Ashok Kumar Dixit Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : Mar-05-1987

Reported in : AIR1987All235

Judge : K.C. Agarwal, ;A.N. Varma and ;R.P. Singh, JJ.

Acts : Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2, 11(1) and 19(2); Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Ordinance, 1986; Cosntitution of India - Articles 21 and 65; Code of Criminal Procedure (CrPC) - Sections 167 and 167(2)

Appeal No. : Civil Misc. Writ Petn. No. 4562 of 1986

Appellant : Ashok Kumar Dixit

Respondent : State of U.P. and anr.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : Jagdish Singh Sengar and ;Rakesh Singh Sengar, Advs.

Disposition : Petition dismissed

Judgement :

K.C. Agarwal, J.

1. Out of the writ petitions challenging the validity of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 (U.P. Act No. 7 of 1986) three cases, which were argued by Sri Jagdish Swarup, Sri Ravi Kiran Jain, and Sri Rakesh Dwivedi, are Writ Petition No. 4562 of 1986, Ashok Kumar Dixit v. State of U.P. Writ Petition No. 2545 of 1986, Hari Singh Thakur v. State of U.P., and Writ Petition No. 6096 of 1986 Bramha Din v. State of U.P. Apart from these Advocates, others who made their submissions before us were Sri A.N. Srivastava and Sri D.S. Misra. The remaining Advocates did not advance any argument in addition to what bad been argued challenging the validity of the Act by the Advocates aforesaid and they adopted the arguments made by them. We must record our appreciation for the valuable assistance received by the Court from the learned counsel on many issues arising in these cases.

2. For the decision of the points urged, it is not necessary to mention the facts in detail, we have not mentioned the same, excepting referring to those which are salient.

3. In Writ Petition No. 4562 of 1986, Ashok Kumar Dixit v. State of U.P. a first information report was lodged on 17-2-1986 at police station Firozabad, district Agra, against the petitioner, being Crime No. 97 of 1986, under Sections 2/3 of U.P. Act No. 7 of 1986, on the ground that:

'Ashok Dixit va Akhilesh va Raja Telang NE APNE APRADHIK KRITIYON SE UTTAR PRADESH GEROH BAND VA SAMAJ VIRODHI KRIYA KALAP '.NIVARAN ADHYADHESH 1986 KE DHARA DO KI UP DHARA (KHA) 4.9.12 KE

ANTERGAT APRADH KIYA HAI.'

4. In Writ Petition No. 2545 of 1986, Hari Singh Thakur v. State of U.P. a first information report was lodged against the petitioner under Section 2/3 of the said act on the ground that the petitioner was a leader or organizer of a gang. The anti-social activities are enumerated in the first information report. Writ Petition No. 6096 of 1986 has been filed by Bramha Din against State of U.P. for quashing the U.P. Gangsters and Anti-Social Activities (Prevention) Ordinance, 1986 (U.P. Act No. 7 of 1986). A first information report against this petitioner had been lodged at the police station Kisunpur, Tehsil Khaga, District Fatehpur, on 10th March, 1986. For the points urged in this case as well, elucidation of facts is not required.

5. Sri Jagdish Swarup urged that the Act does not itself create an offence, hence the petitioner is not liable to be prosecuted and convicted for the charge leveled. In this connection, he pointed out that Section 2(a) deals with anti-social activities, all of which are riot necessarily criminal in nature. Consequently, simply because a person indulges in antisocial activities, he could not be said to have committed any offence.

6. The expression 'anti-social' conveys an idea of an act on the part of a person which is opposed or hostile to the society. If an act indulged in by a person is anti-social, it is within the power of the legislature to make it an offence. Anti-social elements creating havoc have to be taken care of by law. Lawless multitudes bring democracy and the Constitution into disrepute hold the people at ranson. Hence, the legislature could bring a legislation to punish the elements which gang up and indulge in anti-social activities and provide for a deterrent sentence with a view to curbing this phenomenon.

7. In this connection, counsel next urged that it was not within the competence of the legislature to convert a purely civil wrong into a crime and to provide for punishment to a person who indulges in it. An act may be a civil wrong as well as a crime. Frustum in Roman law was wrong, which gave rise to compensation to an injured owner, but the thief could alternatively be punished criminally. An act of conversion could be tort as well as crime of larceny. The distinction in between the two is that crime is a breach of public law and tort a breach of private law. That is one test. Another test is that criminal law requires mens rea, whereas in tort there may be absolute liability. A wrong which is punitive is a crime. We, consequently, do not agree that activities referred in Section 2(b)(i)(v), (vi) (ix), (xiv) cannot make an offence as they give rise only to civil liability in tort or wrongful action. On that account, the argument that the State legislature had no competence to make any activity falling under either of the three categories an offence, is not acceptable. Similar argument made by the petitioner's counsel that nobody could be prosecuted in regard to activities falling under Section 2(b)(iii)(vii) and (viii) cannot be accepted.

8. Sri Jagdish Swarup also argued that two elements which are necessary to constitute a crime are since missing in Act No. 7 of 1986, no one can be punished for any of the offences contemplated by it. He submitted that actus reus and mens rea are necessary elements of a given crime. For rejecting this argument, we will give reasons later.

9. Next, counsel relied on the principle nulla poena sine lege and submitted that every criminal law has to fulfil all the qualifications as it is a vital protection of the subject. This maxim, as said by G.W. Pataon in his book on Jurisprudence, 3rd Edition, at page 346, involves four different notions. One of the notions is, penal laws should not have retrospective operation. Since argument had been confined only to this aspect of the matter, we need not refer to other notions. In fact, Article 20(1) of the Constitution is on the same lines. It prohibits conviction or sentence under an ex post facto law. In Shio Bahadur Singh v. State of Vindhya Pradesh, AIR 1953 SC 394, it has been laid down that:

'Article 20(1) in its broad import has been enacted to prohibit convictions and sentences under ex post facto laws.'

10. We have, however, dealt with this aspect in later part of our judgment and have accepted by laying down that Section 2 of U.P. Act 7 of 1986 takes only those anti-social activities which are enumerated in Section 2(b)

(i) to (xv). No one can be punished in respect of any antisocial activity indulged into prior to the U.P. Gangsters and Anti-social Activities (Prevention) Ordinance, 1986 (U.P. Ordinance 4 of 1986).

11. Relying on certain treatises on criminal law, Sri Jagdish Swarup submitted that in order to constitute a crime, the activities constituting the offence must be clearly declared to be unlawful by the State. He argued, in so far as this Act is concerned it merely defines what activities shall be considered 'anti-social' for the purposes of the Act. The Act stops there. He further submitted that the activities falling under Section 2(b) of the Act comprise activities which Concern contracts, or tort or transfer of property (vide Clauses VI, VII, VIII etc.) Such activities not having been declared to be unlawful or as constituting an offence, no crime can be said to have been created under the Act.

12. We cannot accept the submission. In our opinion, an offence has been fully and clearly created and defined under the Act.

13. Section 2(b) defines the term 'Gang' to mean a group of persons who by violence, or threat, or show of violence or intimidation or coercion etc. indulge in anti-social activities with the object of disturbing public order of gaming any undue temporal or pecuniary material or other advantage for himself. Section 2(b) read as a whole necessarily brings in the concept of violence or intimidation or coercion etc. which is resorted to for gaining material advantage. Then we have Clause (c) of Section 2 which defines the word 'Gangster'. It means a member or leader or organiser of a group which indulges in the kind of activities set out under the various sub-clauses of Clause (b) of Section 2, by use of violence or threat or show of violence or intimidation etc. Section 3(i) lays down the penalty for being the member or leader or organiser of a group which engages or indulges in the kind of unsocial activities enumerated under Section 2(b) by use of violence etc.

14. Thus Clauses (b) and (c) of Section 2 read with Section 3 clearly and unambiguously create an offence declaring certain activities as unlawful and punishable with a term of imprisonment as well as fine specified in Section 3.

15. Even the activities which Sri Jagdish Swarup chose to describe as purely civil in nature pertaining to the realm of contract, tort or property have been declared to be an offence if the same are accompanied by violence, or threat or intimidation or coercion etc. which are but species of the genus 'force'. Thus the so-called civil activities when accomplished or indulged in by force have been declared to be a criminal offence punishable under the Act.

16. For the same reason, the submission of Sri Rakesh Dwivedi (discussed later) to the effect that the Act attempts to punish a mere status of a person without there being any actus reus has to be rejected. A person is not liable to be punished under the Act merely because he happens to be a member of a group. He comes within the clutches of the Act only if he chooses to join a group which indulges in anti-social activities defined under the Act with use of force for gaining material advantage to himself or any other person. The element of actus reus is hence clearly present in the offence created under the statute. We will discuss this aspect of the case in greater depth later in this judgment.

17. Further, many eminent Scholars have taken different view and have sought to offer a formal definition of the term crime. A formal definition, in this context, is one which enables, the questioner if he has enough information about the way in which a particular transaction has to be handled within a legal framework. In his literature. 'The definition of, Crime', Professor Glanville Williams (1955) 8 Current Legal Problems, 107, considers various definitions and, after rejecting them for varying reasons, offers a formal definition of his own. It is :

'A crime is an act of being followed by crimmal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal.....

Features actually taken by the Courts as indicative of crime and the problems that arise in classifying

proceedings must be left for discussion on another occasion.....'

18. Some Jurists do not agree with this definition. It has been said that greatest fools can ask questions that the wisest of men cannot answer.

19. The maxim which has been accepted in this regard is actus non facit reus nisi mens sit rea. Mens rea denotes 'mental' element in the definition of any crime, whereas the other elements of that crime have come to be known as the actus reus thereof. The ptirase 'actus reus' somebody has commented, is nonsensical. An act cannot be guilty, only human beings can be. But, despite this criticism, the phrase is constantly used and it is, in fact, a convenient way of distinguishing ; the non-mental elements of a given crime from a mental element thereof.

20. Glanville Williams, in his book 'Criminal Law' General Part (2nd editon) at page 18, says :

'actus reus means the whole definition of the crime with the exception of the mental element and it even includes a mental element in so far as that is contained in the definition of an act. This meaning of actus reus follows inevitably from the proposition that all the constituents of a crime are either actus reus or mens rea.....

Actus reus includes, in the terminology here suggested not merely that whole objective situation that has to be proved by the prosecution, but also the absence of any ground of justification or excuse, whether such justification or excuse be stated in any statute creating the crime or imposed by the courts in accordance with general principles (though not including matters of excuse depending on absence of mens rea).

21. Actus reus and mens rea are analytical tools, useful in the exposition of the criminal law. It has been remarked by someone that:

'A definition cannot be said to be right or wrong. But, conduct (the act or omission of the accused person) is a pre-requisite of criminal liability in virtually all cases. (For an outlandish exception, see Larsonneur, p. 82, Post). Can it then be useful to exclude conduct from the definition of the basic concepts of crime? Is it helpful to describe a dead man with a knife in his back as the actus reus of murder?'.

22. Before quoting the Statement of Objects and Reasons of the Bill, we may refer to some of the decisions of the Supreme Court about the relevancy of the same. In State of West Bengal v. Subodh Gopal Bose : [1954]1SCR587 , it was held that the Statement of Objects and Reasons could be referred to for ascertaining the conditions prevailing at the time which actuated to sponsor the Bill to introduce the , same and the extent of urgency and the evil which was sought to be remedied. The Preamble of an Act is also an aid in construing the provisions of the Act. The House of Lords in Attorney-General v. Prince Ernest Augustus of Hanover, 1957 AC 436, held that when there is a Preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described.

23. The Statement of Objects and Reasons of U.P. Gangsters and Anti-Social Activities (prevention) Act, 1986 (Act No. 7 of 1986) is as follows :

'Gangsterism and anti-social activities were on the increase in the State posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with this new menace. With a view to break the gangs by punishing the gangsters and to nip in the bud their conspiratoral designs it was considered necessary to make special provisions for the prevention of, and for coping with gangsters and anti-social activities in the State.

'Since the State Legislature was not in session and immediate legislative action in the matter was necessary, the Uttar Pradesh Gangsters and Anti-social Activities (Prevention) Ordinance 1986 (U.P. Ordinance No. 4 of 1986) was promulgated by the Governor on January 15, 1986, after obtaining prior instructions of the President.

The Uttar Pradesh Gangsters and Antisocial Activities (Prevention) Bill, 1986 is accordingly introduced with certain necessary modifications to replace the aforesaid Ordinance.'

24. The Preable of the Act, which gives reasons for the Act, are quoted below : --

'An Act to make special provisions for the prevention of, an for coping with gangsters and anti-social activities and for matters connected therewith or incidental thereto'.

25. It was said by Reed Dickerson in his book 'The Interpolation and Application of Statutes, 1975' that : --

'On the necessity of legislative purpose to legislative interpretation, Llewellyn has said 'If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense'. Hart and Sacks have inquired whether it is not true that 'The meaning of a statute is never plain unless it fits with some intelligible purpose'.

26. Need was felt by the U.P. Legislature to check anti-social activities for coping with the gangsters and consequently the U.P. Act No. 7 of 1986 was enacted.

27. Gangsterism is aimed at creating special organisations and groups to commit murder, use violence, and take people for a ransom or other demands, forcible deprivation of freedom often involving torture black-marketing etc. Gangsterism could also mean the destruction of buildings, ransacking and similar acts in a cruel manner to terrorise the people. The Court can take judicial notice of the situation previling in the State, which has made the life of citizens difficult if not a veritable hell. Threats are extended to the tenants to leave the houses to make the same available to the landlords and vice versa. Curious and novel methods have been evolved by such groups such as holding out the threat to abduct or kidnap the daughters of landlords and tenants and at other times minor sons. An atmosphere of fear and blackmail pervades the State. For dealing with gangsterism, there was no legislation. 'Dadagiari', which is the word ascribed to the activities aforesaid had acquired a definite meaning. Some people called them as Godfathers.

27-A. It was, in these circumstances, that it had become necessary for the Legislature to make provision to meet with such a situation. Indulgence in these activities affected not only the persons who used to be dealt with roughly and victimized by the gangsters but also the community at large because of the reign of terror which is struck by such incident. About the need to make laws regulating such activities, Lord Patrick Devlin said in his book 'Morals and the Criminal Law' at p. 76 :

'The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality an it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or to fry to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality.'

28. The need to pass an independent and comprehensive Act providing for anti-social activities was felt by the Santhanam Committee which had been appointed on 'Prevention of Crime', that the Indian Penal Code, though a very comprehensive compilation, does not fully meet the requirements of our society. After a century of its modification, it does not cover many segments of our socio-economic life with which we are required to content today.

29. The article written by R. Beg 'Reformorms in Criminal Law' printed in the journal of Indian Law Institute Oct-Dec, 1975 Part, at page 592 is also useful.

30. In paragraph 21 of Writ Petition No. 6096 of 1986. the petitioner has contended that the anti-social activity defined in Section 2 (b) is very broad and embraces all the offences under the Indian Penal Code and other Acts. and as such, the present Act was not required. Further what is anti-social is extremely vague and

therefore, the Act was not required to be enacted.

31. We do not agree with the submission, that the legislature was not required to pass the impugned Act as all the offences, which have been enumerated in Section 2 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act. 1986. have been provided for in the Indian Penal Code. The Indian Penal Code does not provide for the offences which have been attempted to be covered by the present Act. We will deal with this controversy at length at a suitable place later. We wish to note here that the impugned Act cannot be declared to be unreasonable on the ground urged by the learned counsel for the petitioner, since the same is within the legislative competence.

32. The next argument is on the ground of legislative competence of the State Legislature. Before embarking upon an examination of the contentions, it would be apposite to find the parameters of judicial interference in this behalf. They are as follows : --

1. Entries in each of the Lists must be given the most liberal and widest possible interpretation. No attempt should be made to narrow or whittle down the scope of the entries.

2. It has to be seen if the pith and substance of a legislation falls entirely within the scope of an entry in List II of the Seventh Schedule.

3. If the legislation in pith and substance falls within the scope of an entry within the competence of State Legislature, if it incidentally trenches upon the legislative field reserved for Parliament or if the entrenchment is minimal, the Act must be held as constitutionally valid. (I.T.C. Ltd. v. State of Karnataka. : 1984 CriLJ668 , Prem Chand Jain v. R.K. Chhabra : [1981]129ITR404(SC) . State of Karnataka v. Ranganatha Reddy. : [1978]1SCR641 .

33. In this behalf, one cannot help recall the note of caution sounded by Justice Krishna Iyer in R.S. Joshi v. Ajit Mills Ltd. : [1978]1SCR338 .

'When examining a legislation from the angle of its vires, the Court has to be resilient not rigid, forward looking, not static, liberal not verbal in interpreting the organic law of the nation.

The Court must also remember the constitutional proposition that Court do not substitute their social and economic beliefs for the judgment of legislative bodies. Moreover, while trespass will not be forgiven a presumption of constitutionality must colour judicial construction. These factors. . . .are essential to the modus vivendi between the judicial and legislative branches of the State. both working beneath the canopy of the Constitution'.

34. The aforesaid observations apply equally in regard to legislative competence as observed by S.K. Das. J.. in State of Bihar v. Smt. Charusila Dasi : AIR 1959 SC1002 : -

'It is now well settled that there is a general presumption that the legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a Sovereign Legislature, should if possible, receive such an interpretation as will make it operative and not inoperative'.

35. State counsel attempts to ward off the attack by pressing into service entry 1 of List II and entry 1 of List III of Seventh Schedule to the Constitution. They are as follows : --

'ENTRY 1 OF LIST II.

1. Public order (but not including the use of any naval, military or air force or any other armed forces of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power.

ENTRY 1 OF LIST III.

1. Criminal Law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List-I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power'.

36. Legislative entries only carve out the field of legislation of the Union and State Legislatures. They themselves are not the fountain of power. This has to be necessarily traced to Articles 245 and 246 of the Constitution. Articles 246(2) and (3), while providing that the Legislature of any State shall have power to make laws, use the significant phrase 'with respect to'. These words widen the ken to legislative powers with reference to the items specified in the various entries. Thus, according to State counsel, the State Legislature is competent to make laws with respect to public order and criminal law.

37. The term 'public order' is not res Integra. It occurs in various Articles of the Constitution, viz.. Article 19(2), (3), (4): Articles 22 and 25: besides entry 1 of List II of the Seventh Schedule. However, the restricted meaning given 10 the word under the aforesaid Article has no bearing on the scope of entry 1. List 13. The restrictive meaning to the term 'public order' has been designedly given by the Courts with a view to minimal interference with the exercise of fundamental rights by the people. On the other hand, as has been pointed out above widest amplitude is given to the entries so as to permit maximum' scope for legislation.

38. The term 'public order' also occurred in Item 1 of List I of the Provincial List to-the Government of India Act. 1935. In Lakhinarayan Das v. Province of Bihar. AIR 1950 FC 59. validity of the Bihar Maintenance of Public Order Ordinance 1949 was challenged on the ground that the Ordinance created new offences which were clearly included under Items 1 and 2 of concurrent list. Repelling the contention, the Ordinance was held to fall under Item 1 of the Provincial List. It was observed as follows : --

'The expression 'public order' with which item 1 begins is in our opinion, a most comprehensive term and it clearly indicates the scope or ambit of the subject in respect to which powers of legislation are given to the province. Maintenance of public order within Province is primarily 'the concern of that Province...the Provincial legislature is given plenary authority to legislate on all matters which relate to or necessary for maintenance of public order.'

39. Thus, the term 'public order' was given an expanded connotation. In Romesh Thappar v. State of Madras. : 1950 CriLJ1514 . speaking for the majority. Patanjali Sastri, J., observed thus : --

'. . . . 'public order' is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. Although Section 9 (1A) refers to 'securing the public safety' and 'the maintenance of public order' as distinct purposes, it must be taken that 'public safety' is used as a part of the wider concept of public order.'

40. Defining the ambit and import of the expression 'public safety', it was stated as follows : --

'Public Safety' ordinarily means security of the public or their freedom from danger. In that sense, anything which tends to prevent danger to public health may also be regarded as securing public safety. The meaning of the expression must, however, vary according to the context'.

41. To sum up the expression 'Public order' signifies the state of tranquillity. 'Public safety' also embraces public health. It was because of this apparent wide import of the term 'public order' that the provisions of the Ajmer Sound Amplifiers Control) Act. 1953. prohibiting use of amplifiers at a public place without the permission of the authority under the Act. was upheld by the Supreme Court in State of Rajasthan v. G. Chawla. : 1959 CriLJ660 . It was held that the legislation falls within the scope of Entry I. List II of Seventh Schedule to the Constitution.

42. In Rev. Stainislaus v. State of Madhya Pradesh. : 1977 CriLJ551 . challenge was made to the constitutional

validity of the Madhya Pradesh Dharma Swatantrya Act. 1966 and a similar enactment of the State of Orissa. By means of those enactments conversion of person from one religion to another by force or fraud was prohibited. It was contended that subject matter of legislation fell under Entry 97 of List 1 and not under Entry 1 of List II or Entry 1 of List III. Repelling the contention. Ray. C.J. observed as follows : --

'The expression 'public order' is of wide connotation. It must have the connotation which it is meant to provide as the very first Entry in List II.'

43. Thereafter, the meaning given to the aforesaid term in Romesh Thapper's case : 1950 CriLJ1514 (supra) was approved.

44. Without any manner of doubt, on a close scrutiny of the provisions of the Act under challenge, it can be said that the Act is referable to entry 1 of List II. Hence, it is squarely within the legislative competence of the State legislature. Section 2 (b) which defines the term 'gang' cannot be said to supplant any provision of the Central Act. Rather, it manifests the concern of the Legislature to bring to book the entire gamut of activities of a gang which endangers tranquillity or public safety. Needless to say. activities of persons operating through a gang pose much more serious threat and unleash greater terror to the people and their security. Section 3 provides for penalty to such gangster. Section 4 creates a special rule of evidence. Sections 5, 6, 7, 8, 9, 10 and 11 relate to establishment of Special courts and matters connected with or incidental thereto. Section 13 provides for transfer of cases from one Court to another. Sections 14 and 15 relate to attachment and release of properties of a gangster. Sections 16 and 17 are concerned with the enquiry by the District Magistrate/Special Court to enquire into character of acquisition of property by a gangster. Section 18 provides for an appeal. Section 19 provides for modification of the provisions of the Code of Criminal Procedure in relation to their applicability to the proceedings under the Act.

45. Section 20 gives overriding effect to the provisions of the Act. Section 21 relates to the presumption as to orders made under the Act. Section 22 is the usual immunity clause from any legal action. Section 23 provides for making of rules by the'State Government.

46. No part of the Act can be said to offend or come in conflict with any Central Act. It concerns itself merely with the activities of gangsters which seriously endanger public order.

47. The subject matter of instant legislation can also be said to fall within the scope of the expression 'criminal law' in Entry 1 of List III of Seventh Schedule. The Entry has both inclusive and exclusion clauses. The words 'including all matters included in the Indian Penal Code' widen the scope of the Entry. But it suffers contraction by the use of the words 'excluding offences against laws with respect to any of the matters specified in List I or List II.' So, the upshot is that the term 'criminal law' has to be given widest amplitude. But while doing so, one has to be taken (to be take?) that the legislation does not stray into the forbidden area, that is matters specified in Lists I and II.

48. While examining the term 'criminal law' as it occurred in Sections 91 and 92 of the British North America Act. 1867. the Privy Council in the Propriety Articles Trade Association v. Attorney General of Canada. AIR 1931 PC 94. observed as follows :-

'Criminal law' means 'the criminal law in its widest sense' : Attorney General for Ontario v. Hamilton Street Railway (4). It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The Power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition: nor can it be discovered by reference to any standard but one : Is the act prohibited with penal consequences Morality and criminality are far from coextensive: nor is the sphere of criminality necessarily part of a more extensive field covered by morality-unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their

very nature belong to the domain of 'criminal jurisprudence': for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes.'

49 In Lakhi Narayan Das v. Province of Bihar. AIR 1950 FC'59. the Federal Court made the following observations : --

'It is true that violation of the provisions of the 'Ordinance or of orders passed under it has been made criminal offences but offences against laws with respect to matters specified in List II would come within Item (37 of List II itself, and have been expressly excluded from Item (1) of the Concurrent List. The ancillary matters laying down the procedure for trial of such offences and the conferring of jurisdiction on certain courts for that purpose would be covered completely by item (2) of List II and it is not necessary for the provincial Legislature to invoke the powers under Item (2) of the Concurrent List'.

50. It is noteworthy that Item 2 of the Provincial List to the Government of India Act. 1935 ran as follows : --

'2. Jurisdiction and power of all Courts except the Federal Court, with respect to any of the matters in this List: procedure in Rent and Revenue Courts.'

51. This Entry is analogous to Entry 65 of List II of the seventh Schedule to the Constitution. It is being quoted below : --

'65. Jurisdiction and power of all Courts, except the Supreme Court with respect to any of the matters in this List.'

52. Thus, the scope of entry 65. List II is wide enough to provide for the procedure and jurisdiction of the Courts. However, the scope of Entry I of List III fell for consideration in G.V. Ramnaiah v. Superintendent. Central Jail. Rajahmundry : 1974 CriLJ150 . The scope was delineated thus : --

'A plain reading of the above Eniry No. 1 would show that the ambit of 'criminal law' was first enlarged by including in it the Indian Penal Code. and. thereafter, from such enlarged ambit all offences against laws with respect to any of the matters specified in List I or List II specifically excluded. The reason for such inclusion and exclusion seems to be that offences against laws with respect to any of the matters specified in List I or List II are given a place in Entry 93 of List I and Entry No. 64 of List II in the Seventh Schedule.'

53. The sum and substance of the aforesaid discussion is that under Entry No. 1 of List III the State Legislature can create new offences and lay down the procedure therefor. But this is circumscribed by the fact that while making a law under the aforesaid entry, the State Legislature cannot trench upon matters specified in List I or List II. However, the State counsel cannot draw much strength from the aforesaid Entry inasmuch as the Legislation under challenge can more conveniently face its legitimacy from Entries 1 and 65 of List II.

54. So far as the ambit of Entry No. 65 of List II is concerned, it was considered in State of Bombay v. Narottam Das. : [1951]2SCR51 . In that case. Legislative competence of the State Legislature to enact the Bombay City Civil Court Act 1948 was challenged. By Section 3 of the said Act. an Additional City Civil Court was constituted. Section 4 enabled the State Government to confer power on such Civil Court to try all causes of civil nature of value not exceeding Rs. 25,000/-. The Bombay High Court struck down the Act on the ground that the Act confers jurisdiction on the new Court not only in respect of matters which the Provincial Legislature is competent to legislate, but also in regard to matters in respect of which only the Central Legislature can legislate under List I.

55. Reversing the aforesaid judgment, the Supreme Court upheld the Act as within the legislative competence of the State Legislature, since it fell within the scope of Entries 1 and II of List II of the Government of India Act, 1935. Entry 1 of the Government of India Act. 1935 was similar to Entry 3 of, List II of the Constitution, as it stood before its amendment by the Constitution (Forty Second Amendment) Act, 1976.

56. It would, therefore, be appropriate to reproduce the Entries in the Government of India Act and the corresponding Entries in the Constitution.

Entry 63 List I.

'Jurisdiction & powers of all Courts except the See : AIR1973 All596 respect to any of the for entries under matters in this List....'

the Constitution Entries 1 and 2 List II

'1. ...the administration of justice Constitution and organisation of all Courts except the Federal Court...'

2. Jurisdiction & powers of all Courts except the Federal Court, with respect to any of the matters in this List....'

Entry 15 List III

''Jurisdiction & powersof all Courts except the Federal Court, with respect to any of the matters in this List.'

57. As pointed out above, the words ''administration of Justice' were omitted from Entry 3 of List II by the Constitution (Forty Second endment) Act, 1976. We are. thus, left with Entry 65 of List II only. Hon. Fazal All. J. expressed the following opinion about Entry 2 List II of the Government of India Act. 1935 :-

'But for an express provision like that made in the entries referred to above, the two legislatures might not have been able to confer special jurisdiction on the Courts in regard to the matters set out in the Legislative Lists, nor could they have been able to bar the jurisdiction of the ordinary Courts in regard to them... .'

'It should be noted that the words used in these entries are -- jurisdiction and power. 'Power' is comprehensive word, which includes all the procedural and substantive powers which may be exercised by a Court, but the full significance of the use of the word in the context can be grasped only by reading a large number of local and special Acts in which power has been given to Courts 'to pass certain special and unusual orders.' 'It seems to me that the word 'power' was added to the word 'jurisdiction' in Entry 53 of List I, Entry 2 of List II. and Entry 15 of List III. in order to enable the two legislatures to grant special powers.....to the Courts to deal with the subject matter of any special ligislation.'

58. The effect of the aforesaid entries was considerd again in O.N. Mohindroo v. Bar Council of Delhi. : [1968]2SCR709 and the observations made in the case of Narrottam Das : [1951]2SCR51 (supra) were approved. It was obsened as follows : --

'It is clear that except for the Constitution and organisation of the Supreme Court and the High Courts, the legislative power in the matter of administration of justice has been ested in the State Legislatures. The State Legislatures can. therefore, enact laws providing for the constitution and organisation of Courts, except the Supreme Court and the High Courts and confer jurisdiction and powers on them in all matters, civil and criminal, except the admiralty jurisdiction. It would, of course, be open to Parliament to bar the jurisdiction of any such Court by special enactment in matters provided in Lists I and II where it has made a law but so long as that is not done the Courts established by the State Legislature would have jurisdiction to try all suits and proceedings relating even to matters in Lists I and III.'

59. According to Hon. Patanjali Sastri. J. 'administratior: of justice' was itself covered by Entry 2 of List II. The opinion has very great significance, in view of the omission of the words 'administration of justice' from Entry 3 of List II of the Constitution. This is how Sastri J. opined :

'It should be remembered and this is what the argument for restricting the Legislative power of provinces in regard to jurisdiction overlooks -- that 'administration of justice' is one of the matters mentioned in List II itself. The Provincial Legislature therefore is competent under Entry 2 to legislate conferring jurisdiction on Courts with respect to administration of justice, that is to say, general jurisdiction to administer justice by

adjudicating on all matters brought before them...'

60. Elaborating further, he observed --

'In other words, though 'administration of justice' in Entry 1 does net authorise legislation with respect to jurisdiction and power of Courts, the legislative power under Entry 2 in regard to the latter topic, which can be legitimately exercised 'with respect to any of the matters in this list', can be exercised with respect to administration of justice, one of the matters comprised in that list with the result that the subject of general Jurisdiction is brought within the authorised area of provincial legislation.'

61. The aforesaid are of great relevance and importance in the context of the legislation hand. These observations furnish a complete answer to the arguments of counsel for the petitioners. The phrase 'administration of justice' now finds place in entry. 11-A of List III of Seventh Schedule to the Constitution. The aforesaid two entries give complete and effective legislative power to enact the impugned legislation.

62. Justice Mahajan, also spoke in the same vein. He observed as follows : --

'It seems to me that the legislative power conferred on the Provincial Legislative by item 1 of List II has been conferred by use of language which is of the widest amplitude (administration of justice & constitution and organisation of all Courts.) It was not denied that the phrase employed would include within its ambit legislative power in respect to jurdisdiction and power of Courts established for the purpose of administration of justice. Moreover, the words; appearjo be sufficient to confer upon the Provincial Legislature the right to regulate and provide for'the whole machinery connected with the administration of justice in the Province. Legislaiion on the subject of administration of justice would be ineffective and incomplete unless and until the Courts established under it were clothed with the jurisdiction and power to hear and decide causes. It is difficult to visualise a statute dealing with administration of justice and subject of constitution and organisation of courts without a definition of the jurisdiction and power of these courts as without such definition such a statute would be like a body without a soul. To enact it would be an idle formality.'

63. Mukherjee J. concurred with Sastri J. in regard to the ambit and amplitude of the two entries.

64. Section 3 of the Act declares offence committed by gangsters an offence punishable under the Act. This can be said to be covered both by Entries 1 and 11-A of List III. Section 4 provides for special rules of evidence in relation of such crimes. Section 5 confers powers on the State Government to constitute one or more special Courts in the interest of speedy trial of offences. Section 6 relates to the sitting of these special Courts and Section 7 provides for their jurisdiction. Section 8 provides for joint trial of the offences which a gangster might have committed under any other law together with offences committed under the Act. Section 9 provides for appointment of Public Prosecutors and Additional Public Prosecutors by the State Government. Section 10 relates to the procedure and powers of Special Courts. Section 11 states that trials will be held in camera. It also provides for protection of witnesses. Section 12 provides that the trial by special courts shall have trial over other trials.

65. Section 13 of the Act provides for transfer of cases from one Special Court to another by the State Government. Sections 14 and 15 relate to attachment and release of properties of gangsters. Section 16 enables a Special Court having jurisdiction to decide as to whether the property or any part thereof was acquired by or as a result of the commission of an offence triable under the Act. Section 19 relates to orders that may be passed following the enquiry under Section 16. Section 18 provides for an appeal against any judgment or order of a court. Section 19 provides for modified application of the provisions of the Code of Criminal Procedure. Section 20 provides that the provisions of the Act shall have overriding effect over any other enactment. Section 21 provides of presumption as to authenticity and regularity of the orders passed under the Act. Section 22 is the usual protection clause proving immunity from litigation to the State Government or any other authority under the Act for anything done in good faith in pursuance of the provisions of the Act. Section 23 confers powers on the State Government to make rules for carrying out the

purposes of the Act.

66. This well integrated chain of provisions, without any manner of doubt, concern themselves with the administration of justice and to the constitution and jurisdiction of Courts. No offence can be taken to these provisions. It cannot be stated that the State Legislature transgresses the bounds set down for it under the Constitution.

67. Having thus cleared the deck on major issues, certain subsidiary issues, which do not touch the soul of the Act. remain to be noticed. Counsel for the petitioner contends that Section 3 of the Act by making the offences committed by gangsters punishable, in substance makes punishable the status of an accused and not his activities. The argument, though appears attractive at the first flush, turns out to be devoid of merits on closer scrutiny.

68. The Act seeks to punish declared criminals who have deliberately chosen the life of crime. The activities of these professional perpetrators of organised crimes, violence and orgy has a far more baneful effect on the health and morals of the society and its people. If the activities of such recidivists are subjected to same punishment as the other ordinary criminals, the confidence of public in the efficacy and efficiency of State administration is bound to shake. It was precisely with this end in view that Lawton J. while submitting a memorandum to the Royal Commission on the Penal System 1964-66 underlined the need that the Courts should be empowered to pass sentences of 'rigorous imprisonment' on the hardened professional criminal.

69. Herbert Gladstone, heading the Departmental Committee on Prisons, in paragraph 85 of his report, signed on April 10. 1985 drew a distinction between habitual criminals of desparate character and habitual criminals not of a desparate order.

70. The Report cannot be dismissed as anachronistic. It has been noted even in the late twentieth century by Duncan Faim. head of the Prison Department (1964-68) as 'the most considered statement of penal policy ever enunciated in this country,' In a country where crime graph is rising very rapidly, almost in geometrical proportion, the Report is very apt and has great relevance.

71. The remarks made in the Gladstone Report provide a complete answer to the argument of the counsel for the petitioners. It is not the status but the act which is made punishable. The activities of gangsters are offence under the Act since they pose grave threat to the even tempo of the society and therefore, call for sterner and more deterrent punishment and speedier trial and early booking.

72. Counsel then expressed an apprehension that though a person may not be physically present on the scene of occurrence, yet he may be roped in under the provisions of the Act in relation to that occurrence on the facile ground that he is a gangster. The apprehension does not appear to be very real. But then, it cannot be dismissed as altogether imaginary or absurd. Police is sometimes prone to be overzealous and in order to win laurels books one and all within the range of its rod. Needless to say. the act has to be enforced in a reasonable manner. Care should be taken that no unnecessary inroad is made into the exercise of fundamental rights of the citizen or interference in the peaceful prosecution of their avocation.

73. In this behalf, provisions of the Act themselves provide intrinsic guidelines. If we advert to Section 2(b) of the Act. which defines the term 'gangster' we would find significant words. They are 'acting', 'singly or collectively', 'violence or show of violence', 'intimidation', 'coercion', or unlawful means'. Thus, for booking a person under the provisions of the Act the authorities have to be prima facie satisfied that a person has acted. The authority has to be satisfied that there is a reasonable and proximate connection between the occurrence and the activity of the person sought to be apprehended and that such activities were to achieve undue temporal, physical, economic or other advantage. There need not be any overt or positive act of the person intended to be apprehended at the place. It is enough to prove active complicity which has a bearing on the crime.

74. While laying down so. we should not be oblivious of the avowed object of the Act. Under the ordinary criminal law. it is sometimes difficult to bring to book the overlords of crime and underworld because they seldom operate in person or in the public gaze. They indulge in clandestine operations which threaten to tear apart the very fabric of society. It is this purpose which the Act seeks to achieve.

75. But nevertheless we must sound a note of caution. Provisions of the Act cannot be used as a weapon to wreak vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt. Then, there is a further provision for appeal. Thus, the power of judicial review of this Court has been preserved. If it is ultimately found that a person was proceeded with in sheer bad faith out of malice and by way of political vendetta the authorities do not enjoy any immunity under Section 22 of the Act. This immunity is confined only to acts done in good faith.

76. In Clause (b) of Section 2 the word used is 'indulged in anti-social activities'. We may note here that the offences for which Sections 2 and 3 of the Act can be attracted must be those which have been committed after the enforcement of the Ordinance or the Act. It is not possible to convict a person for the activities, which could be and were of the nature defined in Section 2, indulged into by him before the Ordinance or the Act. Article 20 recities two limitations upon the law making power of every legislative authority as regards retrospective criminal legislation. It prohibits.....(it the making of ex post facto criminal law. i.e. making an act a crime for the first time and then making that law retrospective, (ii) infliction of penalty greater than which might have been inflicted under the law which was in force when the act was committed. From the language also, we find that Section 2 of the Act is prospective in nature and does not take within it the activities which were indulged into before.

77. Counsel for the petitioners also takes exception to the power to transfer cases from one special court to another conferred on the State Government under Section 7(4) of the Act. According to him the terms in which the power has been conferred is capable of abuse. It also amounts to encroachment on the power of judicial review vested in the Court. The argument is misconceived.

78. The power to transfer cases, which vests in the State Government is not unconstitutional if read in juxtaposition to Section 7(1). Section 7 states that every offence punishable under any provision of the Act shall be triable only by the Special Court within whose local jurisdiction it was committed. Thus, this is the normal rule. This can be departed from only in exceptional circumstances. In fact. Section 7(1). It is well settled that a proviso cannot and does not destroy the main clause. Purpose and the width of power of transfer was explained by the Supreme Court in In re. Special Courts Bill : [1979]2SCR476 where the Supreme Court stressed the need for such a provision in an enactment. Chandrachud. C.J. observed that :

'Though this is so, the provisions of the Bill appear to us to be unfair and unjust in three important respects. In the first place, there is no provision in the Bill for transfer of cases from one Special Courts another. The manner in which a Judge conducts himself may disclose a bias, in which case the interests of justice would require that the trial of case ought to be withdrawn from him. There are other cases in which a Judge may not in fact be biased and yet the accused may entertain a reasonable apprehension on account of attendant circumstances that he will not get a fair trial. It is of the utmost importance that justice must not only be done, but must be seen to be done. To compel an accused to submit to the jurisdiction of a Court, which in fact, is biased or is reasonably apprehended to be biased is a violation of the fundamental principles of natural justice and a denial of fair play. There are yet other cases in which expediency or convenience may require the transfer of a case, even if no bias is involved.'

79. However, in order to insulate the provision from apprehended abuse, we make it clear that the power being exceptional in nature cannot be exercised on mere humour, whims or fancies. The State Government will have to record reasons, since it is amenable to judicial review under Article 226 of the Constitution.

80. However, the arguments of learned counsel are spread on a much wider canvass. According to him investment of power on the State Government constitutes serious trespass on the barricaded area of judicial

review. The argument is misplaced as we shall state hereafter.

81. Power to transfer a case from one special Court to another in any way said to fetter the judicial discretion vested in the special Judge or trench upon his independence. The controversy involved in a transfer application is very limited. It cannot pronounce upon the guilt or innocence of the accused. It is not intended and cannot be used to overawe a Special Judge in the discharge of his duties. An order of transfer only takes out a case from one Court to another Court and invests the other Court with jurisdiction, which, in normal circumstances it would not have. It is difficult to understand as to how the exercise of such power can interfere with impartial trials.

82. Under current sentencing laws. State Legislatures rarely decide what sentence an accused who violates a criminal statute should receive. Instead, they generally determine only what the minimum and maximum sentence for a given offence will be. What should be the proper sentence in any case is left to judicial discretion. Judicial discretion is thus very broad with judge having considerable flexibility to tailor the sentence to the individual accused. In extreme and special cases where extraordinary aggravating conditions exist, the judge may impose any sentence up to the maximum authorised by the Legislature for the offence.

83. Although Section 3 lays down the maximum and minimum enumerated therein to be the same, but the discretion of power being with the Court it will judicially apply its mind to each case and award sentence which a particular case may require. The argument that in the absence of different sentences being prescribed for different offences. Section 2 is a typical case of no application of mind by the Legislature in enacting it does not appear to us to be correct. Sentences, counsel urged, should been harsher for at least certain categories of crimes and criminals, whereas liberal in cases of others. Democratic theory allocates to the legislature the power to make fundamental judgment of policy. It recognizes the representative nature of that body, in exercise of which sentences are provided for the accused. Judicial sentencing is intimately related to the trial of cases, which is controlled by the Judge. An accused is tried and found guilty is duly sentenced. Within such bounds, as may be prescribed by law the question what fine shall be imposed is one addressed to the discretion of the Court.

84. In Jagmohan Singh v. State of U. P.. : 1973 CriLJ370 .

'the impossibility of laying down standards at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.....

The exercise of judicial discretion on the well recognised principles is in the fial analysis, the safest possible safeguard for the accused.'

85. Counsel relied on decision of the Supreme Court in Mithu Lal v. State of Punjab. 0065/1983 : 1983 CriLJ811 and argued that since the punishments provided are disproportionate to the offence and are cruel and unusual, this Court must strike down the entire Section 3. We are unable to agree. Neither is the punishment severe nor it is cruel. It is somewhat difficult to determine precisely what is meant by cruel, severe and unusual punishment. It may be that those degrading punishments which have become obsolete may well be held to be forbidden as cruel and unusual. But there is nothing in the punishment provided in Section 2 to lead us to that conclusion.

86. State of Kerala v. Haji K. Kutty. : [1969]1SCR645 was relied on by Sri Rakesh Dwivedi for the argument that where objects and persons essentially dissimilar are treated by the imposition of a uniform tax discrimination may result. Refusal to make a rational classification may itself in some cases operate as denial of equality. The aforesaid case affords no assistance to the petitioner inasmuch as in enacting the Kerala Building Tax Act. no attempt at rational qualification was made by the Legislature. Ours is a case of awarding sentences for different offences to the courts where sentences are bound to differ on the fact of each case whereas that was so in the Kerala Buildings Tax Act. The Legislative power is the authority, under the Constitution to make laws or to alter. On the other hand to construe and apply the laws is the peculiar province of the judicial

department.

87. Section 11(1) reads as under :

'Notwithstanding anything contained in the Code, all proceedings before a court trying an offence under this Act shall be conducted in camera.

Provided that where the public prosecutor so applies any proceeding or part thereof may be held in open Court.'

88. The validity of Section 11(1) was also attacked on the following ground. The adjudication of a criminal trial is a public activity and not wholly a private affair. The public has therefore, an interest in being kept informed about how criminal justice is administered. Such a right cannot be denied by making a provision in a Statute empowering the Courts to work in camera. A camera trial, according to the petitioners, could not be fair inasmuch as there are chances of unfair practices being resorted to therein in the course of trial.

89. Sri Jagdish Swarup urged that long ago Poato observed in his laws that the citizen should attend and listen attentively to the trials. Hegal counsel pointed out in his book 'philosophy of Life' maintained that judicial proceedings must be published since the aim of Court is justice which is a universal belonging to all (Sri Jagdish Swarup's Human Rights, page 84).

89-A. That contention was that Section 11(1) providing that all proceedings before a Special Court should be conducted in camera, violates guarantee of fair procedure, as ordained by Article 21 of the Constitution. It draws its strength from Sixth Amendment to the American Constitution, which expressly provides that :

'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial....'

89-B. This, however, was not accepted by the Founding Fathers of our Constitution and was deliberately not incorporated or imported in the aforesaid notion of public trial. The amendment to the American Constitution was inspired by the following observations of justice Black in In re William Oliver (1947) 333 US 257.

'....Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee as always been recognised as a safeguard against any attempt to employ our Courts as instruments of persecution.'

90. In our country, the right to hold a trial in camera has been recognised as a power inherent in Court under Section 151. Civil P.C. and Section 352. Criminal P.C. Of course, this has to be exercised with great circumspection and in exceptional circumstances.

91. The leading case on the point is Naresh v. State of Maharashtra. 0044/1966 : [1966]3SCR744 where all the Judges agreed that it was desirable that proceedings should have been in public. They differed, however, on the Court's power to declare proceedings in camera. Majority held that the Court has inherent power to direct for trial to be held in camera, if administration of justice requires it, whereas Hidayatullah. J. (as he then was) found that there was no inherent power to order for a trial to be held in camera. Apart from difference on the inherent power of the Court, judges appear to be agreed that a Statute could provide for a trial being held in camera. The relevant portion of the majority, which spoke through Gajendragadkar. C. J., is as follows :

'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 defect 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 causes brought before it then in 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 whereby following the principle, justice itself may be defeated.'

92. The view of Hon'ble Mr. Justice Hidayatullah was that where the Legislature felt the special need, it provided for holding of a trial in camera. His observations are extracted below : --

'We have several Statutes in which there are express provisions for trials in camera. Section 58 of the Act 4 of 1869 dealing with matrimonial causes. Section 22. Hindu Marriage Act. 1955 Section 352. Criminal P. C. 1898. and Section 14. Official Secrets Act. 1923, allow the court a power to exclude the public. Where the Legislature felt the special need it provided for it.'

93. Hidayatullah. J. pointed out that the public interest in holding camera proceedings has been and can be sufficiently protected by the statute.

94. The English law on this point is not clear. The leading case on the subject is Scott v. Scott. (1913) AC 417. A lady and her solicitor were cited for contempt because they published copies of the transcript of certain proceedings which were held in camera. Central to the issue was the power of the Court to convert proceedings from public to camera proceedings. The House of Lords, reversing the decision of the Court of Appeal held that apart from Statute, there was no power to declare proceedings in camera unless it is manifest that proceedings could not be conducted otherwise. In any event, it was not contempt to subsequently publish the proceedings of an in camera hearing. The exact scope of the power was left in an uncertain state.

95. In Scott v. Scott. Viscount Haldane observed :

'Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open court that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.....'

96. To the general rule of holding a trial in public, as would be found from above, there are exceptions which themselves are the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done. In the Article 'Investigating the Administration of Justice 'published in the booklet 'Contempt of Court and the Press' page 129 at page 143. the author has summed it up by saying :

'The result is that in camera proceedings are permissible only where there is a statutory exception or where it would be impossible or improbable that the ends of justice can be served. Justice Gajendragadkar seems to have formulated the power of the courts much too widely.'

97. In Superintendent and Remembrancer. Legal Affairs. West Bengal v. Section Bhowmick. : 1981 CriLJ341 . the question of holding trial in camera was examined on the touchstone of Article 14 of the Constitution Fazal AH. J. speaking for the Court, observed thus :

'There can be no doubt that an open trial held in public is the general rule and seems to be the very concomitant of a fair and reasonable trial yet the public can be excluded from the hearings of the trial and the proceedings can be held in camera only under very exceptional circumstances.'

98. Thus, holding of trial in camera has not been abhorred. At any rate, a provision enabling holding of trial in camera cannot be said to offend any provision of the Constitution. Such a provision is a part of the procedure of this country. It is there in a number of statutes, viz.. Section 352. Criminal P.C. S, 22. Hindu Marriage Act.

Section 33. Special Marriage Act. Section 53. Divorce Act. and Section 14. Official Secrets Act. etc.

99. In Bhowmick's case : 1981 CriLJ341 (supra), the vires of Section 14. Official Secrets Act was not in dispute. The only controversy raging there was denial of copies of the statement of witnesses and other documents to the accused, ft is further noteworthy that the Supreme Court did not depart from the view expressed in Mirajkar's case 0044/1966 : [1966]3SCR744 (supra).

100. Counsel also places reliance on two Full Bench decisions of the Patna High Court in the State v. Maksudan Singh. : AIR1986 Pat38 and Madheshwardhari Singh v. State of Bihar. : AIR1986 Pat324 . In both the Chief Justice Hon'ble Sandhawalia delivered opinions for Full Bench. In arriving at the opinion that 'Speedy trial' was a necessary concomitant of Article 21. he drew very heavily from the VI Amendment to the American Constitution and the cases decided by the U.S. Supreme Court and that of our own Supreme Court in Hussainara Khatoon : 1979 CriLJ1036 .

101. In Hussainara Khatoon : 1979 CriLJ1036 (supra). Bhagwati. J. observed that :-

'Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute complience with the requirement of that Article that some semblance of a procedure should be 'prescribed by law, but that the procedure should be reasonable, fair and just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release.'

102. Proceeding further, he stated that : --

'.....Obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable fair or just' and it would fall foul of Article 21.'

103. Hon'ble Bhagwati. C.J. drew support for the aforesaid view from the VI amendment to the U.S. Constitution and Article 3 of the Europen Convention on Human Rights. Significantly enough. Pathak. J. (as he ihen was), expressed his reservation on the amplitude of Article 21. However, the Supreme Court did not issue any directions and waited for the return from the State of Bihar. It was only in the Hussainara Khatoon : 1979 CriLJ1045 that the Supreme Court, instead of passing final order, directed the State of Bihar to examine the cases of all these undertrial prisoners who were languishing in jails for period more than the maximum awardable for the offence under the law.

104. The view was reaffirmmed in Kadra Pahadiya v. State of Bihar. AIR 1982 SC 1167 wherein it was laid down that 'speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution,'

105. Thus, it can be seen that in none of the cases right to open trial or validity of any provision providing for the same was in issue. The controversy centered round the right to speedy trial. What the Full Benches were dealing with was about speedy trial. In none the Full Benches said that trials could be open and not in camera. Both the cases were about the trials of the offences under Penal Code. The two benches took the help of the IV amendment of the Constitution for the limited purpose of speedy trial. None of the cases is authority for the submission advanced. If a Judge is not called upon or required to decide a point or controversy but still he does it, the opinion expressed is obiter.

106. As already pointed out earlier, right to open trial cannot be said to be implicit in Article 21. The history of legislation in this country is a clear pointer in this behalf. VI Amendment to the U.S. Constitution was brought into being on account of circumstances peculiar to the European and American constituents.

107. Even in the U.S. right to speedy and open trial is not an inviolable or indefeasible right. While in Dickey v.

Florida. (1970) 398 US 30. the Supreme Court firmly declared that, 'the right to a speedy trial is not a theoretical or abstract right, but the rooted in hard reality in the need to have charges promptly exposed. State claims have never been favoured by the law. and far less so in criminal cases.' But then in Barkar v. Wingo. (1972) 407 US 514 it beat a retreat. It being conscious of the ominous and far reaching consequences of the exposition of law cast in such wide terms, it acknowledged the need to 'set out a criteria by which a speedy trial right is to be judged.' It identified four such factors, viz. length of delay, the reason for delay, the accused person's assertion of his right and the consequent prejudice to him. Supreme Court has also struck the same cautious note in Raahubir Singh v. State of Bihar. AIR 198' SC 149.

108. However, the U.S. Court of Appeals lamented the concept of speedy trial when it was forced to release two big time drug smugglers who had not been brought to trial within 90 days of arrest as ordained by the Speedy Trial Act. 1974 in the United States v. Tirasso 532 F 2nd 1298 in the following words : --

'Release of these two foreign nationals from custody is tantamount to an invitation to flee across the Mexican border, less than 6 hours away.....In the light of these facts the wisdom of the result the Congress has ordered is questionable. We release a man alleged to be the head of a foreign criminal organisation dedicated to the smuggling of large quantities of illegal drugs, so that he may quickly cross the border and resume operating his business. We are also releasing his alleged right-hand man as if to make certain that the enterprise continues to operate at top efficiency. But this result is the only one open to us under the plain terms of the statute. It is discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so inactfully drawn as this one.'

109. So far as the right to open trial is concerned, it is based on the supposed right of the public to know as well as to enable the accused to have some of his friends in the Court room for the putative protection their presence would afford. However, even in the States, such a right has never been naived as sacrosanct or inviolable. Even then, the public generally may be excluded on certain occasions from the grand jury proceedings, conferences among Supreme Court Justices. the meetings of other official bodies in executive action.....' Branzbura v. Haves (1972) 408 US 665.

110. Thus, it would not be proper, in the backdrop of the history of legislation in this country and the inherent power of the Court to regulate procedure of the Courts in the ends of justice to elevate the right to public trial as a fundmental right. It may even amount to legislation which is not our province.

111. What may have a precedential value is the ratio decidendi. The ratio decidendi is generally speaking any rule of law expressly or impliedly treated by the Judge as a necessary step in reaching his conclusion. Every case has certain facts which all lawyers would recognise to be material, and the ratio decidendi is all the material facts plus conclusion.

112. We have already seen and discussed above that the two Full Bench decisions of the Patna High Court do not throw any light on the legality or validity of a provision providing for holding of a trial in camera. In fact, this was not the controversy before the Full Benches. The ratio decidendi as noted above, cannot be divorced from the facts for providing a guide in deciding another case. These decisions, therefore, are of no help.

113. It was within the competence of the legislature for holding trials in camera. As such, a provision was felt necessary for proper and complete dispensation of justice. For making a provision to have trials in camera no breach of the entitlement of fair justice was committed. It is settled law that the Courts sit not to review or revise the legislative action, but to enforce the legislative will, and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action. Cooley deals with this question at page 160 of his book 'A Treatise on The Constitutional Limitations' as follows : --

'In exercising this high authority the judges claim no judicial supremacy, they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution and because the will of the people:

which is therein declared, is paramount to that of their representatives expressed in any law.'

114. The learned counsel has also challenged the validity of the Proviso to Sub-section 111 of Section 11 of the Act which reads : --

'Provided that where the Public Prosecutor so applies, any proceedings or part thereof may be held in open Court.'

115. The attack on this Proviso was on two grounds, firstly that it discriminates between the Public Prosecutor and the accused unreasonably and unjustifiably. Counsel urged that under the Proviso, a right has been conceded in favour of the Public Prosecutor to apply for a trial being held in open Court. Such a right has been arbitrarily denied to the accused by the legislature. The second ground was that the Proviso since does not give or confer a right of hearing to an accused the same is infringed by the principles of natural justice.

116. On both the grounds, we do not find any merit. Whereas the general rule under Sub-section (1) of Section 1 is of holding trials in Camera, the Public prosecutor can apply for trials being held in public where it is felt that take place without any hindrence or difficulty in public itself the Proviso is therefore, for the benefit of the accused and cannot, thus be held to be unreasthe accused and cannot, thus be held to be unreasonable or arbitrary. Further, counsel for the petitioner has been canvassing himself for open trial, it does not appeal to reason that on the ground of arbitrariness or unreasonableness, the Proviso be struck down, the result of which would be that all the trials would have to be held in camera irrespective of its nature and triviality. The learned counsel himself realised that there was no justification for pressing 14. Since the Proviso is for the benefit of the accused himself, there could be no point in granting a hearing to him.

117. From what we have said above, we find that the rule of law upon competence of legislature to frame law appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. Cooley in his book 'A. Treatise On the Constitutional Limitations' at page 168 dealing with this subject, has observed :--

'the judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law making power'.

118. From what we have said above, we find that neither the main provision of Sub-section 111. Section 11 nor the Proviso appended to it is ultra vires the Constitution. What an accused is entitled to under Article 21 is to have a fair trial which would be made if the same is dispensed without partiality or favouritism. If the legislature thought that the atmosphere prevailing in the country is such that a provision for holding trial in camera is necessary in the interest of sound administration of justice, the Court would not interfere with 'he legislative will. We therefore, cannot annul Section 11 (1) on the ground of any supposed conflict with Article 21. Article 21 requires fair and reasonable procedure. To us it appears that the said requirement is not in any way unfair or unreasonable.

119. Next Sri Rakesh Dwivedi argued that Section 11 (1) infringes Article 21 of the Constitution and as such, the said provision is liable to be quashed on that ground. We do not find any merit in this submission.

120. In Article 21 as contrasted with the American Constitution, the word 'liberty, is qualified by the word 'personal' and therefore, its content is narrower. The restricted interpretation of the expression personal liberty' given or accepted by the majority judgment in A. K. Gopalan v. State of Madras. : 1950 CriLJ1383 has not been accepted by the Supreme Court in Kharak Sigh v. State of U.P.. : 1963 CriLJ329 and Satwant Singh Sahini v. A. P. O. New Delhi. : [1967]3SCR525 . Another phrase used in this Article is 'procedure established by law'. This means the procedure laid down by Statute. The ambit of protection given by the American Constitution in relation to personal liberty is wider than under the Indian Law. The American Supreme Court interpreted the guarantee to mean that the Court could examine a law to ascertain if it is just law both as to

the procedure and to the substantive provisions contained therein. The American Constitution, it may be noted here, provides that a person cannot be deprived of his liberty except by 'due process of law'. This 'due process' has a different connotation and meaning and as the Parliament deliberately after discussion at the time of framing of the Constitution did not incorporate the same in Article 21, view taken in some of the Supreme Courts is that the Court would not be justified in reading it in Article 31.

121. In A. K. Gopalan v. State of Madras : 1950 CriLJ1383 (supra) it was held that the expression 'procedure established by law' means the procedure incorporated by law made by the Constitution. The majority rejected the argument contending that the law in Article 21 is used in the sense of jus and lex. and it means the principles of natural justice on the anology of due process of law. as interpreted by the American Supreme Court. This was seriously questioned in R.C. Cooper v. Union of India : 1979 CriLJ857 . It was subsequently in Shambhu Nath Sarkar v. State of West Bengal : [1974]1SCR1 . the Supreme Court explained that the majority view in the case of A. K. Gopalan was held to be incorrect in Bank Nationalisation case.

122. In Maneka Gandhi v. Union of India. : [1978]2SCR621 . Bhagwati. J. (as he then was) who delivered the majority judgment found that the law must be taken to be well settled that Article 21 does not exclude Article 19 and a law prescribing a procedure for depriving a person of personal liberty will have to meet the requirement of reasonableness as well. In his view, the principle of reasonableness is an essential element of equality or non-arbitrariness pervading Article 14. must also apply with equal force to the 'procedure' contemplated by Article 21. that is the procedure 'must be right just and fair' and not 'arbitrary, fanciful or oppressive'. In order that the procedure is right, just and fair, it should conform to the principles of natural justice, that is. 'fair play in action,'

123. In Sunil Batra v. Delhi Administration. : 1978 CriLJ1741 , the solitary confinement of a prisoner, was awarded the capital punishment, was held bad as it was imposed not as a consequence of violation of the present discipline but on the ground that the prisoner was one under sentence of death.

124. In M.H. Hoskat v. State of Maharashtra. : 1978 CriLJ1678 . the petition filed before the Supreme Court was dismissed, but the Supreme Court considered Article 21 as prescribing amongst others the right to engage a lawyer for defending himself.

125. In Kasturi Lal v. State of J. K. : [1980]3SCR1338 . Bhagwati. J. (as he then was) explained that the concept of reasonableness in fact pervades the entire constitutional theme and the interpretation of Articles 14. 19 and 21 analysed by the Supreme Court in Maneka Gandhi's case : [1978]2SCR621 (supra) clearly demonstrates that the requirement of reasonableness 'runs like a golden thread through the entire fabric of fundamental rights'.

126. In Hussainara Khatoon v. Home Secretary. : 1979 CriLJ1036 . Bhagwati. J., observed that although the right to speedy trial is not specifically mentioned as a fundamental right, it is implicit in the broad sweep and content of Article 21.

127. In A. D. M. labalpur v. Shivakant Shukla : 1976 CriLJ945 . it was held by the majority that if Article 21. which was the sole repository of the right to personal liberty, has been suspended by an order issued under Article 359, the detenu has no right to file the writ petition.

128. In Sunil Batra v. Delhi Administration : 1978 CriLJ1741 (supra), the Supreme Court reaffirmed the reign of 'due process' by saying :

'This is true, our constitution has no 'due process clause'.... but....after Cooper and Maneka Gandhi, the consequences are the same.'

129. The rulings cited by us above left no doubt that 'procedural reasonableness has become a part of Article 21. but the doubt lingers as to whether like the Court (we) can examine a law to ascertain if it is a just law. both as to the procedure and to the substantive provisions contained therein.

130. Chandrachud. C. J.. reaffirms the distinction between the American and Indian approach to the interpretation of constitutional guarantee in A.K. Roy v. Union of India : 1982 CriLJ340 by remarking ;

'He observed : I am inclined to think that the presence of the due process clause in the 5th and 14th amendments of the American Constitution makes significant difference to the approach of the American judges to the definition and evaluation of the constitutional guarantee. The content which has been meaningfully and imaginatively poured into 'due process of law' may in my view, constitute an important point of distinction between the American Constitution and ours which studiously avoided the use of that expression.'

131. In his dissenting judgment. Mr. Justice Bhagwati. (as he then was), again declared in Bachan Sish v. State of Punjab : [1983]1SCR145a . that the word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of the law. But the opinion expressed in A.K. Roy v. Union of India : 1982 CriLJ340 (supra), is contrary to the observations made by the Hon'ble Mr. Justice Bhagwati in Bachan Singh's case. While speaking for the majority in A.K. Roy. Chief Justice Chandrachud ruled out the powers of the court to scrutinize the reasonableness of the law itself, as distinguished from the procedure prescribed thereunder. It may be observed that reliance had been place by Rakesh Dwivedi on Mithu v. State of Punjab. 0065/1983 : 1983 CriLJ811 . In this case, the Supreme Court was of the opinion that Section 303. Penal Code, violates the guarantee of equality contained in Article 14 and also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or liberty except according to the procedure established by law.

132. We have found above that 'procedural reasonableness' may have become a part of Article 21 but nothing more.

133. For the proposition that as the Proviso to Section 11 (1) discriminates between the State and the accused, therefore, the whole of Sub-section (1). Section 11. which is an integrated provision, incapable of being exercised, was liable to be struck down, counsel relied on a decision quoted in Freddie Eubanks v. State of Lousiana, (1958) 356 US 584. and submitted that :

'The State Legislature was not at liberty to impose one charge with crime, a discrimination in its trial procedure which the Federal Constitution and an Act of Congress passed pursuant to the Constitution.'

134. In that case Negros had been excluded from being chosen on grand juries. This decision also turned on its own facts and because of the express Constitutional prohibition. This does not offer any assistance to us in accepting the submission advanced.

135. Sri Rakesh Dwivedi relied on Lawrence Robinson v. California. (1962) 370 US 660. for the proposition that where State Statute made it a criminal offence punishable by imprisonment for not less than 90 days and not more than one year, to the persons addicted to narcotics, even though the accused had never touched any narcotic drug within the State or had been guilty of any irregular behaviour there, the punishment by the Act was cruel and unusual and as such, was in violation of Eight and Fourteenth Amendments. Suffice it to say that there is nothing like Eighth or Fourteenth Amendments in our Constitution. Consequently, the law laid down in this case would not apply to us. Similarly, James Tyrone Woodson And Luby Waxton v. State of North Carolina. (1976) 428 US 280, is also distinguishable. In that case as well, the United States Supreme Court held by majority that imposition of the mandatory death sentence violated the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments. These cases are scarcely of any aid while interpreting the provisions of our Constitution.

136. Sri Jagdish Swarup as well as Sri Rakesh Dwivedi attacked the constitutionality of Sub-section (2) of Section 11 which enables the Court on an application made by a witness or by the Public Prosecutor in relation to such a witness or on its motion to take such measures as it deems fit for keeping the identity and address of the witness secret. Both the learned counsel strongly urged that this provision, if invoked by the

Court, would directly infringe upon the right of the accused to defend himself. Such a right guaranteed as it is under Article 22(I) of the Constitution constitutes one of the most basic offered by the Founding Father to the people towards security of life and liberty.

137. Learned counsel passionately pleaded that if the accused does not know the identity and address of the witness, how would he cross-examine him. And right to cross-examine the witness for the persecution is one of the most basic guarantees of an effective defence. If, therefore, the accused were to be kept in dark as to the identity and address of the witness, it would tantamount to most direct and serious assault on his right to defend himself.

138. Our task has been rendered easier by the very categorical and firm stand taken on this issue by both Sri Yogeshwar Prasad, learned Senior Counsel appearing on behalf of the State as well as Sri R.P. Singh, learned Chief Counsel. Indeed they made a categorical statement at the Bar supported also by elaborate written arguments that the names and addresses of the witnesses to be examined at the trial would, as a matter of law, in each case be available to the accused and his counsel before the trial begins in view of Section 10 (4) of the Act as well as the provisions of the Code of Criminal Procedure. As the statement made by the learned counsel for the State at the Bar was the same as that contained in their written arguments for precision sake we would extract here the relevant part of the written submissions, The same is as follow :

'After completing investigation, the investigating officer is required to submit a report under Section 73, Cr. P. C. (charge sheet or final report as the case may be). The charge sheet submitted by the investigating officer will contain all details required by Section 173(2). This includes name of the parties, name of the person who appears to be acquainted with the circumstances of the case. The names of the witnesses are mentioned in the charge-sheet, all the copies of documents, all the statements of the witnesses which are relied by the prosecution to prove offence are forwarded to the Magistrate to be supplied to the accused (Section 173(5) Cr. P. C.).

The copies of the charge-sheet, statement recorded under Section 161, Cr. P. C., and other document on which prosecution place reliance are required to be supplied to the accused (Section 207 Cr. P.C.

The procedure of the trial under Gangster Act is to be followed by the Special Judge as of warrant case. The Special Judge is required to act according to Sections 238 to 243, 248 to 250, Cr. P. C. The Special Judge will ensure that the copies as provided under Section 207, Cr. P. C., have been given to the accused (S. 238, Cr. P. C.).'

139. In view of this very clear and categorical stand taken by the learned counsel for the State, it is unnecessary to pronounce on the constitutionality of Section 11 (2) of the Act. According to the learned counsel appearing for the State in each case that will be tried under the Act, the names and addresses of the witnesses shall be made available to the accused persons. The apprehension expressed by the learned counsel for the petitioners, therefore, that they would be deprived of the very right to defend themselves, in case the Court issues the direction contemplated under Section 11 (2), thus stands fully safeguarded.

140. Sub-section (3) of Section 11 ensures the right of cross-examination by an accused of the witnesses produced by the prosecution. Simply because the names of the witnesses would not be mentioned in the judgment that cannot be considered to be a ground for holding Clause (a) of Sub-section (3) of Section 11 to be ultravires nor can Clause (b) of Sub-section (3) of Section 11 empowering the Court to take measures which may be necessary for securing the identity and addresses of the witnesses can be held to be in breach of Article 21. Clause (b) of Sub-section (3) of Section 1 was wrongly interpreted by the petitioner's counsel by asserting that an accused to be tried under this Act could not be entitled to get the police papers and that he could be prosecuted without even knowing about the witnesses who were likely to depose in the trial.

141. For the submission that offence created by Section 3 (1) of the Act is not for any act of commission or omission on the part of any person but merely because of a certain status, therefore, the said provision is

invalid, counsel relied on a decision given in Leroy Powell v. State of Taxas, (1968) 392 US 514. In that case, the defendant was tried in the Corporation Court of Austin, Taxas and found guilty of violating a Statute which made it unlawful to be drunk at public place. Upon appeal, the defendant asserted to punish him criminally would be cruel and unusual punishment, contrary to the Eighth Amendment, as applied to the State under the Fourteenth Amendment, since the defendant was afflicated with the disease of chronic alcoholism and his appearance in public was not of his volition. The county court, holding as a matter of law that chronic alcoholism was not a defence to the charge and finding the defendant guilty, convicted him. In appeal, five members of the Court agreed that the conviction should be affirmed. Marshall, J., however, upheld the contention that the defendant could not be punished for his 'status' or 'condition as being a chronic alcoholic'. This proposition that no one be punished on the basis of status has been elaborately dealt with by us and negatived.

142. Sri Rakesh Dwivedi urged that as the counter affidavit filed by the State does not annex with it the information which the State had at its disposal, the Court can strike down the Act on the ground that it is arbitrary, unreasonable and unthoughtful. Counsel suggested by relying on the decision of the Supreme Court in Ramkrishna Dalmia v. S.R. Tendolkar : [1959]1SCR279 , that the State Government in order to justify the presumption of constitutionality should have brought to the notice of the Court the material which it had in its possession.

143. The controversy in Ramkrishna Dalmia (supra) was relating to the validity of notification under Section 3, Commission of Enquiry Act. In that connection, the Supreme Court while repelling the argument of discrimination observed :

'The facts disclosed on the face of the notification itself and the facts which have been brought to our notice by the affidavits of sufficient support to the constitutionality of the notification.....'

144. There is nothing in this case laying down that in every case, the State is bound to file the materials in its possession in justification of the constitutionality of an Act. It has been said that the constitutionality of a law is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they may be deemed to have acted, with integrity, and with a just desire to keep within the restriction laid down by the Constitution upon the action, have adjudged that it is so.

145. Cooley dealing with 'Inquiry Into Legislative Motives' at 186 says : --

'If so, the courts are not at liberty to enquire into the proper exercise of the power in any case. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding. And although it has sometimes been urged at the bar, that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.'

146. Sri Ravi Kiran, Jain, counsel appearing in Writ Petition No. 2545 of 1986, mostly adopted the argument which had been urged by the learned counsel in the other two cases, but apart from those points, he further submitted that the activities enumerated in Clauses (i) to (v) of Section 2(b) could not be brought under the purview of a penal law and person found indulging in it could thus not be punished. He submitted that those activities on being established or proved, the proper course would be to extern them, and not to put them behind the bar. The object of the U.P. Goondas Act is different and it was enacted for different purposes to be applicable in different context. The U.P. Goondas Act was preventive in nature, whereas U.P. Act No. 7 of 1986 is punitive. There is a vast difference between the two. The argument, if I may say so, is perilously close to straying into the barricaded area of legislative policy or propriety of legislation. This is plainly beyond the province of judiciary.

147. In Prakash Chandra Mehta v. Commr. and Secy. Govt. of Kerala : 1986 CriLJ786 , it was noted that preventive detention unlike punitive detention which was to punish for the wrong done, was to protect the society by preventing wrong being done. For externment, it is not necessary that a goonda should be convicted under the Penal Code. On the basis of subjective satisfaction, he can be externed. Of course, satisfaction must be based on relevant considerations. A decision for externment is essentially different in character from a judicial or quasi-judicial decision. Under U.P.Act 7 of 1986, a person is tried for the charges levelled against him and only on evidence being brought against him proving the guilt that he could be convicted. Such is not the position under the U.P. Goondas Act which is a Preventive Act.

148. Sri D.S. Misra, apart from adopting the submission of the other counsel, urged that in respect of the same offences, the minimum sentence prescribed is two years whereas Section 19 of the Act permits the grant of remand to the extent of two years. Therefore, Sub-section (2) of Section 19 must be struck down as ex facie unfair and arbitrary. In such an event, the result would be that even if he is acquitted, he would have served two years, the minimum prescribed sentence under orders of remand.

149. We are unable to uphold the submission. The impugned Act is designed to deal with a class of crime which is entirely distinct from the ordinary offences, and the accused involved may be such as against whom it may be difficult to collect evidence sometimes. Consequently, if the Legislature made a provision for larger period of remand than contemplated by Sub-section (2) of Section 167, Cr. P. C, it may not be possible to hold sub- Section (2)of Section 19 to be ultra vires on that ground.

150. Further first remand is granted by the Judicial Magistrate or by the Executive Magistrate which cannot exceed more than sixty days. Any further remand is granted only by the special Judge after satisfying himself as to the desirability of granting further time to the investigating officer for completing the investigation. The discretion to grant remand for a period of sixty days is thus vested in a Judicial Officer, namely, the Special Judge who may disallow further remand asked for by the investigating agencies, if grounds for the same are not made out. Power of further remand is not with any executive authority. We therefore, do not see any unconstitutionality in Section 19 (2) of the Act.

151. Arguments were also advanced before us challenging the validity of Clause (e) of Section 2, U.P. Act. 7 of 1986, in so far as it provided that even a person in whose welfare the public servant is interested would be a member of his family. Clause (e) provides : --

'Member of the family of a public servant means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested.'

152. We find that the aforesaid definition of 'member of the family of a public servant' is extremely vague and incapable of being worked out. How could a person in whom B public servant is interested be a member of his family. This definition including any person in whose welfare the public servant is interested is extremely vague, and, as such if liable to be held as unreasonable. As a result whereof, we hereby find that the phrase' and a person in whose welfare the public servant is interested' is unconstitutional on the ground of being unreasonable and violative of Article 14 of the Constitution. However, since this clause is capable of being severed from the remaining, it is not correct to argue that the whole of Clause (e) of Section 2 would have to be struck down.

153. These petitions had been filed mainly on the ground that U.P. Act 7 of 1986 was ultra vires the Constitution. We have not been able to find substance in any one of the grounds of attack of the Act. So far as our power to quash the investigation and the proceedings pending before the Special. Judges challenged in some of the writ petitions before us, are concerned, we are of opinion that this is not possible to be done in these cases. Judicial opinion seems to be settled and we have several authorities of the Supreme Court where interference by the Court into police investigation has been disapproved. This question arose in connection with an application under Section 561A Criminal P. C. in an appeal in State of West Bengal v. S.N. Basak :

[1963]2SCR52 . Kapoor, J. quoted with approval the observations of the Judicial Committee in the case of Emperor v. Kh waja Nazir Ahmad , where the Privy Council observed :

'The functions of the judiciary and the police are complementary not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to interfere in an appropriate case when moved under Section 491, Criminal P. C. to give directions in the nature of habeas corpus.'

154. This view was followed by the Supreme Court in State of West Bengal v. Sampat Lal : 1985 CriLJ516 and Eastern Spinning Mills Shri Virendra Kumar Sharda v. Rajiv Poddar : 1985 CriLJ1858 . In this case, the Supreme Court observed :

'We consider it absolutely unnecessary to make a reference to the decision of this Court and they are legion which have laid down that save in exceptional cases where noninterference would result in miscarriage of justice, the Court and judicial process should not interfere at the stage of investigation of offences.'

155. Of course, the decisions cited above were in connection with Section 482, Cr. P. C., but the scope of interference under Article 226 of the Constitution is narrower. The power of superintendence of the High Court under Article 226 being extraordinary is to be exercised sparingly and only in appropriate cases. The power to issue certiorari cannot be invoked to correct an error of fact which a superior Court can do in exercise of its statutory power as a Court of appeal. The High Court cannot in exercising its jurisdiction under Article 226 convert itself into a Court of appeal when the legislature has not chosen to confer such a right. The High Court's function is limited to see that the subordinate court or Tribunal or authority functions within the limits of its power. It cannot correct errors of fact by examining the evidence.

156. In a writ petition filed under Article 32 of the Constitution, the argument made on behalf of the petitioner of that case that there was no material whatsoever to warrant the framing of charges, hence, the entire proceedings were liable to be quashed. The Supreme Court in Raghubir Singh v. State of Bihar : 1987 CriLJ157 , repelled that argument by saying :

'it was strenuously contended by Sri Jethmalani that there was no material whatsoever to warrant the framing of charges for any of the offences mentioned in the charge sheet other than Section 165A. We desire to express no opinion on this question. It is not a matter to be investigated by us in a petition under Article 32 of the Constitution. We wish to emphasise that this Court cannot convert itself into the Court of a Magistrate or a Special Judge to consider whether there is evidence or not justifying the framing of charges'.

157. For the reasons given above, all the writ petitions fail and are dismissed with costs. Interim order shall stand vacated.

158. The oral prayer made by Sri M. D. Singh,counsel appearing for the petitioners, for grant of a certificate under Article 134A of the Constitution is refused as in our opinion the cases do not involve substantial questions of law of general importance which need to be decided by the Supreme Court.

159. Let copies of this judgment be given to the counsel for the parties within three days on payment of usual charges.