitions in this Court *inter alia* challenging the vires of some of the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1985, in the first instance, and later on the corresponding provisions of the Ordinance of 1987 and the Terrorist and Disruptive Activities (Prevention) Act, 1987, through the amended petition, as already observed.

(17) The Terrorist and Disruptive Activities (Prevention) Act, 1985, received the assent of the President of India on 23rd May, 1985. It was enforced with effect from the 24th day of May, 1985. It was to remain in force for a period of two years. Barring the State of Jammu and Kashmir, this Act was applicable to every part of India. By virtue of the provisions of sub-section (2) of section 1 of the Act, the citizens of India outside India and all persons in the service of the Government, wherever they may be and also persons on ships and aircraft registered in India, wherever they may be, were covered. On the date on which this Act expired its place was taken by the Ordinance of 1987, which came into force with effect from 24th May, 1987. The Ordinance of 1987 has since been replaced by the Terrorist and Disruptive Activities (Prevention) Act

1987, which received the assent of the President of India on 3rd of September, 1987. This Act too would remain in force for two years. Sections 5, 15, 21 and 22 of this Act shall come into force at once and its remaining provisions shall be deemed to have come into force on the 24th day of May, 1987, as envisaged by sub-section (3) of section 1 of this Act.

(18) For the sake of brevity, the Terrorist and Disruptive Activities (Prevention) Act, 1987, shall hereinafter be referred to as 'the Act'), but where any provision of this Act is to be compared or contrasted with any of the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (hereinafter to be referred to as "the Act of 1985), it would be referred as "the Act of 1987".

(19) Before adverting to the rival contentions addressed at the Bar, a quick survey of the statutory provisions of the Act would be in order.

(20) Section 2 of the Act defines various terms occurring in this Act. Section 3 of the Act defines the terrorist acts and also provides for punishment. Section 4 of the Act defines the disruptive activities and also provides for punishment. Section 5 of the Act provides the minimum and maximum sentence for persons present in a notified area possessing unauthorisedly certain arms and explosives mentioned in this section.

(21) Section 6 of the Act provides for enhanced penalties for offences resulting from contravention of the provisions of Arms Act, 1959, the Explosives Act, 1884, the Explosive Substances Act, 1908 or the Inflamable Substances Act, 1952, if the accused contravened the provisions of the said Act with intent to aid any terrorist or disruptionist.

(22) Section 7 of the Act enables the Central Government notwithstanding anything contained in the Code or in any other provision of the Act, to confer by notification in the Official Gazette, on any officer of the Central Government, powers exercisable by a Police Officer under the Code in such State or part thereof or as the case may be for such case, class or group of cases, and in particular, the powers of arrest, investigation and prosecution of persons before any Court. Section 7 requires and empowers all police officers of the Government to assist the officer of the Central Government,

in the exercise of the aforementioned powers by him and in the execution of the provisions of this Act or any rule or order made thereunder. Section 7 also provides that the provisions of the Code shall so far as may be and subject to such modifications made in this Act, apply to the exercise of the powers by the officers of the Central Government.

(23) Section 8 of the Act envisages and indicates circumstances and contingencies in which the Designated Court forfeits the property of the accused to the Government free from all encumbrances.

(24) Section 9 of the Act enables the Central and the State Government to constitute one or more Designated Courts for such area or areas or for such case or class or group of cases as may be specified in the notification. This section also provides as to who could be appointed the presiding officer of such Designated Courts and for what period; by whom he could be appointed and the manner of the Court's dealing with the business before it. In the event of there being two Designated Courts — one being constituted by the State and the other by the Central Government, the one constituted by the Central Government alone shall have the jurisdiction in the given area and in regard to the cases or class or group of cases, mentioned in the notification.

(25) Section 10 of the Act enables the Designated Court to sit at a place other than the ordinary place of its sitting, in the State in which it is constituted. Section 11 of the Act prescribes the juristion of the Designated Courts. Sub-Section (2) of section 11 of the Act envisages transfer of cases from the Designated Court to another Designated Court in any other State, with the concurrence of the Chief Justice of India. Sub-section (3) of section 11 of this Act envisages the divesting of Designated Court in a State of its jurisdiction over the offences committed in an area, which is declared to be a disturbed area and the giving of jurisdiction over such offences in a Designated Court outside that State.

(26) Section 12 of the Act indicates the powers of the Designated Courts with respect to other offences. Section 13 of the Act authorizes the Central or the State Government to appoint the Public Prosecutors or Additional Public Prosecutors for every Designated Court of a Special Public Prosecutor for any case or class or group of cases.

(27) Section 14 of the Act deals with the procedure and powers of the Designated Courts. Section 15 of the Act enables any Police Officer not lower in rank of Superintendent of Police to record the confession of a person and make it admissible at the trial of such a person under this Act.

(28) Section 16 of the Act enables the Designated Court to hold all proceedings in camera and also take steps for the protection of witnesses. Section 17 of the Act provides that the trial by the Designated Courts shall have precedence over the trial of the same accused regarding any other case triable by another Court. Section 18 of the Act authorizes the Designated Court to transfer a case, which it is not competent to try, to a Court which has jurisdiction under the Code of Criminal Procedure to try the same. Section 19 envisages the Supreme Court as the only Court of Appeal against the final judgment and order of the Designated Court. Section 20 of the Act modifies the application of certain provisions of the Code regarding taking of cognizance of offences which may not be cognizable under the Court. It enables the Executive Magistrate to give remand notwithstanding the provision of sub-section (1) of section 167, Code of Criminal Procedure. It converts the period of fifteen days, ninety days and sixty days envisaged in clause (b) of sub-section (2) of section 167 of the Code of Criminal Procedre into one of sixty days, one year and one year, respectively. It altogether omits sub-section (2A) of section 167 of the Code of Criminal Procedure. It makes applicable section 21 of the Code of Criminal Procedure to a case involving offence punishable under this Act, or any rule made thereunder and requires the expression 'the State Government' to be construed as the 'Central Government' or 'the State Government'. It also similarly makes applicable section 164 of the Code of Criminal Procedure and requires to read for the expression 'Metropolitan Magistrate or Judicial Magistrate or Judicial Magistrate' the expression 'Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate'. It substitutes expression 'Court of Session' and 'High Court' in sections 366 to 371 and section 392 of the Code by the expression 'Designated Court' and 'Supreme Court' respectively. Section 20 also makes inapplicable the provision of section 438 of the Code. This section also imposes additional limitations on the Court regarding granting bail.

(29) Section 21 of the Act places on the accused the onus to prove his innocence in certain circumstances. Section 22 of the Act makes admissible the evidence of identification of a proclaimed offender by a witness from his photograph. Section 21 of the Act provides for the saving of the jurisdiction exercisable by the Court or other authority of Naval, Military or Air Forces or other Armed Forces of the Union, as also the Procedure applicable to them. This section also provides that the Designated Court shall be a Court of Oridinary Criminal Justice for the purpose of sub-section (1) thereof. Section 24 of the Act provides that an order passed under this Act and signed by the competent authority, shall be presumed to be so made. Section 25 of the Act gives overriding effect to the porvisions of the Act or any rule made thereunder or any order made under any such rule over any other enactment or any instrument having effect by virtue of any of the provisions of such other Act. Section 26 of the Act accords protection from legal proceedings of all kind for any action taken under this Act. Section 27 of the Act authorises the Supreme Court to make rules for carrying out the provisions of the Act relating to Designated Courts. Section 28 of the Act provides for the framing of rules by the Central Government. Section 29 of the Act provides for such rules being laid before Houses of Parliament. And section 30 envisages repeal of the Ordinance of 1987 (the Terrorist and Disruptive Activities (Prevention) Ordinance, 1987), and also that anything done or any action taken under the Ordinance of 1987 shall be deemed to have been done or taken under the corresponding provisions of the Act.

(30) Before examining the challenge posed in these petitions to some of the provisions of the Act and the rival submissions advanced at the Bar in that regard, it would be appropriate to mention at the very outset that in view of the provision of section 3(2)(i) and section 25 of the Act of 1987, the challenge to the provision of clause (i), sub-section (2) of section 3 of the Act of 1985 was abandoned by the counsel for the petitioner, for in regard to the pending cases, which is also the position in regard to the case of the petitioner, the punishment that would be imposable for the given offences would be that which is provided by the relevant provisions of the Act of 1987 and not the one, which was envisaged by the provisions of the Act of 1985.

(31) The provisions of clause (i), sub-section (2) of section 3 of the Act of 1985 and the corresponding provisions of the Act of 1987 read as under:—

S. 3 (2) (*i*) *of the Act of* 1985	*S.* 3(2) (*i*) *of the Act of* 1987.
"if such act has resulted in the death of any person, be punishable with death."	"if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine."

Section 25 of the Act reads:

> "The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

(32) The challenge to the provision of section 3(2)(i) of the Act of 1985 was mounted on the basis of the ratio of Supreme Court decision reported in *Mithu* v. *State of Punjab and another* (1), in which their Lordships struck down the provision of section 303 of the Indian Penal Code, which provided for compulsory imposition of death sentence. The corresponding provision of the Act of 1987 by providing the alternative sentence of life imprisonment has brought this provision in line with the provision of section 302, Indian Penal Code, the vires whereof have already been upheld by the Supreme Court in *Bachan Singh* v. *State of Punjab* (2).

(33) In view of the above, the learned counsel for the petitioner, has in our opinion, rightly given up the challenge to the provision of section 3(2)(i) of the Act of 1985 and the corresponding provision

(1) A.I.R. 1983 S.C. 473.
(2) A.I.R. 1980 S.C. 898.

of the Act of 1987, because despite the following provision of section 1(3)(d) of the Act of 1958, it is the provision of the Act of 1987 by virtue of section 25, which would govern the trial of the offences and the punishment for a given offence subject of course to the provision of Article 20 of the Constitution of India:—

> *S.* 1(3)(*d*): any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punisment as aforesaid,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired."

At this stage, I may also notice that the learned counsel for the petitioners earlier gave up the challenge to the provision of section 9(2) of the Act of 1985 and the corresponding section 11(2) of the Act of 1987, specifically and expressly now at the Bar, when Mr. Anand Swaroop, the learned counsel for the Union of India, conceded that the accused would be entitled to have his say before the Chief Justice of India before the latter gives his consent to the transfer of the case.

(34) I may now first examine the challenge posed on behalf of the petitioner to the 'Designated Courts' and the conferment of exclusive appellate jurisdiction over such courts in the Supreme Court.

(35) Mr. B. S. Khoji, the learned counsel for the petitioner, has canvassed that the creation of Designated Court and vesting it with the jurisdiction of trying the offences created by the Act in accordance with the procedure provided by the said Act is violative of Articles 14, 19 and 21 of the Constitution of India. The discrimination against the person accused of the commission of the offences created by the Act is implicit in the creation of the Designated Court of the kind for trying such offences.

(36) It has further been argued on behalf of the petitioner that Article 21 of the Constitution of India envisages that a person can be deprived of his life or liberty only in accordance with a procedure, which is fair, reasonable and just. Implicit in this, it is asserted, is also the assurance that a citizen shall be tried by a Court presided over by an independent and impartial presiding officer.

(37) Mr. B. S. Khoji has next contended that the provisions of sub-section (7) of section 9 of the Act, which enables a Sessions Judge or an Additional Sessions Judge after being appointed as a Judge or an additional Judge of a Designated Court to continue to function as such beyond the age of superannuation would have the effect of undermining the judicial independence of such presiding officer, because after the age of superannuation his continuance to preside over the Designated Court would depend upon the sweet will of the Executive Authorities.

(38) Learned counsel for the petitioner sought support for his above submission from the following observations of their Lordships in *re*: *The Special Courts Bill*, 1978, (3):—

> "95. The second infirmity from which the procedural part of the Bill suffers is that by Clause 7, Special Courts are to be presided over either by a sitting Judge of a High Court or by a person who has held office as Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India. The provision for the appointment of a sitting High Court Judge as a Judge of the Special Court is open to no exception. In so far as the alternate source is concerned, we entertain the highest respect for retired Judges of High Courts and we are anxious that nothing said by us in our judgment should be construed as casting any aspersion on them as a class. Some of them have distinguished themselves as lawyers once again, some as members of administrative tribunals, and many of them are in demand in important walks of life. Unquestionably they occupy a position of honour and respect in society. But one cannot shut one's eyes to the constitutional position that whereas by Article 217, a sitting Judge of a High Court enjoys security of tenure until he attains a particular age, the retired Judge will hold his office as a Judge of the Special Court during the pleasure of the Government. The pleasure doctrine is subversive of judicial independence."

> "96. A retired Judge presiding over a Special Court, who displays strength and independence may be frowned upon by

(3) A.I.R. 1979 S.C. 478.

the Government and there is nothing to prevent it from terminating his appointment as and when it likes. It is said on behalf of the Government that if the appointment has to be made in consultation with the Chief Justice of India, the termination of the appointment will also require similar consultation. We are not impressed by that submission. But, granting that the argument is valid, the process of consultation has its own limitations and they are quite well known. The obligation to consult may not necessarily act as a check on an executive which is determined to remove an inconvenient incumbent. We are therefore, of the opinion that Clause 7 of the Bill violates Act 21 of the Constitution to the extent that a person who has held office as a Judge of the High Court can be appointed to preside over a Special Court, merely in consultation with the Chief Justice of India."

(39) The provision of section 9 of the Act, it is argued on behalf of the petitioner, is also violative of the provisions of Articles 226, 227, 228, 233 and 235 of the Constitution of India. The relevant provisions of section 9 and section 19 of the said Act are in the following terms:—

"S.9. *Designated Courts.*—(1) The Central Government or a State Government may by notification in the Official Gazette, constitute one or more Designated Courts for such area or areas, or for such case or class or group of cases as may be specified in the notification.

(2) * * * * *

(3) * * * * *

(4) A Designated Court shall be presided over by a Judge to be appointed by the Central Government or, as the case may be, the State Government with the concurrence of the Chief Justice of the High Court;

(5) * * * * *

(6) * * * * *

(7) For the removal of doubts, it is hereby provided that the attainment by a person appointed as a Judge or an additional Judge of a Designated Court of the age of superannuation under the rules applicable to him in the Service to which the belongs, shall not affect his continuance as such judge or additional judge.

(8) * * * * *

"S. 19. *Appeal.*—(1)Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.

(2) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, sentence or order of a Designated Court.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days."

In my opinion, neither the provision of section 9 of the Act, nor any other provision of this Act, including the provision of section 19 of the Act, which confers exclusive appellate jurisdiction over the judgments and orders of the Designated Court in the Supreme Court of India, in any manner, takes away the powers of the High Court under Articles 226, 227 and 228 of the Constitution of India in regard to the orders and judgments passed by the Designated Court.

(40) Since Mr. Anand Swaroop, Senior Advocate, appearing for the Union of India has frankly conceded as much, so I have refrained from examining the above contention of Mr. Khoji.

(41) Mr. B. S. Khoji asserted that the provision of sub-section (4) of section 9 of the Act providing for the appointment of a Judge of

the Designated Court is violative of the provision of clause (1) of Article 233 of the Constitution of India,—in that whereas clause (1) of Article 233 of the Constitution envisages appointment of a District Judge in consultation with the High Court, the provision of sub-section (4) of section 9 of the Act provides for the appointment of the Judge of the Designated Court with the concurrence of the Chief Justice of the High Court. Mr. Khoji highlighted the fact that the Chief Justice of the High Court is not the same thing as the High Court. The expression 'High Court' refers to and encompasses the Chief Justice and the other Judges of the High Court.

(42) For one thing, section 9 of the Act does not envisage appointment of District Judge. It envisages manning of Designated Court by a District Judge or Additional District Judge and therefore, the provision of Article 233 is not attracted. Even otherwise, in my opinion there is no merit in this contention. It is, no doubt, true that the expression 'Chief Justice' is not synoymous with the expression 'High Court', but we cannot lose sight of the fact that the right of being consulted does not confer effective power on the High Court. A view which their Lordships gave expression to with some anguish in *re*: *The Special Courts Bill*, 1978 (supra), when they observed:—

> "97. Yet another infirmity from which the procedure prescribed by the Bill suffers is that the only obligation which Clause 7 imposes on the Central Government while nominating a person to preside over the Special Court is to consult the Chief Justice of India. This is not a proper place and is to some extent embarrassing to dwell upon the pitfalls of the consultative process though by hearsay, one may say that as a matter of convention, it is in the rarest of rare cases that the advice tendered by the Chief Justice of India is not accepted by the Government. ... ...
> ... ...

(43) Provision of sub-section (4) of section 9 of the Act, on the other hand, confers effective power on the Chief Justice of the High Court, because the expression used in this provision is 'with the concurrence', which means, that no person exercising the functions of the Sessions Judge, or the Additional Sessions Judge, under the jurisdiction of a given High Court could be appointed a Judge or an Additional Judge of a Designated Court by the State Government, unless the Chief Justice gives his concurrence.

(44) Also, I am of the view that the powers enjoyed by the High Court under Article 235 of the Constitution, is not taken away by section 9 or by any other provision of the Act. The administrative control of the High Court over the Designated Courts remains intact and Mr. Anand Swaroop, counsel for the Union of India has conceded as much at the Bar.

(45) As regards the implied subversion of 'judicial independence' of the presiding officer of the Designated Court, as a result of continuance by him in the said office after the age of superannuation at the whim and pleasure of the Executive Authority, it may be observed that their Lordships in *Re: Special Courts Bill*, 1978 (*supra*) expressed disapproval of the relevant provision of the Special Courts Act which envisages appointment of retired Judge as the Presiding Officer of the Special Court because it was considered that he held his office during the pleasure of the Government, whereas in contrast, the sitting Judge was assured security of tenure until he attained a particular age and their Lordships considered the pleasure doctrine as subversive of judicial independence.

(46) In the present case, the continuance of the District Judge or the Additional District Judge of the Designated Court after the age of superannuation, is not entirely dependent upon the pleasure of the Executive Authority. It is, no doubt, true that after the age of superannuation the judicial officer is not assured of a tenure for a fixed or specified period, but in my view by necessary implication, the manner of the termination of the tenure of the Designated Court would be the same as its appointment. Hence, as and when his tenure is to be brought to an end after the age of superannuation, it would be done with the concurrence of the Chief Justice, which in my view, would work as a bulwark against the erosion of the judicial independence of a concerned official.

(47) I also find no merit in the further submission of the learned counsel for the petitioner that the trial by the Designated Court *per se* involved discrimination against the petitioner inasmuch as the offence envisaged by sections 3, 4, 5 and 6 of the Act, are almost the very offences which are made punishable in the Indian Penal Code and the concerned special statute also, and are triable by ordinary Judicial Courts in accordance with the procedure envisaged in the Code of Criminal Procedure.

(48) When somewhat similar contention was raised before their Lordships under *Re : Special Courts Bills' case* (supra) their Lordships rejected the same with the following observation:—

> "93. * * * *
>
> Every variation in procedure is not to be assumed to be unjust and indeed, as observed by this Court in *Rao Shiv Bahadur Singh* (3A) which was followed in *Union of India* v. *Sukumar Pyne,* (4), a person accused of the commission of an offence has no vested right to be tried by a particular court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. * * *".

(49) Mr. Khoji has next argued that a person accused of an offence under the Act as compared to the person, who is accused of an offence under the Indian Penal Code and is tried by the Sessions Court, is placed at a disadvantage by section 19 of the Act, which confers appellate jurisdiction in the Supreme Court over the final orders of the Designated Court and excludes the High Court's appellate jurisdiction, which is available to an accused, who is tried by the Sessions Court. The learned counsel was, however, at a loss to spell out any rational ground in support of his above submission. He only managed to say that the Supreme Court is located at a great distance from such States as Kerala, Madras, Bengal, Assam, Bombay and Gujarat *et cetera;* and that it would have been financially and otherwise easier for an accused to file an appeal in the High Court of a State than it would be to file an appeal in the Supreme Court at a far away place. That, in my view, is a mere apology for a rational reason in support of his above contention.

(50) It is the natural right of every human being to be entitled to his liberty and freedom. When the soveriegn citizens of India gave the present Constitution to themselves, they secured recognition of certain measure of that right in Article 21 of the Constitution of India: Article 21 of the Constituiton in a broad sense represents a compromise between the *inter se* competing claims of

(3-A) A.I.R. 1953 S.C. 394.

(4) (1966) 2 S.C.R. 34 at p. 38 : A.I.R. 1966 S.C. 1206 at p. 1209:

individual citizens in regard to the aforesaid right to life and liberty on the one hand and the role of the State in providing conditions and circumstances conducive to the enjoyment of the said freedom to every citizen and it is for this reason that Article 21 of the Constitution is worded in a negative form and it reads:

> "*Art.* 21. *Protection of life and personal liberty*:—No person shall be deprived of his life or personal liberty except according to procedure established by law."

(51) The substantive law may provide that a person found guilty of a given offence can be sentenced to death, but it does not mean that the moment a person is accused of a crime or, the offence which merits death sentence, he can be straightway executed. Similarly if the law prescribes a given term of imprisonment for a given offence, it does not mean that the moment a person is accused of the said given offence he could be straightway put behind the bars for the given period. It would make no difference whether in the given eventuality it is the Executive Authority which straightway orders execution of the sentence or it is the Court which merely after seeing the accusation, orders execution of the death sentence or orders confining of the accused to a given term of imprisonment. That is why Article 21 of the Constitution has provided that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law.

(52) By now, it is established beyond cavil by a chain of decisions of the apex Court, starting from *Cooper's case* and to mention only the important ones:—

(1) *Rustom Cavasjee Cooper* v. *Union of India;* (5)
(2) *Khudiram Das* v. *The State of West Bengal and others,* (6)
(3) *Smt. Maneka Gandhi* v. *Union of India and another,* (7);
(4) *Sunil Batra* v. *Delhi Administration and others,* (8);
(5) *In re The Special Courts Bill,* 1978 (Supra);
(6) *Gurbaksh Singh Sibbia etc.* v. *The State of Punjab,* (9);

(5) AIR 1970 S.C. 564.
(6) A.I.R. 1975 S.C. 550
(7) A.I.R. 1978 S.C. 597.
(8) A.I.R. 1978 S.C. 1675
(9) AIR 1980 S.C. 1632

(7) *Bachan Singh* v. *State of Punjab* (Supra);
(8) *Mithu* v. *State of Punjab* (supra);

that the procedure envisaged by Article 21 of the Constitution has to be reasonable, just and fair. One may ask, does Article 21 of the Constitution permit that a person can be deprived of his personal liberty, the moment he is formally and legally accused of the commission of an offence? Article 21 of the Constitution does not operate in isolation. Its protective range can be gauged only when read alongwith the provision of Article 22. Clause (1) of Article 22 of the Constitution envisages arresting of a person but this Article also envisages that he would not be detained in such custody without being informed as soon as may be of the grounds of his arrest and that he shall be entitled not only to consult but to be defended by a legal practitioner of his choice; that such custody shall not continue beyond 24 hours unless it has the sanction of the Magistrate in whose Court he is to be produced for the said purpose. Question arises as to what is to happen thereafter? Can a person after he has been produced before the Magistrate and the orders of the Magistrate have been secured for further custody be kept in custody for any length of period, say, if he is facing a criminal trial, till the trial is over in acquittal or conviction.

(53) Article 21 of the Constitution would envisage further custody only in accordance with a reasonable, fair and just procedure. Article 22 of the Constitution, as already mentioned, provides for a procedure for custody of first 24 hours after arrest and thereafter as sanctioned under the orders of the Court of the Magistrate. Would the Magistrate be at liberty to sanction or not to sanction further custody as he likes? Article 21 of the Constitution would countenance no such thing. It would insist upon the exercise of power in this regard in accordance with a reasonable, just and fair procedure.

(54) On the one extreme the accused's estimation of reasonable, fair and just procedure may warrant a submission that since an accused is to be presumed innocent till he is proved guilty, he is entitled to remain at large during the trial and his life and liberty could not be put in jeopardy unless his guilt is established. The other extreme is the view projected on behalf of the State that a citizen accused of a cognizable offence, carrying severe punishment if proved guilty, is liable to be deprived of his liberty by his arrest

and is to remain under restraint within the four walls of the prison till such time his innocence is established and he is acquitted of the charge.

(55) Article 21 of the Constitution of India neither envisages the one extreme nor warrants the other. Code of Criminal Procedure, 1973 steers clear of both the extremes and can easily lay claim to be laying down a reasonable, just and fair procedure *inter alia* starting from the point of arrest to the point of conclusion of the trial and appeal.

(56) There is no doubt that in Anglo Saxon Criminal Jurisprudence, which our Law-makers have adopted for India, presumption of innocence occupies a sanctified place and warrants the view that a person is to be sent behind the bar only after his guilt is proved, but there is also *inter alia* the fear that the citizen accused of the crime may make himself scarce and thus make the investigation of the crime difficult or at the conclusion of the trial, in which he is found guilty of the charge, he may not be available to receive the sentence and thus thwart justice.

(57) Pathak, J. (as he then was) has articulated the aforesaid concept in the following words in *Hussainara Khatoon and others* v. *Home Secretary, State of Bihar,* (10):—

> "* * * * *
>
> The primary principle of Criminal law is that imprisonment may follow a judgment of guilt. But should not precede it. But there is another principle which makes it desirable to ensure that the accused is present to receive his sentence in the event of being found guilty. * * * * * * *".

(58) A criminal charge has first to be investigated during which facts are gathered, which are then to be established to the satisfaction of the trial Judge. The association of person accused of crime with the investigation of the charge by the Investigating Officer is as essential as his presence to receive the sentence in the event of he being found guilty of the offence by the Court.

(10) AIR 1979 S.C. 1360.

Whether the person accused of the crime in the circumstances of the given case would be present at the conclusion of the trial to receive sentence is one of the very relevant circumstances that should weigh with the Court while deciding as to whether the accused is to be enlarged on bail or not. Two other circumstances that would also have a bearing upon the decision of the Court in this regard are—(i) whether there exist or not reasonable grounds for believing that the accused had committed the non-bailable offence and the case warranted further inquiry in to his guilt; and (ii) if enlarged on bail, the accused is not likely to subvert justice by suborning the witnesses by holding out threats or temptation to them.

(59) In recent past, the Apex Court had occasion to enunciate its views in this regard.

Krishan Iyer, J. in *Gudikanti Narasimhulu and others* v. *Public Prosecutor, High Court of Andhra Pradesh*, (11) in his inimitable style has spelled out the circumstances that should weigh with the Court while granting or declining to grant bail to the accused before trial and after trial. The following observations of his Lordship in which he has also adverted to the significance and sweep of Article 21 of the Constitution also, are to the point:—

Para 10:

> "The significance and sweep of Art. 21 make the deprivation of liberty of a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Art. 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice to the individual involved and society affected."

Para 11:

> "We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing

(11) A.I.R. 1978 S.C. 429.

the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. * * * The considerable public expense in keeping in custody where no danger of disappearance or disturbances can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and policy favouring release justly sensible."

"*Para* 12 :

A few other weighty factors deserve reference. All deprivation of liberty is validated by social defence and individual correction along an anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harashness should be minimised. * * * * * *, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned 'free enterprise' should be provided against."

(60) In *Babu Singh and others* v. *The State of Uttar Pradesh*, (12), Krishna Iyer ,J., this time sitting in Division Bench with D. A. Desai, J., reiterated the aforesaid observations.

(61) In the context of the provision of S. 438 of the Code of Criminal Procedure, which provides for the grant of anticipatory bail, their Lordships frowned upon any attempt at such a construction of the said provision as would make it difficult for the accused to secure anticipatory bail. While construing the said provision the Full Bench of Punjab High Court *inter alia* laid down that "the discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge

(12) A.I.R. 1978 S.C. 527.

appears to be false or groundless". Their Lordships while examining the ambit of the provision in *Gurbaksh Singh Sibbia, etc* v. *The State of Punjab,* (supra), disagreed with aforesaid formulation of the Full Bench of the High Court and enunciated the constitutional position in the following words :—

> "26. We find a great deal of substance in Mr. Tarkunde's submssion that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficient provision contained in Section 438 must be saved, not jettisoned No doubt can linger after the decision in *Maneka Gandhi's case* (supra), that in order to meet the challenge of Article 21 of the Constitution the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. *We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."*

(62) It has been contended on behalf of the petitioner that clause (b) of sub-section (8) of section 20 of the Act, which is in the following terms renders granting of bail almost impossible and thus runs counter to the basic postulates enunciated in this regard by their Lordships in the above quoted decisions :—

> "S-20. *Modified application of certain provisions of the Code.* * * * * *

(8) * * * * *

* * * * *

(b) Where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

in that, that clause (b) of section 20(8) not only puts the onus on the accused of proving his innocence in order to be able to assert his right to be released on bail, but also requires the Court to be further satisfied that when on bail, the accused would not commit any offence.

(63) Question arises for consideration as to whether such a procedure could be considered reasonable, fair and just to the accused ?

(64) Mr. Anand Swaroop, the learned counsel for the Union of India, has canvassed that concept of reasonableness, justness and fairness is relative . What may appear to be reasonable, just and fair in a given context may not appear to be so in a changed context and he sought to fortify his said contention with the following observation of their Lordship from *The State of Madras* v. *V. G. Row,* (13) :—

"15. This Court had occasion in '*Dr. N. B Khare* v. *State of Delhi*', (1950) SCR 519 to define the scope of the judicial review under CI. (5) of Article 19 where the phrase "imposing reasonable restrictions on the exercise of the right" also occurs, and four out of the five Judges participating in the decision expressed the view (the other Judge, leaving the question open) that both the substative and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been

(13) A.I.R. 1952, S.C. 196.

authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judical verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgement in such cases can only be dictated by their sense of responsibility and self-restraint and the sober reflection that the constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorising the imposition of the restrictions, considered them to be reasonable."

(65) Mr. Anand Swaroop drew our attention to statement of objects and Reasons underlying the enactment of the Act, which reads as under :—

"Terrorists had been indulging in wanton killings, arson, looting of properties and other heinous crimes mostly in Punjab and Chandigarh. Since the 10th May, 1985, the terrorists have expanded their activities to other parts of the country, i.e., Delhi, Haryana, Uttar Pradesh and Rajasthan as a result of which several innocent lives have been lost and many suffered serious injuries. In planting of explosive devices in trains, buses and public places, the object to terrorize, to create fear and panic in the minds of citizens and to disrupt communal peace and harmony is clearly discernible. This is a new and overt phase of terrorism which requires to be taken serious note of and dealt with effectively and expeditiously. The alarming increase in disruptive activities is also a matter of serious concern.

2. The Bill seeks to make provision for combating the menace of terrorists and disrnuptionists. It seeks, *inter alia,* to:—

(a) Provide for deterrent punishments for terrorist acts and disruptive activities;

(b) confer on the Central Government adequate powers to make such rules as may be necessary or expedient for the prevention of, and for coping with, terrorist acts and disruptive activities; and

(c) Provide for the constitution of Designated Courts for the speedy and expeditious trial of offences under the proposed legislation.

* * * * *".

He also required us to take judicial notice of the events recounted in the White-Paper issued by the Central Government on 10th July, 1984, on Punjab, detailing therein the calendar of events of violence and anti-national and disruptive activities in Punjab starting from March, 1981 to June, 1984.

(66) Mr. Anand Swaroop in particular referred us to Annexure VIII of the White-Paper containing the following ex-ceprts from the statements of late Sant Jarnail Singh Bhindranwala :—

"(i) Translation of excerpts from tape recorded speeches transcribed from cassettes:

It should be clear to all Sikhs whether living in urban and rural areas that we are slaves and want liberation at any cost. To achieve this end, arm yourselves and prepare for a war and wait for orders.

Mind well, in case of any trouble, the muzzles of all the Sikhs in the army and the police will be towards that spot.

It is very clearly written there that 12 bore gun does not require a licence. There is no need of a licence. If you are detected with a 12-bore gun and asked where is the licence, you can well point out, it is according to Anandpur Sahib resolution.

I beg to warn Sikhs to be vigilant against this trick. Keep on having negotiation but also have your preparations complete.....preparations are to be complete.

It comes to 35 and not even 100. Divide 66 crores then each Sikh gets only 35 Hindus, not even 36th. How do you say you are weak ?

I had earlier directed that each village should raise a team of three youth with one revolver each and a motorcycle. In how many villages has this been done."

Reference is to Anandpur Sahib Resolution:

"Every Sikh boy should keep 200 grenades with him....."

There is the need to raise motorcycle-groups in order to take revenge against perpetrators of crimes against the Sikhs.

Those of you who want to become extremists should raise their hands. Those of you who believe that they are the Sikhs of the Guru should raise their hands, others should hang their heads like goats.

As far as I am concerned, we want all the demands of the Anandpur Sahib resolution accepted, i.e., 'Sikhs are a separate nation (Qaum). That is all I have to say.

(ii) *Statements published in the press*:

A Sikh without arms is naked, a lamb led to slaughter..... Buy motorcycles, guns, and repay the traitors in the same coin.

("International Herald Tribune", April 24, 1984)

"Whoever performed these great feats' deserves to be honoured by the Akal Takht, the highest seat of the Sikhs.....if their killers came to me, I would weigh them in gold."

('India Today', April 30, 1983).

I ask them to prepare themselves to join the fight for our independence as a separate nation".

(Interview to 'Daily Mail', April 12, 1984).

"The Sikhs are a separate nation and this fact must be recognised. The Sikh must have special status in the Indian Union, the State of Punjab must be given the status enjoyed by Jammu and Kashmir under Article 370 of the Constitution."

(Interview to the 'Week', March 27 —April 2, 1984).

"Frankly I don't think that Sikhs can either live in with India."

(Interview to the 'Sunday Observer' on June 3, 1984 Published in the newspaper on June 10, 1984).

'Reference is to the killing of Baba Gurbachan Singh and Lala Jagat Narain'.

'Reference is to Sikhs now living in Britain'."

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(67) Mr. Anand Swaroop argued that it is against the background of facts furnished by the White Paper and the objects/reasons underlying the enactment of the Act that the reasonableness, justness and the fairness of various provisions of the Act bearing upon the right of the accused to bail, the manner and procedure of his trial should be viewed.

(68) Mr. Anand Swaroop also contended that whatever is in public interest, cannot be considered unreasonable and in support of his above submission, he referred us to *Bachan Singh's case,* supra; *Inderjit Baruna* v. *State of Assam and another,* (14); *Prakash Chandra Mehta* v. *Commissioner and Secretary, Government of Kerala and others,* (15); *and State of Gujarat* v. *Shri Mohanlal Jitamalji Porwal and another,* (16).

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(14) A.I.R. 1983, Delhi 513.
(15) 1985 (Supp.) S.C.C. 144.
(16) J.T. 1987 (1) S.C. 783.

(69) I am not unmindful of the fact that if the spirit of Article 14 and Article 19 is to be read into Article 21 of the Constitution then the right of legislature to create valid classification, can also not be ignored and I intend to test the constitutional vires of the given provision while fully keeping in view the above aspect.

(70) As to the judgement which Mr. Anand Swaroop has referred us to, it may be observed that in *Bachan Singh's case* (supra), their Lordships were confronted with the plea that prescription of death sentence in the alternative for an offence under section 302, Indian Penal Code, militated against the provision of Article 19 of the Constitution of India and was thus *ultra vires* of Article 19 of the Constitution of India. Their Lordships held that the provision of Article 19 was not attracted to a situation where persons personal freedom had been taken away as a result of conviction for an offence; that clauses (2)(4) of Article 19 envisaged putting of reasonable restrictions on the enjoyment of fundamental right guaranteed by sub-clauses (a) (b) and (c) of clause (1) of Article 19 only for the reasons specified therein, which *inter alia* included in the interest of public order. It was pointed out that every offence mentioned in Indian Penal Code or for that matter every murder does not constitute disturbance of public order, which meant that no person could be deprived of his personal liberty for committing an offence, which did not disturb public order. It was in that context that it was said that prescription of punishment for an offence was in the public interest. No one had a right to deprive someone of his life and liberty and then plead that his personal life or liberty could not be taken away. However, an individual has a right to plead that his life and liberty could not be taken away, except in terms envisaged by Article 21 of the Constitution of India.

(71) In *Inderjit Baruna's case* (supra) provisions of sections 4 and 5 of the Armed Forces (Assam and Manipur) Special Powers Act (28 of 1958) were impugned as unconstitutional, as the said provisions authorised even a Havaldar to shoot down a person. That was a case where the statutory provisions in question were applicable to an area which was declared to be a disturbed area. The Authorities maintaining law and order were authorised to shoot a person actually committing the offence within their sight. In that case, the exercise of power was sustained on the additional ground that if a private individual could act in right of self-defence or in the defence of another innocent person, then why cannot the police

man do so in the right of private defence or to prevent the commission of an offence. The ratio of that judgment is also not germane for the consideration of the issues before us.

(72) The observations of their Lordships: "the law of self-preservation and protection of the country and national security made in certain circumstances claim priority", cited from *Prakash Chandra Mehta's case* (supra) were made while judging the tenability of the plea raised by a smuggler that there has not been application of the mind by the COFEPOSA Board, because his representation was in Gujarati and the Members of the Board did not know Gujarati language. It was pointed out that two language experts who knew Gujarati were associated by the Board who explained the representation to the Board and so it could not be said that the representation had been rejected by the Board without applying its mind. It was then their Lordships thought it necessary to emphasize the flimsiness of the plea by making the observations that we have just reproduced above.

(73) In *Mohanlal Jitamalji Poswal's case* (supra), a smuggler was being proceeded against for smuggling of gold. There was a report on the record that the gold recovered from his possession was of 99.60 per cent purity, which fact was relevant to judge as to whether the accused had committed the given offence or not under Gold (Control) Act, 1968. Said report could not be formally proved on the record. At the appellate stage, counsel appearing for the State sought to formally prove that report. The High Court declined that request on the ground that six years had elapsed. Their Lordships disagreed with the approach of the High Court and it was then that they made the following observations :—

> "..... To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a Criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a *persona-non-grata* whose cause may be treated with disdain. The entire community is aggrieved if the

economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest. ... ..."

(74) According to Mr. B. S. Khoji, the learned counsel for the petitioner, unreasonableness, unfairness and unjustness is writ large in the procedure which envisages that a person accused of offences under the Act unlike other persons accused of any other offence can be produced before the Executive Magistrate for remand purposes; that he can be kept on police remand for a period of sixty days instead of 15 days and on judicial remand instead of a period of sixty days and ninety days, for one year ; that he can be released on bail only if he not only establishes to the reasonable satisfaction of the court that he is not guilty of the given offence, but also if he further satisfies the court that on being released on bail he would not commit any offence ; that he has to be tried by a Special or Designated Court within or outside the State at a place which could be other than the ordinary place of sitting of the Court, say within the prison or some other fortified place and that he may be tried by such court in camera instead of in open court, where prosecution witnesses could be brought in purdah and may even be made to depose from behind the *purdah*.

(75) The courts, one would but agree, have a social relevance in a settled/civilized society. The court is envisaged to be a forum which citizens should gladly submit to with total equanimity of mind, particularly when the citizens come in conflict with the State. It was for that reason that the framers of the Constitution enacted Article 50 of the Constitution of India which contains a mandatory direction to the State to separate the judiciary from the executive. Courts would enjoy social relevancy only if justice is not only done but appears to have been done. A lurking fear, even though unjustified, that the court is under the shadow of the executive would

tend to diminish its utility and social relevance and if such a fear happened to be entertained by a large body of citizens, then it would become socially irrelevant which would have a consequence of unleashing chaos and upheaval in the society.

(76) The parliament by enacting the Code of Criminal Procedure, 1973, sought to carry out the constitutional directive contained in Article 50 of the Constitution of India and entrusted the dispensing of criminal justice to the care of independent judiciary, right from the remand stage.

(77) Section 167 of the Code of Criminal Procedure provides for the production of a person arrested without a warrant within 24 hours before a Judicial Magistrate, which was also the import of clause (1) of Article 22, when read along with Article 50 of the Constitution of India. Sub-section (2-A) of section 167 of the Code in recognition of a situation where a Judicial Magistrate may not be available at the given time provides for the production of the arrested person before an Executive Magistrate on whom powers of the Judicial Magistrate are conferred.

(78) Let us have a look at the provision of the Act which modifies the application of some of the provisions of section 167 of the Code of Criminal Procedure to the offences under the Act. That provision is sub-section (4) of section 20 of the Act, which is in the following terms :—

> "20. **Modified application of certain provisions of the Code.** (1) ..... (4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that—
>
> (a) the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate" ;
>
> (b) the reference in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", "one year", and "one year", respectively ; and

(c) sub-section (2A) thereof shall be deemed to have been omitted.

— — — —".

(79) A perusal of clause (a) of sub-section (4) of section 20 of the Act would show that a person accused of an offence under the Act at the sweet will of the investigator could be produced for the purpose of remand either before the Judicial Magistrate or before the Executive Magistrate. The provision contains no guidance even of a nature as does sub-section (2A) of section 167 of the Code. The norm is that a person accused of a crime has to be produced before a Judicial Magistrate for remand purposes. For any departure therefrom there should exist a rational reason. Such a rational reason can be the non-availability of a Judicial Magistrate at the relevant time. Such a rational reason finds recognition in sub-section (2A) of section 167, as already observed. Clause (c) of sub-section (4) of section 20 of the Act seeks deemingly to omit sub-section (3A) of section 167 of the Code. That means the investigating officer may decide to seek remand from an Executive Magistrate without the power of Judicial Magistrate being conferred upon him and that too not necessarily for the reasons of absence of the Judicial Magistrate. Clause (a) when read along with clause (c) of sub-section (4) of section 20 of the Act entrusts the investigating officer with unguided and arbitrary power to seek remand in one case from the Executive Magistrate and in another case from the Judicial Magistrate and thus discriminate between one accused and the other. The said provision, apart from being violative of Article 14 of the Constitution of India, also falls foul with the constitutional mandate of Article 22(1), read with Article 50 of the Constitution of India, when the mandate of Article 50 had already been implemented by enacting the revised Code of Criminal Procedure in 1973. Once the mandate of Article 50 is implemented, then thereafter the expression 'Magistrate' occurring in Article 22(1) of the Constitution would mean the one as belonging to a separate judicial service of the State — in other words "the Judicial Magistrate".

(80) A Full Bench of this Court in *Sukhdev Singh Dhindsa and another* v. *The State of Punjab and another*, (17) for the very reasons struck down the provisions of section 4 of the Code of

(17) I.L.R. (1985) 2 Pb. & Hry. 380.

Criminal Procedure (Punjab Amendment) Act (I of 1984), which *inter alia* provided for the grant of remand for the specified offences by the Executive Magistrate as also for the trial of the accused for such offences by the Executive Magistrate to the exclusion of the Judicial Magistrate. P. C. Jain, C.J., who delivered the opinion for the Bench with whom the other two Judges concurred, in paragraph 25 of the judgment, observed :

"— — — — — —

> As is evident from the aims and objects of enacting the Code of Criminal Procedure, 1973, the main emphasis was that an accused person should get a fair and just trial in accordance with the accepted principles of natural justice. In the present set-up where there is complete separation of Judiciary from the Executive after 1973 Code and especially when the Executive Magistrates are completely under the control of the Government, we find it very difficult to hold that an accused person charged of the offences which are now triable by the Executive Magistrates shall ever have a feeling that he would have fair and just trial. Merely the fact that the appeal or revision is to be heard by the Sessions Court or the High Court would not give any satisfaction to the accused as it is of the greatest importance that the basic trial should inspire the confidence of the accused and when under a a procedure prescribed confidence cannot be inspired, then such a procedure is to be held as unjust, unreasonable and unfair and violative of the provisions of Article 21. — — — — —"

Learned Chief Justice in suport of the above view also recalled the weighty observation of Chandrachud, C.J., in **re : The Special Courts Bill, 1978,** (supra) :—

"— — — — — —
— — — — — —

> Administration of justice has a social dimension and the society at large has a stake in impartial and even-handed justice."

(81) One is of course, aware of the fact that section 4 in regard to specified offences had excluded the Judicial Magistrate from the stage of the remand till the stage of the trial. What is additionally relevant for our purpose, however, is not the measure and extent of the exclusion of the Judicial Magistrate and the entrustment of criminal justice to the Executive Magistrate, but also the fact that there should exist justifiable reason for so doing. For justifiable reason even sub-section (2A) of section 167 of the Code of Criminal Procedure empowered an Executive Magistrate enjoying powers of a Judicial Magistrate to give remand. The relevant provision of clause (c) of sub-section (4) of section 20 of the Act, on the other hand, sought to exclude that ground for entrusting the Executive Magistrate with the power of granting remand.

(82) As to the attack on the provision of clause (b) of sub-section (4) of section 20 of the Act, which is in the following terms :

> "S. 20(4)(b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", "one year", and "one year", respectively ;"

it may be observed that the commission of the terrorist acts being on the increase, making in turn heavy demands on police not only for the purpose of investigation of such offences, but also for the purpose of providing security to threatened citizens and the government functionaries, it may be difficult for the police to conclude investigation of the case within the period of 15 days originally stipulated by section 167 of the Code. Same may be true regarding the investigation and putting in of the chalan and, therefore, we are of the view that the circumstances adverted to above reasonably justify the extension of the period of police remand and judicial remand. More so, when the provision envisaging such a period of remand does not imply that the court is bound, in every case, to grant remand for the period envisaged by clause (b) of sub-section (4) of section 20 of the Act. The court in each case must, with full sense of responsibility, assure itself about the existence of the necessity of an extended remand, before further remanding the accused to police or judicial custody.

(83) The argument pertaining to the unconstitutionality of clause (b) of sub-section (4) of section 20 of the Act, which is sought

to be sustained on the ground of discrimination between those who are accused of the offences mentioned in the Act and those who are accused of the offences contained in the Penal Code, is also without any basis. The offences under the Act in the nature of things, generally would have wide ramifications and consequently requiring greater efforts and time in investigating and, therefore, the investigating agency had to be provided adequate time for the purpose. In this regard, reference may be made to the following observations of their Lordships of the Supreme Court in *Raghubir Singh Mann* v. *State of Bihar* (18) :

"13. ... ...

"The investigating agency cannot, therefore, be blamed for the slow progress that they made in investigating a case of this nature. It is true that there were what appeared to be lulls in investigation for fairly long spells but we are unable to see anything sinister in the lulls. We have to remember that investigation of this case was not the only task of the investigating agency. There must have been other cases and tasks. In our country, the police are not only in charge of the investigation into crimes, but they are also in charge of law and order. We have to take into account the extraordinary law and order situation obtaining in various parts of the country necessitating the placing of a great additional burden on the police. We are satisfied that such delay as there was in the investigation of this case was not wanton and that it was the outcome of the nature of the case and the general situation prevailing in the country..."

(84) For the reasons aforementioned the provision of clause (b) of sub-section (4) of section 20 of the Act is held to be constitutional and intra vires the provisions of Articles 14 and 21 of the Constitution.

(85) Coming now to the provision of section 10 of the Act providing for the place of sitting of the Designated Court at a place other than its ordinary place of sitting, it may be highlighted that

(18) A.I.R. 1987 S.C. 149 (156).

the apprehension that has been expressed on behalf of the petitioner is that in exercise of the power contained in this provision, the court may decide to hold proceedings within the jail premises or at some other fortified place, which may virtually amount to the holding of the Court in camera.

Section 10 of the Act is in the following terms :—

> "S. 10. A Designated Court may, on its own motion or on an application made by the Public Prosecutor, and if it considers it expedient or desirable so to do, sit for any of its proceedings at any place, other than its ordinary place of sitting :
>
> Provided that nothing in this section shall be "be construed to change the place of sitting of a Designated Court constituted by a State Government to any place outside that State."

(86) The fear expressed by the learned counsel that the trial in Jail or any such place may in fact become trial in camera is not justified in view of the provision of section 327, Code of Criminal Procedure, which provides that trial of criminal case shall be deemed to be an open trial. Section 327, Code of Criminal Procedure, is in the following terms :—

> "S. 327. **Court to be open.**—(1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offences shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them.
>
> Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court."

(87) One can take judicial notice of the fact that there has been incidence of presiding officer being attacked with fire-arms and killed which holding court, the accused facing trial for offences under the Act have been freed and rescued by their companions

after storming the Court premises and after resorting to firing with Machine Guns and Sten-Guns, resulting in murder of police personnel and other innocent civilians in such incidences. The Legislature, in my view, rightly enacted the provision like section 10 of the Act, enacting the Designated Courts to hold court at any place other than the place of sittings, if circumstances, to be detailed in its order, justify such an action. This provision, in my view, cannot therefore, be considered in any manner to be unreasonable, unjust and unfair to the accused.

(88) Mr. B. S. Khoji, counsel for the petitioner, is however, on stronger grounds in attacking the following somewhat related provision of sub-section (1) of section 16 of the Act as being **ultra vires** the provision of Article 14 of the Constitution.

> "S. 16. **Protection of witnesses.**—(1) Notwithstanding anything contained in the Code, all proceedings before a Designated Court shall be conducted in camera :
>
> Provided that where the Public Prosecutor so applies, any proceedings or part thereof may be held in open court."

Perusal of the aforesaid provision would show that it mandates the holding of all proceedings for offences under the Act, without exception, in camera unless the Public Prosecutor applies to the Court to hold any proceedings or part thereof in open court.

(89) Perusal of the provision of section 327 of the Code of Criminal Procedure would show that the mandatory departure from the norm of open court trial is warranted only regarding an inquiry into or trial for an offence under sections 376, 376-A, 376-B, 376-C, or 376-D of the Indian Penal Code and even there too the Presiding Officer may, if he thinks fit, allow any particular person to have access to, or be or remain in, the room or building used by the Court. The trial of other offences, is envisaged to be held in open court with the proviso that the Presiding Judge, if he thought fit could exclude the public generally or any particular person from being present in room or building where the trial is held.

(90) Provision of section 16, sub-section (1) of the Act, as would be seen from a perusal thereof, leaves no discretion to the court whatsoever in the matter.

(91) The open public trial is not only necessary in the interest of justice to the accused, but is also essential in the interest of the community and serves an important social purpose. For not only the accused is entitled to receive justice, but the community at large is interested that an innocent person is so pronounced within the public gaze, so that he reasonably succeeds in washing off the stigma of guilt and join back the main stream of the community as a respectable citizen or in the alternative if guilty person is publicly tried and so pronounced, then he is left with no *alibi* or excuse, which he could justifiably spin out if he is tried in a hush-hush manner in camera away from the public gaze.

(92) *In Richmond Newspapers, Inc.* v. *Commonwealth of Virginia* (19), Burger CJ. delivering the majority opinion for the Supreme Court of U.S.A., traced the nexus between openness of the trial, fairness and perception of fairness in the following words:—

> "When a shocking crime occurs, a community reaction of outrage and public protest often follows.....Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reaction of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help", as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate to restore the imbalance which was created by the offence or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that that lament "urge to punish."
>
> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the darks; no community eatharsis can occur if justice is "done in a corner, or in any covert manner. ".....It is not enough

(19) 1980—65 L.Ed.-II Series—(1973).

to say that results alone will satiate the natural community desire for "satisfaction". A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected out-come can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice"..... and the appearance of justice can best be provided by allowing people to observe it.

Looking back, we see that when the ancient "town meeting" form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a "right of visitation" which enabled them to satisfy themselves that justice was in fact being done.

People in an open society do not demand infallibility from their institution, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case :.....".

(93) It is no doubt true that right to public trial is not a constitutionally guaranteed right as held in *A. K. Roy* v. *Union of India* (20) cannot be minimised and open trial cannot be avoided unless it is likely to result in miscarriage of justice.

(94) Their Lordships in *Naresh Shridhar Mirajkar* v. *State of Maharashtra and another* (21), enunciated the relevant principles bearing upon right to open trial, its relevance and the circumstances justifying departure therefrom:—

"20. Before dealing with this question, it is necessary to refer to one incidental aspect of the matter. It is well settled that in general, all cases brought before the

(20) AIR 1982 S.C. 710 (Para 107).
(21) AIR 1967 S.C. I.

Courts whether civil, criminal, or others, must be heard in open Court, Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, courts must generally hear causes in open and must permit the public admission to the court-room. As Bentham has observed:

"In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest or all guards against improbity. It keeps the Judge himself while trying under trial in the sense that the security of securities is publicity."

21. Having thus enuniciated the universally accepted proposition in favour of open trials, it is necessary to consider whether this rule admits of any exceptions or not. Cases may occur where the requirement of the administration of justice itself may make it necessary for the Court to hold a trial in camera. While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in cause brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all

trials before Courts must be held in public was treated as inflexible and universal, and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasize that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold that trial in camera, but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said the said requirement should be sacrificed because of the principle that every trial must be held in open court. In this connection it is essential to remember that public trial of causes is a means, though important and available, to ensure fair administration of justice; it is a means, not an end. It is the fair administration of justice which is the end of judicial process, and so, if ever a real conflict arises between fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice. That, in our opinion, is the rational basis on which the conflict of this kind must be harmoniously resolved.....".

(95) The question arises as to who should be the judge of the fact as to whether the trial should be held in open court or in camera ? Should it be Executive or the Court ?

(96) Since it is the Court, which is entrusted with the task of imparting justice or doing justice, it alone is the best judge to decide whether circumstances and situation warrant holding of proceedings in camera. Even the court would not come to decide to

hold court in camera for routine reasons, for it would be for very extraordinary and exceptional circumstances that it would decide to hold the court in camera.

(97) Since provision of section 16, sub-section (1) of the Act, leaves no discretion to the court in the matter of deciding as to whether the court is to be held in public or in camera and also does not provide any guideline to instruct the Public Prosecutor as to in what cases he should demand open trial, so the said provision is clearly arbitrary and violative of the provisions of Article 14 of the Constitution.

(98) The following scenario caricatured on the basis of the provisions of sub-section (2), sub-section (3) and sub-section (4) of section 16 of the Act runs thus:

> "The trial would be held within jail premises in camera, the witnssses for the prosecution, whose names are kept secret from the accused and his counsel, brought in *purdah* in court and made to depose from behind the *purdah*, the accused being pronouced guilty on the basis of such evidence and the copy of the judgment handed down to the accused too being ignorant of the names and identity of the witnesses."

If the court procedure for holding criminal trial has to be such as to ensure to the prosecution to establish its case with the aid of the witnesses who would be able to speak the truth without the fear of molestation or injury to their person or to those whom they hold near and dear to them, then the procedure to be called reasonable, fair and just, has also to be such as to provide due opportunity to the accused to effectively defend himself against the charge.

(90) In support of the above view, I may refer to the weighty observation of Gajendragadkar, J., (as his lordship then was) in *Talab Haji Hussain* vs. *Madhukar Purshottam Mondkar and another* (22),—

> "6. Now it is obvious that the Primary object of criminal procedure is to ensure a fair trial of accused persons. Every criminal trial begins with the accused, and provisions of the Code are so framed that a criminal trial

(22) A.I.R. 1958 S.C. 376.

should begin with and be throughout governed by this essential presumption but a fair trial has naturally two objects in view; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view. It is therefore, of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the guilty are the objects of a criminal trial and so there can be no doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice."

The main accuser of an accused being the witness who is deposing against him and accusing him of the commission of the crime within the witnesses, presence or hearing, the accused has to be afforded full opportunity of cross-examining the witness to show that what he had stated was not a fact as he had neither seen nor heard anything, he being not present at the scene of the occurrence or the witness was not a truthful witness, in that he had been so pronounced by the court at earlier occasions when he had appeared as a witness or that the witness was inimical to the accused or his family and, therefore, his testimony be taken with a pinch of salt and be not accepted at its face value. If the accused would not be disclosed the address and identity of the prosecution witness, then how would he be able to instruct his counsel to effectively cross-examine such a witness and bring out the truth in court and thereby defend himself against the false accusation.

(100) Mr. Anand Swaroop, the learned counsel for the Union of India cited *A. K. Roy* v. *Union of India and another* (23), to show

(23) A.I.R. 1982 S.C. 710.

that right to cross-examination by the accused of the witnesses is not fundamental. He drew pointed attention to paragraph 100, which is in the following terms:—

> "100. Apart from this consideration, it is a matter of common experience that in case of preventive detention, witnesses are either unwilling to come forward or the sources of information of the detaining authority cannot be disclosed without detriment to public interest. Indeed, the disclosure of the identity of the informant may abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination. *It is, therefore, difficult in the very nature of things to give to the detenu the full panoply of rights which an accused is entitled to have in order to disprove the charges against him.* That is the importance of the statement that the concept of what is just and reasonable is flexible in its scope and calls for such procedural protections as the particular situation demands. Just as there can be an effective hearing without legal representation even so, there can be an effective hearing without the right of cross-examination. The nature of the inquiry involved in the proceeding in relation to which these rights are claimed determines whether these rights must be given as components of natural justice."

The underlined portion of the aforesaid observation of their Lordships in *A. K. Roy's case* (supra) itself refutes the contention of Mr. Anand Swaroop that the right to cross-examination of the prosecution witneses by the accused is not essential. What is more, in *A. K. Roy's case* (supra) their Lordships were dealing with a case of preventive detention and the detenu's claim to cross-examine the witnesses before the Board.

(101) Mr. Anand Swaroop also placed reliance on Supreme Court decisions in *Gurbachan Singh* v. *State of Bombay and another* (24), and *Hira Nath Mishra and others* v. *The Principal, Rajendra Medical College, Ranchi and another* (25), in support of his submission that right to cross-examine witnesses by the accused is not essential.

(24) A.I.R. 1952 S.C. 221.

(25) A.I.R. 1973 S.C. 1260.

(102) In *Gurbachan Singh's* case (supra), the petitioner (Gurbachan Singh) was ordered to remove himself from Greater Bombay and go to his native village at Amritsar in East Punjab. This order was passed under section 27(1) of the City of Bombay Police Act. It was argued before their Lordships on behalf of Gurbachan Singh by Mr. Umrigar, Advocate that since suspected person was not allowed to cross-examine the witness, who deposed against him and on whose evidence, the proceedings were stared, so the provisions of section 27(1) of the City of Bombay Police were not reasonable. Their Lordships disposed of the said contention with the following observation:—

> "... ... ...
> in our opinion, this by itself would not make the procedure unreasonable having regard to the avowed intention of the legislature in making the enactment. The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing therein. This object would be wholly defeated if a right to confront or cross-examine these witnesses was given to the suspect. The power to initiate proceedings under the Act has been vested in a very high and responsible officer and he is expected to act with caution and impartiality while discharging his duties under the Act. ... ...
> ... ...".

It may be highlighted that the right of cross-examination was barred not in a criminal trial, but in a mere proceeding which at best, could result in extentment of a person from a particular area. The ratio of the aforesaid judgment would not be attracted to a criminal trial in which as a result whereof the accused found guilty can be sentenced to death.

(103) In *Hira Nath Mishra's case* (supra), some students at night had misbehaved with the girl students of their college, who resided in the hostel. The girls complained to the Principal. The Principal appointed a committee of three senior Members of the Staff, who examined some of the girl students and made them to identify the

offenders from their photos which were mixed with twenty other photographs of other students, who had not been named in the complaint. The girls had picked up the photos of the offenders. On the basis of the report submitted by the Committee, the Principal rusticated the students from the College. They challenged the said order. One of the contentions advanced on behalf of the rusticated students was that the rustication proceedings were vitiated as they had not been given the chance to cross-examine the witnesses. Their Lordships after referring to three decision of the English Courts, namely—*Board of Education* versus *Rice* (26), *Russell* versus *Duke of Norfolk* (27), *Byrne* versus *Kinematograph Renters Society Ltd.* (28), dealing with the sweep and scope of principle of natural justice, repelled the contention advanced on behalf of the rusticated students, with the following observations:

> "Rules of natural justice cannot remain the same applying to all conditions. We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witnesses who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses
>
> "The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However unsavoury the procedure may appear to a judicial mind, these are facts of life which are to be faced. The girls who were molested that night would not have come forward to give evidence in any regular enquiry and if a strict enquiry like the one conducted in a court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were capable of such indecencies. Under the circumstances of course followed by the Principal was a wise one. The Committee whose integrity could not

(26) 1911 A.C. 179.
(27) (1949) 1 All. E.R. 109.
(28) (1958) 2 All. E.R. 579.

be impeached collected and sifted the evidence given by the girls. Thereafter the students definitely named by the girls were informed about the complaint against them and the charge. They were given an opportunity to state their case. We do not think that the facts and circumstances of this case require anything more to be done."

It would be seen from the perusal of the aforesaid provisions of sub-section (2) of section 16 of the Act that the Legislature has left the matter to the discretion of the court. The court in exercise of its discretion in the matter shall on the one hand try to ensure that a witness is able to depose in court free from all mental constraint and fear, it would also at the same time ensure that the accused is put in a position to effectively cross-examine the witness.

(104) Neither the court nor the government can ensure total safety to a prosecution witness or to the investigator or the court or any other government functionary. A witness deposing in a criminal trial supposedly does so from a sense of public duty, which enlightened citizenship enjoins. One has to perform the public duty even at some risk to oneself. Within the aforementioned constraint, the court can take such steps as may stop the dissemination of the information regarding the address and identity of a prosecution witness by ensuring that his name and address and the identity are not given publicity by the media; that in public record he is merely mentioned as PW-1, PW-2, and PW-3 *et cetera* and the documents identifying as to who are PW-1, PW-2 and PW-3 *et cetera* are kept confidential in sealed cover by the court barring access of the same to the public. The court would also be within its right to allow the shielding of a witness from public gaze when he is brought to the court room where of course he would be made to depose openly and not from behind the purdah and in any case where the trial is in open court, the identity of the witness shall not be screened from the accused, his counsel and the court.

(105) Since, it has been left to the court to decide upon as to how to keep the identity and address of any witness secret, so while doing so it would act in a manner as to ensure to the accused effective opportunity of cross-examining the witness by seeing to it that

the name and address and identity of the witness are disclosed to him *well before the start of the trial.*

(106) While so interpreted, the said impugned provisions cannot be considered to contain a procedure that can be held to be unreasonable, unjust or unfair.

(107) As to the challenge to the *vires* of section 20(7) of the Act, it may be observed that the provision of section 438 was incorporated for the first time in the revised Code of Criminal Procedure, 1973. Right to anticipatory bail did not flow from Article 21 of the Constitution either expressly or impliedly. This right has been conferred by the statute enacted by the Parliament. The Parliament by enacting another law or by amending the Code of Criminal Procedure can take it away also. One may, however, with some justification argue that right to anticipatory bail cannot altogether be denied in some cases, while at the same time it is being made available to some others. This would be clearly discriminatory and therefore would be violative of the mandate of Article 14 of the Constitution, unless the persons who have been denied this right constitute a class distinct from those to whom such a right remains available.

(108) In my opinion section 20(7) is *intra vires* the provision of Article 14 of the Constitution in that the persons charged with the commission of terrorist act fall in a category which is distinct from the class of persons charged with commission of offences under the Penal Code and the offences created by other statutes. The persons indulging in terrorist act form a member of well organized secret movement. The enforcing agencies find it difficult to lay their hands on them. Unless the Police is able to secure clue as to who are the persons behind this movement, how it is organized, who are its active members and how they operate, it cannot hope to put an end to this movement and restore public order. The Police can secure this knowledge only from the arrested terrorists after effective interrogation. If the real offenders apprehending arrest are able to secure anticipatory bail then the Police shall virtually be denied the said opportunity.

(109) Now coming to that part of the provision of sub-section (8) of section 20 of the Act, which imposes restrictions on the granting of bail to a person accused of an offence under the Act, it may be observed that neither public policy nor the supposed interest of the

society would justify the ban on the Designated Court or the High Court to grant bail *inter alia*, only if it is in a position to give a finding that when on bail, the accused was not likely to commit any offence. This would amount to making an impossible demand on the court, more so for the reason that an investigating officer while releasing the accused on bail in exercise of provision of section 169, Code of Criminal Procedure, is not required to entertain any such belief of the future behaviour of the accused nor when the Designated Court decides to discharge an accused in terms of the provision of section 227 of the Code of Criminal Procedure. The above said provisions are in the following terms :—

> "S. 169. *Release of accused when evidence deficient.*—If, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report; and to try the accused or commit him for trial."

> "S. 227. *Discharge.*—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

(110) Imagine a situation, where an accused is produced before the court along with the first information report and the case diaries and where neither the first information report discloses the given offence nor do the case diaries establish any connexion between the accused and the commission of the supposed offence, and the court is satisfied that on the basis of the material with the police, the accused is not guilty of the offence he is charged with, yet the accused would not be entitled to be enlarged on bail unless the court further certifies that he would not commit any offence if

enlarged on bail. This places the innocent citizens at the mercy of the police. A police officer, out of enmity or to wreak personal vengeance or for some other reason would be in a position to lay hands on an innocent person and be able to keep him in jail, even though not a shred of evidence/material is placed before the court for connecting the accused with the supposed crime, because the court even in such a situation may not be in a position to say with certainty and clear conscience that the accused, if released on bail, would not commit any offence.

(111) As a result of the above discussion of the matter, the following provisions of sub-section (1) of section 16; that of clause (a) of sub-section (4) of section 20 and only the underlined last portion of clause (b) of sub-section (8) of section 20 of the Act, which reads: *"and that he is not likely to commit any offence while on bail"* alone, out of the provisions of the Act, challenge to the constitutional vires whereof is posed at the Bar, are held to be *ultra vires* such provisions of the Constitution of India, as have already been indicated and rest of the challenged provisions are held to be *intra vires* the given provisions of the Constitution of India:—

> "S. 16. (1) Notwithstanding anything contained in the Code, all proceedings before a Designated Court shall be conducted in camera:
>
> Provided that where the Public Prosecutor so applies, any proceedings or part thereof may be held in open court."
>
> "S. 20(4) (a). the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate or Special Executive Magistrate".
>
> "S. 20(8) (b). Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence *"and that he is not likely to commit any offence while on bail."*

(112) Having answered the common question of law, I now direct the office to list all the cases, except Civil Writ Petitioner No. 1629 of 1986 before the appropriate Bench for decision on merits.

So far as Civil Writ Petitioner No. 1629 of 1986 is concerned, it may be observed that the petitioner is from Haryana State. He is

said to have violated the provision of section 25, Arms Act, 1959 (Act No. 54 of 1959) as he was found carrying in his possession one single barrel, 12 bore Gun and 10 cartridge of 12 bore. There is no allegation whatsoever that he contravened the said provision with an intention to aid any terrorist or disruptionist. His offence became triable by the Designated Court only because of the provision of section 6, read with section 10 of 1985 Act. Application of the provision of section 6 of the said Act to an area depended on the area being so notified by the State Government.

Sub-section (1) of section 6 of the Act of 1985 is in the following terms:—

> "S. 6(1) *Enhanced penalties.*—If any person contravenes, in any area notified in this behalf by a State Government, any such provision of, or any such rule made under the Arms Act, 1959 (54 of 1959), the Explosives Act, 1884 (4 of 1884), the Explosive Substances Act, 1908 (6 of 1908), or the inflammable Substances Act, 1952 (20 of 1952) as may be notified in this behalf by the Central Government or by a State Government, he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which may extend to ten years or, if his intention is to aid any terrorist or disruptionist, with death or imprisonment for a term which shall not be less than three years but which may extend to term of life, and shall also be liable to fine."

The corresponding provision in the Act of 1987 is section 6(1), which as under:—

> "6(1) If any person with intent to aid any terrorist or disruptionist contravenes any provision of, or any rule made under, the Arms Act, 1959, the Explosives Act, 1884, the Explosive Substances Act, 1908 or the Inflammable Substances Act, 1952 he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

Perusal of section 6(1) of the Act of 1987 would show that offences resulting from the contravention of the provision of the Acts mentioned in this section of the provision of the Acts mentioned in this section would be taken cognizance of as an offence under the Act of 1987, only if the contravention of the provisions of the given statutes was with intent to aid a terrorist or disruptionist, whereas section 6 of the Act of 1985 envisaged no such relationship between the offences, resulting from the contravention of the provisions of the given statues and the offences under section 3 and 4 of the Terrorist Act, 1987.

(113) By vitrue of the provision of section 25 of the Act of 1987, the provisions of all other Acts including the Act of 1985, which are inconsistent with the provision of the Act of 1987, would become inapplicable in pending cases in regard to the trial *et cetera* thereof and the punishment for the same.

(114) In view of the above, the offence *qua* this petitioner under section 25 of the Arms Act would no longer attract the provision of section 6 of the Act of 1985; because of the provisions of Section 6 and Section 25 of the Act of 1987 nor would it attract in the present case the provision of section 6 of the Act of 1987, because the offence under section 25 of the Arms Act herein was not committed with intent to aid the terrorist or disruptionist, as there is no such allegation against the petitioner.

(115) When such is the case, then section 10 of the Act of 1985 and the corresponding provision of section 12 of the Act of 1987, which provide for the trial of the offences under section 25 of the Arms Act by the Designated Courts became inapplicable.

(116) For the reasons aforementioned, the petitioner's case is held to be triable only by the Criminal Court.

(117) Consequently, we allow Civil Writ Petition No. 1629 of 1986 and direct that his case shall be tried not by the Designated Court, but by the Criminal Court of competent jurisdiction.

R.N.R.

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