

SRIKAKULAM DISTRICT : WORKSHOP – IV

CHAIRPERSON

HON'BLE SRI JUSTICE G.RAMAKRISHNA PRASAD GARU

**JUDGE, HON'BLE HIGH COURT OF ANDHRA PRADESH,
AND ADMINISTRATIVE JUDGE, SRIKAKULAM**

NODAL OFFICER

JUNAID AHMED MOULANA

**PRINCIPAL DISTRICT JUDGE,
SRIKAKULAM**

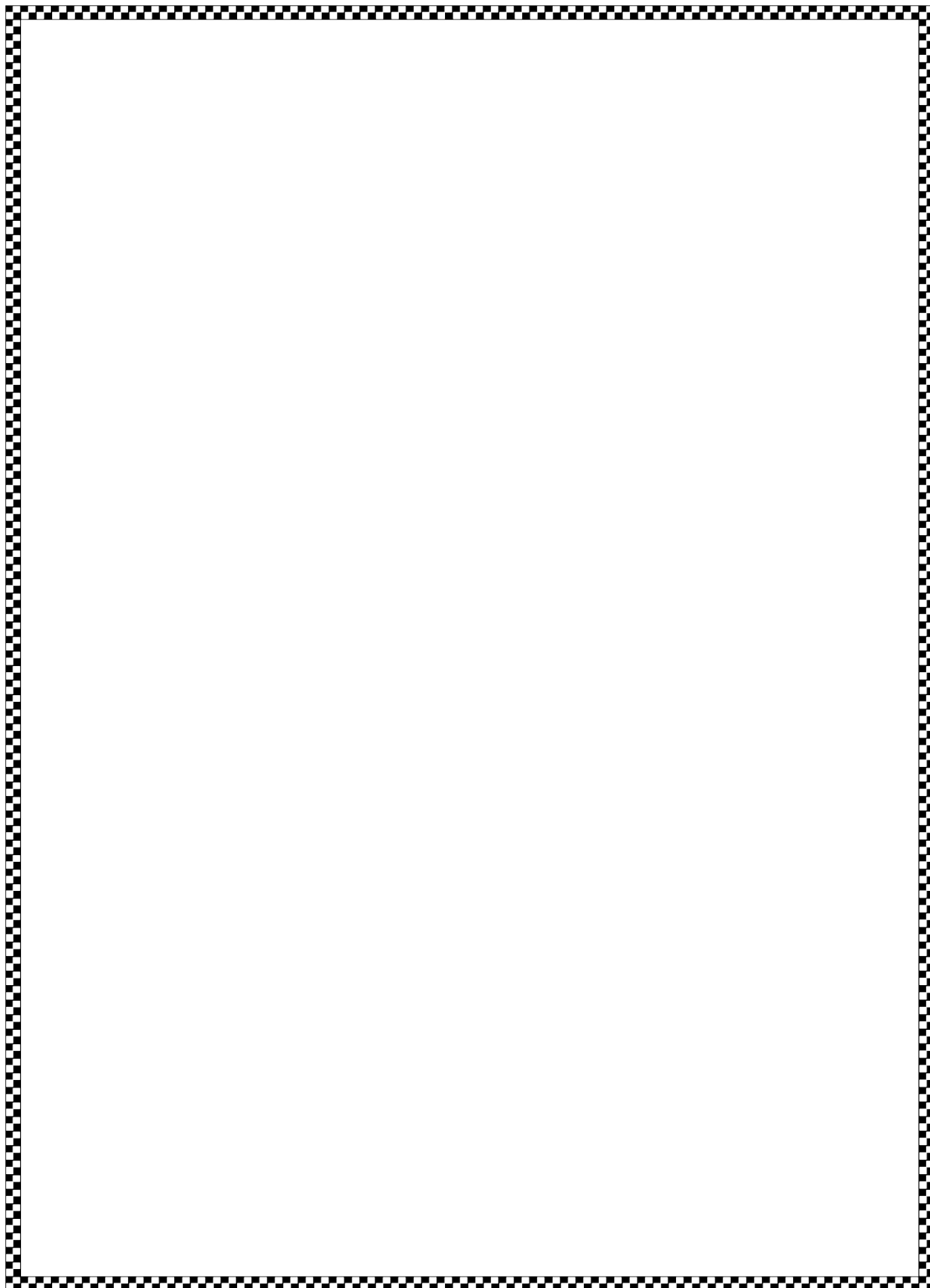
DATE : 06.12.2025

VENUE : DISTRICT COURT CONFERENCE HALL

TOPICS ON CRIMINAL SIDE:

Subject : ASSORTED TOPICS ON CRIMINAL SIDE

- a). Cognizance of offences under IPC and BNS.
- b). Framing of Charges.
- c). Discharge
- d). Electronic devices – Electronic Evidence – Changing Trends.



SESSION NO.I

TOPICS:

- a) Cognizance of offences under IPC and BNS

Paper Presentation by-

Sri. Ch.Vivenk Anand Srinivas,
III Additional District Judge,
Srikakulam.

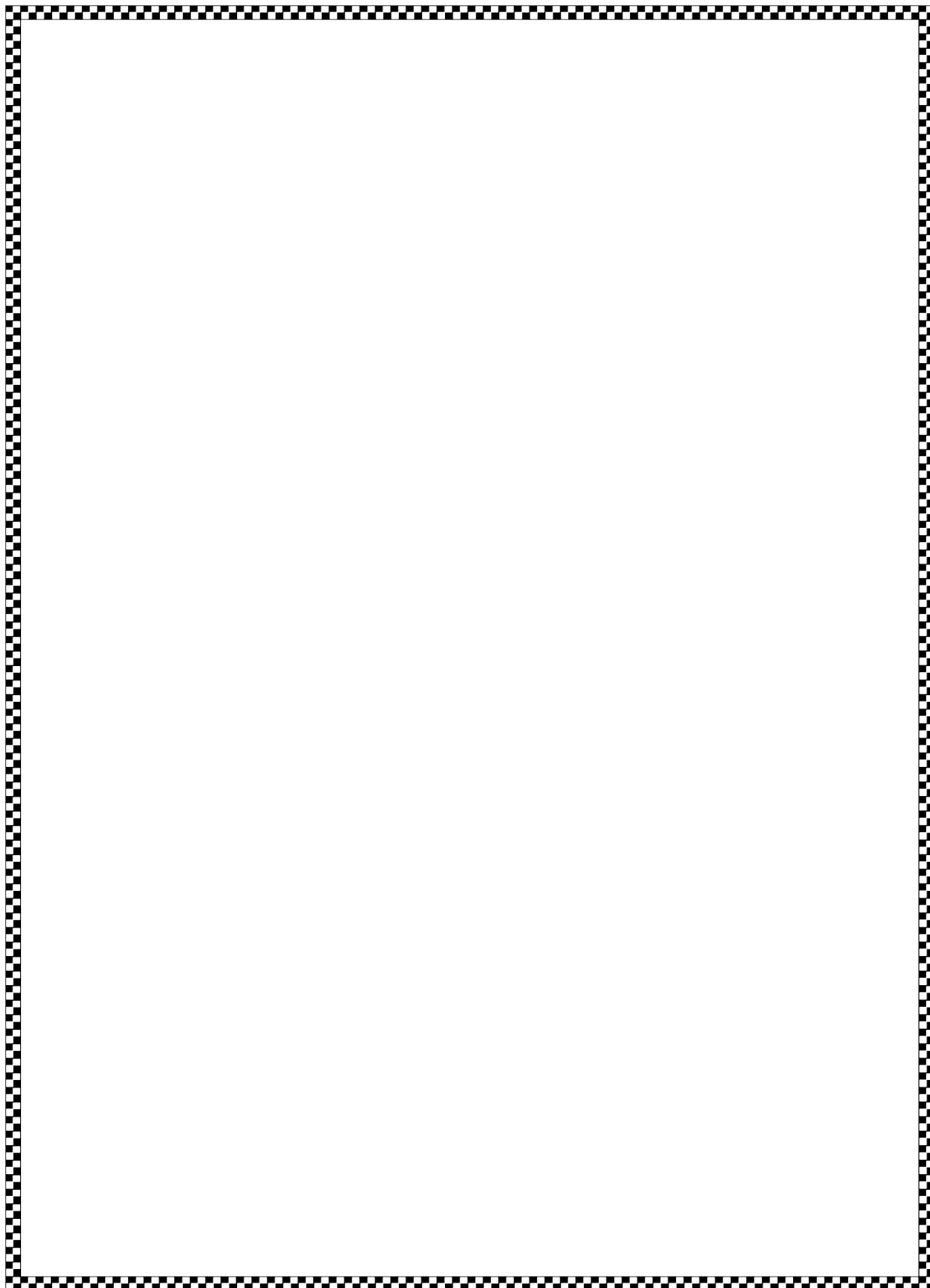
SESSION NO.II

TOPIC:

- b). Framing of Charges.

Paper Presentation by-

Smt. B.Ramya,
Civil Judge (Junior Division),
Amadalavalasa.



SESSION NO. III

TOPIC:

c). Discharge.

Paper Presentation by-

Sri. K.Anurag,
Principal Civil Judge (Junior Division),
Srikakulam.

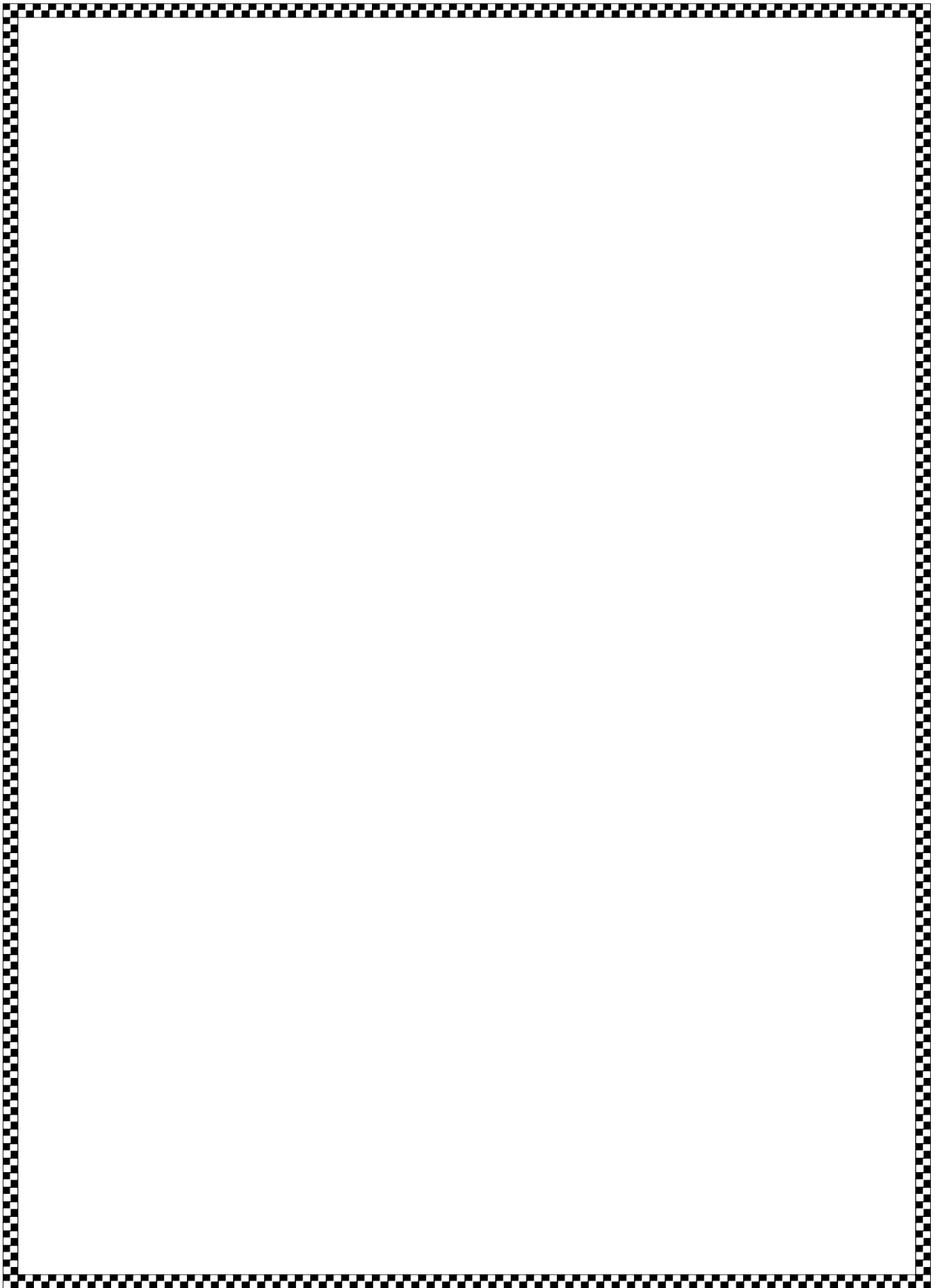
SESSION NO. IV

TOPIC:

d). Electronic devices – Electronic Evidence –
Changing Trends.

Paper Presentation by-

Sri. S.M.Phani Kumar,
IV Additional District Judge,
Srikakulam.



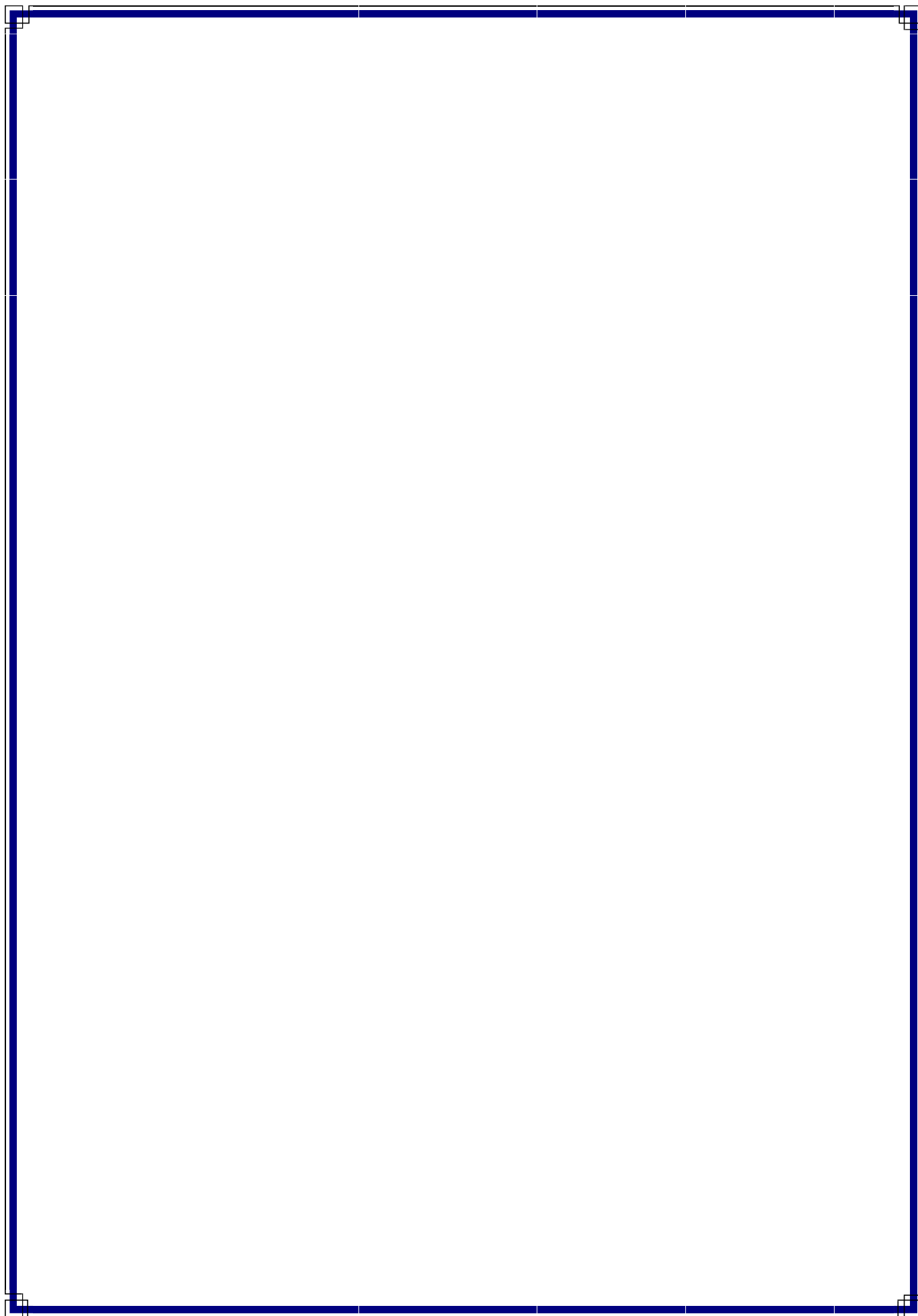
SESSION- I

COGNIZANCE OF OFFENCES UNDER IPC AND BNS

Paper Presentation

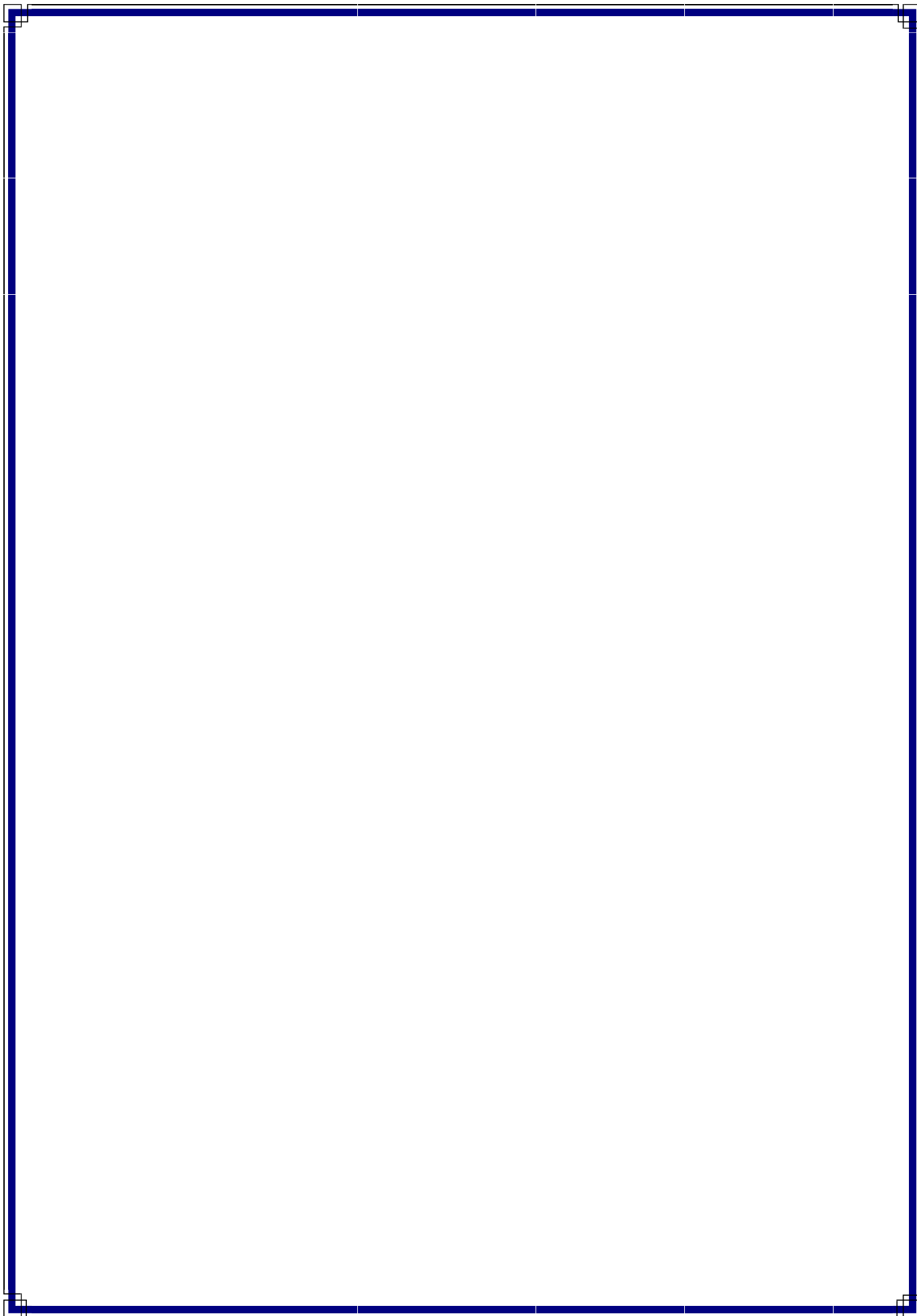
By

Sri. CH. VIVEK ANAND SRINIVAS,
III Additional District Judge,
SRIKAKULAM.



TOPICS

COGNIZANCE OF OFFENCES UNDER IPC AND BNS



COGNIZANCE OF OFFENCES UNDER
INDIAN PENAL CODE
AND
BHARATIYA NAGARIKA SURAKSHA SAMHITHA

The word 'cognizance' or the words 'taking cognizance' have not been deciphered and defined in the procedural law, the same derive definite meaning from plethora of precedents and from judicial pronouncements. While plain and dictionary meaning thereof is 'taking note of', 'taking account of', 'to know about', 'to gain knowledge about', 'awareness about certain things' etc.

In law, the common understanding of the term 'cognizance' is "taking judicial notice by a court of law, possessing jurisdiction, on a cause or matter presented before it, so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter 'judicially' or a broad and general comprehension is 'judicial notice by a court of law on a crime which, according to such court, has been committed against the complainant, to take further action if facts and circumstances so warrant.

In the language of the Hon'ble Apex Court employed in its earliest decision (Ref: R.R.Chari v. State of U.P¹.), "taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of offence".

¹ AIR 1951 SC 207

Regarding the procedure involved in taking cognizance, to start with, there must be application of judicial mind to the materials, oral and documentary as well as other information submitted and apprised of. The litmus test of taking cognizance, whether it be relating to an offence on a complaint, or on a police report, or upon information of a person other than a police officer, is making a thorough assessment of the allegations by coming into grip with the facts presented and bringing into focus the law on the subject and applying the facts to the law and thereafter arriving at a conclusion by a process of reasoning and evidencing that all relevant facts have been taken note of and properly analysed in the light of the law applicable.

A Judicial Officer must apply judicial mind coupled with discretion and such exercise should not be arbitrary, capricious, whimsical, fanciful and casual, because just and right decisions cannot be taken by an ordinary individual but by a person with legal acumen, experience, knowledge and intelligence on the application of law with reference to the facts of a given case.

Taking cognizance of a case which ought not to have been taken cognizance of would amount to encroaching into the jurisdiction of the other forum and would defeat the very purpose behind establishment of the forum concerned. An offence being acts of commission/omission made punishable under the law for the time being, cognizance can be taken only if the allegations and disputes attract the Penal Provisions in the enactment.

"Taking cognizance" of a case relating to an alleged offence is different from "cognizable case". A Police Officer can register an FIR only if a cognizable offence is made out and he cannot investigate into a non-cognizable offence without seeking permission from the court. Both the terms seem to sound similar but they stand for a meaning and context different from each other. Though the word 'cognizance' is not defined in the Code of Criminal Procedure, 'cognizable offence' is defined in Section 2 (c) of the Code, which reads as follows:-

"Cognizable offence means an offence for which, and 'cognizable case' means a case in which a police officer may, in accordance with the First schedule or under any other law for the time being in force, arrest without warrant ", and Section 2(l) defines 'non-cognizable offence' as follows:-

"Non-Cognizable offence means an offence for which and 'non cognizable case' means a case in which a police officer has no authority to arrest without warrant."

Therefore, one must be clear about the application of the Code with reference to "taking cognizance" and distinction between "cognizable" and "non-cognizable" offences.

Once cognizance is taken, process may have to be issued against the person, who is alleged to have committed the offence and the procedure adumbrated must necessarily follow.

For better analysis of the scope of cognizance and the consequences arising there from, it is worthwhile to highlight the scheme of relevant provisions in the Code and the case laws touching the same.

Chapter XIV of the Code under the caption 'Conditions requisite for initiation of proceedings' employs the word 'cognizance' and the very first Section in the said Chapter viz., Section 190, outlines as to how cognizance of offences will be taken by a magistrate of an offence on a complaint, or on a police report or upon information of a person other than a police officer.

Section 191 empowers the Chief Judicial Magistrate for transfer of a case taken on file *suomotu* by a Judicial Magistrate concerned since the Magistrate him self being a complainant, there may be scope for alleging prejudice or malice. By virtue of Section 192, a Chief Judicial Magistrate, who takes cognizance of an offence, by passing administrative order, transfer the case concerned to the file of any other Magistrate subordinate to him for inquiry or trial.

Section 193 prohibits cognizance of any offence by a court of Sessions stepping into the shoes of the court having original jurisdiction except in cases where power is conferred by the statute.

Section 194 empowers Sessions Courts for transfer of cases to the file of Additional and Assistant Sessions Judges.

Section 195 deals with prosecution for contempt of lawful authority of public servants for offences against public justice and for offences relating to documents given in evidence;

Section 196 pertains to offences against the State and for criminal conspiracy to commit the offence; and Sections 197, 198, 198-A and 199 relates to prosecution of Judges & public servants, prosecution for offences against marriage, offences under Section 498-A IPC and defamation respectively.

Chapter XV with the title 'Complaints to Magistrates' contain four sections viz., 200 to 203 regarding examination of complainant, procedure by Magistrate not competent to take cognizance of the case, postponement of issue of process and dismissal of complaint.

Sections 204 to 208 at Chapter XVI with the caption 'Commencement of proceedings before Magistrates' deal with the subsequent proceedings that would follow after cognizance is taken. It must be taken note of, in cases where police report is submitted for taking cognizance, the Magistrate may resort to one of the three options: (i) he may

accept the report and take cognizance of the offence and issue process; (ii) he may disagree with the report and drop the proceedings or (iii) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report.

In a case where the report on the other hand states that, in the opinion of the police, no offence appears to have been committed, again, the Magistrate has three opinions viz., (a) he may accept the report and drop the proceedings; (b) he may disagree with the report and by holding that there is sufficient ground for proceeding further, take cognizance of the case and issue process or (c) he may direct further investigation to be made by the police under sub-section 3 of Section 156.

It is worthwhile to mention below certain case laws of the Hon'ble Apex Court wherein the scope and purview of the term 'cognizance' are vividly explained,

(i) R.R.Chari Vs. The State of Uttar Pradesh² Before it can be said that any Magistrate has taken cognizance of any offence under S.190 he must have applied his mind to the offence for the purpose of proceeding in a particular way as indicated in the subsequent provisions of Chapter. Proceeding U/S. 200 & thereafter sending it for inquiry & report U/S.202. When the Magistrate applies his mind not for the purpose of

² AIR (38 1951 Supreme court 207

proceeding under the subsequent sections of the Chapter but for taking action of some other kind, e.g. ordering investigation u/S. 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.

(ii) *Narayandas Bhagwandas Madhavdas Vs. West Bengal*³.

As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance is taken of an offence. It is only when a Magistrate applies his mind for the purpose of proceeding under S.200 and subsequent sections of Ch. XVI of the code of Criminal Procedure or under S.204 of Ch. XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance.

(iii) *D. Lakshminarayana Vs. V. Narayana*⁴

What is meant by "taking cognizance of an offence" by the Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which

³ AIR 1959 Supreme court 1118 (V 46 C 150)

⁴ AIR 1976 Supreme Court 1672 .

Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein.

The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1) (a). If, instead of proceeding under Chapter XV, he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence. The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Sec. 202 (1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Sec.

156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156 (3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156 (1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding." Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

(iv) Bhagwant Singh Vs. Commissioner of Police and another⁵.

⁵ AIR 1985 Supreme Court 1285

Magistrate deciding not to take cognizance of offence or drop proceedings against some persons mentioned in F.I.R. must give notice and hear first the informant. In a case where the Magistrate to whom a report is forwarded under sub-sec.(2) of S.173 decided not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. However, either from the provisions of the Criminal Procedure Code or from the principles of natural justice, no obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person an opportunity to be heard at the time of consideration of the report can be spelt out, unless such person is the informant who has lodged the F.I.R. But, even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of S.173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process.

(v) Kishun Sing and others Vs State of Bihar⁶

Sessions Court has jurisdiction, on committal of a case to it, to take cognizance of offence of persons not named as offenders, whose complicity in the crime comes to light from the material available on record – Hence on committal under S.209, Sessions Judge justified in summoning, without recording evidence, the appellants not named in police report under S.173 to stand trial along with those already named therein. Sessions Court having jurisdiction under S.193, mere exercise of power under a wrong provision (S.319) would not render its order invalid.

On committal, the restriction on the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. "The object of Section 190 is to ensure the safety of a citizen against the vagaries of the police by giving him the right to approach the Magistrate directly if the police does not take action or he has reason to believe that no such action will be taken by the police. Even though the expression 'take cognizance' is not defined, it is well settled by a catena of decisions of this Court that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence decides to initiate judicial proceedings against the alleged offender he is said to have taken cognizance of the offence. Cognizance is in regard to the offence, not the offender.

⁶ (1993) 2 Supreme Court Cases 16

(vi) State of W.B. and Another Vs. Mohd. Khalid and Another⁷.

Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. It has, thus, reference to the hearing and determination of the case in connection with an offence.

(vii) Rashmji Kumar (smt) Vs. Mahesh Kumar Bhada⁸.

It is fairly settled legal position that at the time of taking cognizance of the offence, the Court has to consider only the averments made in the complaint or in the charge-sheet filed under Section 173, as the case may be. It was held in State of Bihar V. Rajendra Agarwall ⁹ that it is not open for the Court to sit or appreciate the evidence at that stage with reference to the material and come to the conclusion that no prima

⁷ (1995) 1 Supreme Court Cases 684

⁸ 1997 Supreme Court Cases (Cri) 415

⁹ 1996 (8) SCC 164

facie case is made out for proceeding further in the matter. It is equally settled law that it is open to the Court, before issuing the process, to record the evidence, and on consideration of the averments made in the complaint and the evidence thus adduced, it is required to find out whether an offence has been made out. On finding that such an offence has been made out and after taking cognizance thereof, process would be issued to the respondent to take further steps in the matters.

(viii) Ponnal @ Kalaiyarasi Vs. Rajamanickam and 11 others¹⁰
No doubt, it is true that the complaint filed by a private party can be dismissed by the learned Magistrate under Section 203 Cr.P.C., if he thinks that there is no sufficient ground for proceeding. While exercising his discretionary powers, the learned Magistrate should not allow himself to evaluate and appreciate the sworn statements recorded by him under Section 202 Cr.P.C. All that he could do would be, to consider as to whether there is a prima facie case for a criminal offence, which, in his judgment, would be sufficient to call upon the alleged offender to answer. At the stage of Section 202 Cr.P.C. enquiry, the standard of proof which is required finally before finding the accused guilty or otherwise should not be applied at the initial stage. This is what exactly is done by the learned Magistrate in the instant case.

¹⁰ 1998 (4) Crimes 543

(ix) G. SagarSuri and another Vs. State of U.P¹¹.

A criminal complaint under S. 138 of the Negotiable Instruments Act was already pending against the appellants and other accused. They would suffer the consequences if offence under S.138 is proved against them. In any case there would be no occasion for the complainant to prosecute the appellants accused under Ss. 406/420 IPC and in his doing so it would be clearly an abuse of the process of law and prosecution against the appellants for those offences would be liable to be quashed.

(x) State of Karnataka and Another Vs. Pastor P. Raju¹².

Several provisions in Chapter XIV of the Criminal Procedure Code use the word

"cognizance". However, the word "cognizance" has not been defined in the Criminal

Procedure Code. The dictionary meaning of the word "cognizance" is – "judicial hearing of a matter". Taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to

¹¹ AIR 2000 Supreme Court 754

¹² (2006) 6 Supreme court Cases 728

proceed against the offenders against whom a prima facie case is made out."

(xi) P. Ashok Kumar Vs. Inspector of Police.¹³

In the present matters, it is ex facie apparent that, in spite of having weighed the nature of allegations in judicial scales and thereby knowing fully well that legally are not supposed to refer the civil disputes for police investigation or take cognizance by themselves, the Judicial Officers concerned, with ulterior motives and to oblige the demand of the Bankers, illegally imputed criminal flavour to civil disputes, which action is not only inappropriate, and as such legally untenable, but elicits their unwanted intention in aiding one party to intimidate the other party. The basic premise is, once a matter is found to be purely civil nature, the scope and extent of issues covering the same cannot take on a criminal character, for, both the civil and criminal disputes are mutually exclusive. Obviously, the reasons for these Bankers/Financial Institutions trespassing into the area of criminal law remedy is that civil law remedies are time consuming; further, by obtaining orders for police investigation, they can exert pressure upon the borrowers through police to a considerable extent by imbibing the fear of arrest or being subjected to ignominy at the hands of police

¹³ (2009) 1 MLJ (CrI) 352

and ultimately, with ease, they could collect the principle amount plus exorbitant rate of interest. In the complaints taken on file, such break-up figures of principal and interest are not mentioned. Unfortunately, the Magistrates, who have been repeatedly advised and guided by the Hon'ble Apex Court to exercise great caution in that regard, have abruptly failed in adhering to such guidance, as a result of which, the immersion of civil disputes with criminal charges is immensely growing with each passing day as reflected in the statistics furnished before this Court. Day in and day out, hundreds of such complaints have been entertained by some of the Magistrates and cognizance is taken. Humanly, it is impossible if there is proper application of mind. Obviously, such cognizance is taken by the Magistrates on the mere request of the Bankers with an ulterior motive and in collusion and conspiracy with them.

To conclude, as remarked by the Supreme Court, there is no special charm or any magical formula in the expression 'taking cognizance' which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to take further judicial action.

Cognizance of an offence under the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, is the judicial process where a court first applies its mind to the facts of a case to determine if there are sufficient grounds to initiate legal proceedings. This is a critical step, as a criminal trial cannot begin without it. The BNSS largely maintains the principles of the previous Code of Criminal Procedure (CrPC) but introduces key procedural changes, notably in complaint cases.

By Whom Cognizance is Taken

- **Magistrates:** Section 210 of the BNSS empowers a Magistrate of the first class, or a specially empowered Magistrate of the second class, to take cognizance of an offence.
- **Courts of Session:** A Court of Session generally cannot take cognizance of an offence directly. Cases must first be received or committed to it by a Magistrate, except where a specific provision of law allows otherwise.

Sources of Cognizance (Section 210 BNSS)

A Magistrate may take cognizance of an offence under the following circumstances:

- **Upon receiving a complaint of facts:** This refers to a private individual filing a complaint, orally or in writing, with the Magistrate.

- Upon a police report: This occurs after the police complete their investigation and submit a charge sheet (under Section 193 BNSS, corresponding to Section 173 CrPC) or a closure report.
- Upon information from any person other than a police officer, or upon their own knowledge (suomotu): The court can initiate proceedings based on third-party information or its own judicial notice.

Key Changes and Procedural Aspects under BNSS

The BNSS introduces significant procedural safeguards, particularly concerning private complaints:

- Mandatory Hearing for the Accused in Complaint Cases: A major change is the introduction of a proviso to Section 223(1) of the BNSS, which mandates that a Magistrate cannot take cognizance of an offence based on a private complaint without first giving the proposed accused an opportunity of being heard. This aims to prevent the misuse of legal provisions and filter out frivolous complaints at an early stage.
- Stage of Hearing: This hearing occurs after the Magistrate has examined the complainant and their witnesses on oath (under Section 223 BNSS) but before the formal order to issue process (summons or warrant) to the accused.

- Police Reports (Charge Sheets): The BNSS clarifies existing Supreme Court judgments that it is not mandatory for the police to physically arrest an accused who has cooperated with the investigation when filing a charge sheet (Section 190 BNSS). The Magistrate can secure their presence by other means, such as demanding a bond.

- Limitations on Cognizance: Certain sections (e.g., Sections 215-222 BNSS) impose restrictions on taking cognizance for specific offences, such as those against public servants acting in official duty, defamation, or certain offences against the state, without the required sanction or written complaint from the appropriate authority or aggrieved person.

Difference Between Cognizance and Issuing Process

It is important to distinguish between two stages:

- Taking Cognizance: The court's initial application of the judicial mind to the facts to decide if a case warrants further legal action.

- Issuing Process: The subsequent step, after taking cognizance and finding sufficient grounds, where the court summons the accused or issues a warrant to ensure their presence for trial.

The BNSS largely maintains the principles of the previous Code of Criminal Procedure (CrPC) but introduces key procedural changes, notably in complaint cases.

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A Magistrate may take cognizance of an offence under the following circumstances:

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- **Upon information from any person other than a police officer, or upon their own knowledge (suomotu):** The court can initiate proceedings based on third-party information or its own judicial notice.

Section 210 of BNSS: This section empowers Magistrates to take cognizance of offences based on various sources. A Magistrate of the first class or a specially empowered Magistrate of the second class can initiate proceedings upon receiving a complaint, a police report, information from a person other than a police officer, or even based on their own knowledge.

Section 211 of BNSS: When a Magistrate takes cognizance based on information under Section 210(1)(c), the accused is informed about the right to have the case tried by another Magistrate if they object before evidence is taken.

Section 212 of BNSS: After taking cognizance, the Chief Judicial Magistrate can assign the case for inquiry or trial to a competent Magistrate subordinate to them.

Section 213 of BNSS: Courts of Session, under normal circumstances, can't take cognizance unless a Magistrate commits the case to them.

Section 214 of BNSS: Additional Sessions Judges are designated to try cases made over to them by the Sessions Judge or the High Court.

Section 215 of BNSS: This section outlines the conditions for taking cognizance of specific offences. It emphasizes that no Court shall take cognizance unless certain conditions, like a written complaint from a public servant, are met.

Section 216 of BNSS: In cases of threatening, a witness or any other person can file a complaint.

Section 217 of BNSS: Deals with offences against the State and criminal conspiracy. No court can start proceedings in the offences mentioned in Section 217 of BNSS without permission from the Central or State Government.

Section 218 of BNSS: Offers protection to Judges, Magistrates, and public servants doing their duties. No legal action can be taken against them without prior approval from the Government, ensuring their independence and shielding them from unnecessary legal hassles.

Section 219 of BNSS: Covers offences against marriage. Only the person affected by the offence can complain, with special provisions for various situations, like age or health concerns.

Section 220 of BNSS: Focuses on offences under section 85. Action can only be taken based on a police report or a complaint from the person affected or specific relatives.

Section 221 of BNSS: Pertains to offences under section 67, involving married individuals. Action can only be taken if the wife files a complaint against her husband.

Section 222 of BNSS: Deals with defamation cases (section 356 of BNS). Proceedings can only begin if the person affected files a complaint.

Important Provisions in B.N.S.S. (With Corresponding Cr.P.C. Sections)

Section (BNSS/Cr.PC) Title Relevance Section 173 /154 Information in cognizable cases (FIR) Analogous to Section 154 CrPC. FIR is registered when a cognizable offence is reported. Section 174/155 Information in non-cognizable cases No investigation without Magistrate's permission.

Section 175/156 Procedure when information is given about non-cognizable offence. Police to inform the informant and seek permission of Magistrate to investigation.

Section 176/157 Procedure for investigation An officer in charge of police station may proceed to the spot, to investigate the facts and circumstances of the case.

Section 177/158 Report how submitted Submitted through superior officer of police by general or special order.

Section 208/188 Jurisdiction of Magistrate Important for deciding whether the Magistrate is competent to take cognizance or should forward the case.

Section 210/190 Cognizance of offences by Magistrates : lays down the situations in which a Magistrate may take cognizance (on complaint, police report, or suomotu).

Section 211/191 Cognizance by Sessions Court Specifies when and how a Court of Session may take cognizance (upon commitment or direct complaint).

Section 212/192 Commitment of cases to Court of Session When offence is exclusively triable by a Sessions Court, the Magistrate must commit the case after cognizance.

Section 213/193 Magistrate's power to commit case Allows a Magistrate to commit any case to the Court of Session after taking cognizance.

Section 223/200 Filing of complaint to Magistrate. Deals with how a complaint is made before the Magistrate. Starting point of cognizance in complaint cases.

Section 224/201 Examination of complainant If cognizance is taken on a complaint, the Magistrate must examine the complainant and witnesses on oath.

Section 225/202 Postponement of issue of process Allows the Magistrate to postpone issuing process if he wants further inquiry.

Section 226/203 Dismissal of complaint If no sufficient ground is found to proceed, the Magistrate may dismiss the complaint after taking cognizance.

Section 227/204 Issue of process If sufficient ground exists, the Magistrate issues summons or warrant to the accused.

Stage FIR Case Complaint Case Relevant Section Under BNSS
Initiation / Filing Information about a cognizable offence is given to police officer in-charge. Complaint is filed before a Magistrate either orally or in writing.

FIR: Section 173 Complaint:

Section 223 Nature of Offence FIR is registered only for cognizable offences.

Complaint can be for both cognizable and non-cognizable offences.

Who can file?

Any person aware of the commission of a cognizable offence.

Any person including the aggrieved party.

Duty to Register Police must register FIR for cognizable offences. Magistrate has discretion to take cognizance.

Section 173(1) and Section 220 Preliminary Inquiry / Examination. Not mandatory unless under certain guidelines. Magistrate may examine complainant and witnesses.

Section 224 Role of Police. Police investigates the matter immediately. No role of police initially; Magistrate may order investigation.

FIR: Section 178 Complaint:

Section 225 DIFFERENCE IN STAGES OF F.I.R. & COMPLAINT

Stage FIR Case Complaint Case Relevant Section

Under BNSS Report Submission Police files charge sheet or closure report. After inquiry, Magistrate may dismiss or issue process.

Section 194 (Police Report)

Sections 226–227 (Complaint case)

Cognizance by Magistrate Taken on police report (charge sheet).

Taken on complaint after examination/inquiry.

Section 220 Dismissal at Initial Stage

FIR generally not dismissed; Police may file closure report. Complaint may be dismissed if no sufficient ground is found.

FIR: Section 194(6)

Complaint: Section 226 Issue of Process / Summons

After taking cognizance on charge sheet, summons/warrant is issued.

After satisfaction from complaint and inquiry.

Section 227 Further Investigation Allowed even after filing of report.

Magistrate may direct further inquiry.

Section 195 (FIR case)

Section 225(2) (Complaint)

Trial Stage Proceeds after filing of charge Proceeds after issue of process.

Steps in Taking Cognizance

Receipt of complaint / police report / own knowledge

Magistrate applies judicial mind. Decides whether offence is made out.

Takes cognizance under appropriate sections Issues process (summons/warrant) if needed.

Section 210 of B.N.S.S.- Cognizance of offences by Magistrate.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts, including any complaint filed by a person authorised under any special law, which constitutes such offence;

(b) upon a police report (submitted in any mode including electronic mode) of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

[Similar to Section 190 of Cr.P.C.]

Section 175(3) in Bharatiya Nagarik Suraksha Sanhita, 2023
(3) Any Magistrate empowered under section 210 may, after considering the application supported by an affidavit made under sub-section (4) of section 173, and after making such inquiry as he thinks necessary and submission made in this regard by the police officer, order such an investigation as above-mentioned.

Recording Satisfaction About Sufficient Grounds

Mandatory To Summon Accused – Sachin Garg v. State of U.P.¹⁴,

"20. While it is true that at the stage of issuing summons a magistrate only needs to be satisfied with a prima facie case for taking cognizance, the duty of the magistrate is also to be satisfied whether there is sufficient ground for proceeding, as has been held in the case of Jagdish Ram (supra). The same proposition of law has been laid down in the case of Pepsi Foods Ltd. v. Special Judicial Magistrate¹⁵. The learned Magistrate's order issuing summons records the background of the case in rather longish detail but reflects his satisfaction in a cryptic manner. At the stage of issue of summons, detailed reasoning as to why a Magistrate is issuing summons, however, is not necessary. But in this case, we are satisfied that the allegations made by the complainant do not give rise to the offences for which the appellant has been summoned for trial.

¹⁴ 2024 SCC online SC 82

¹⁵ (1998) 5 SCC 749

- Pepsi Food Limited v. Special Judicial Magistrate¹⁶,

The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations.

- Jagdish Ram v. State of Rajasthan ¹⁷

A Magistrate is empowered to take cognizance if the material on record makes out

a case for the said purpose. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry.

*Amresh Kumar Dhiraj v. State of Jharkhand*¹⁸,

"25. The order taking cognizance under Section 190 Cr.P.C. and order issuing process under Section 204 Cr.P.C., can very well be a composite order but as observed, the application of mind would be different in both cases. This application of mind must be reflected in the order itself. The order should

¹⁶ (1998) 5 SCC 749

¹⁷ (2004) 4 SCC 432

¹⁸ 2019 SCC online Jhar 2775

not be mechanical. Magistrate has to mention at least that there are sufficient materials to proceed against the persons and what are the prima-facie materials to proceed against them. He need not pass a detail judgment evaluating the materials, which are before him. The detail reasons as to why he is taking cognizance or issuing process are not to be mentioned but at least what are the bare minimum prima-facie materials against the accused-petitioners should be mentioned in the order issuing summon and prima facie what offence is alleged, in the order taking cognizance."

Section 223(1) of Bharatiya Nagrik Suraksha Sanhita- Examination of complainant.

A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

- Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:
- Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-
- (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

- (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:

- Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them. An accused should have an opportunity of being heard

- *Kushal Kumar Agarwal v. Enforcement Directorate*,¹⁹

The proviso to sub-section (1) of Section 223 puts an embargo on the power of the Court to take cognizance by providing that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

- *Suby Antony v. Judicial First-Class Magistrate-III*²⁰, Being guided by the precedents on Sections 200 and 202 of the Code and the plain language of the proviso to Section 223(1) of the BNSS, this Court is of the opinion that, after the complaint is filed, the Magistrate should first examine the complainant and witnesses on oath and thereafter, if the Magistrate proceeds to take cognizance of the offence/s, opportunity of hearing should be afforded to the accused.

- *Basanagouda R. Patil v. Shivananda S. Patil*²¹,

¹⁹ 2025 SCC Online SC 1221

²⁰ 2025 SCC On line Ker 532

²¹ 2024 SCC OnLine Kar 96

The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.

- *Prateek Agarwal v. State of U.P*²².,

A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate/concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.

²² 2024 SCC OnLine All 8212

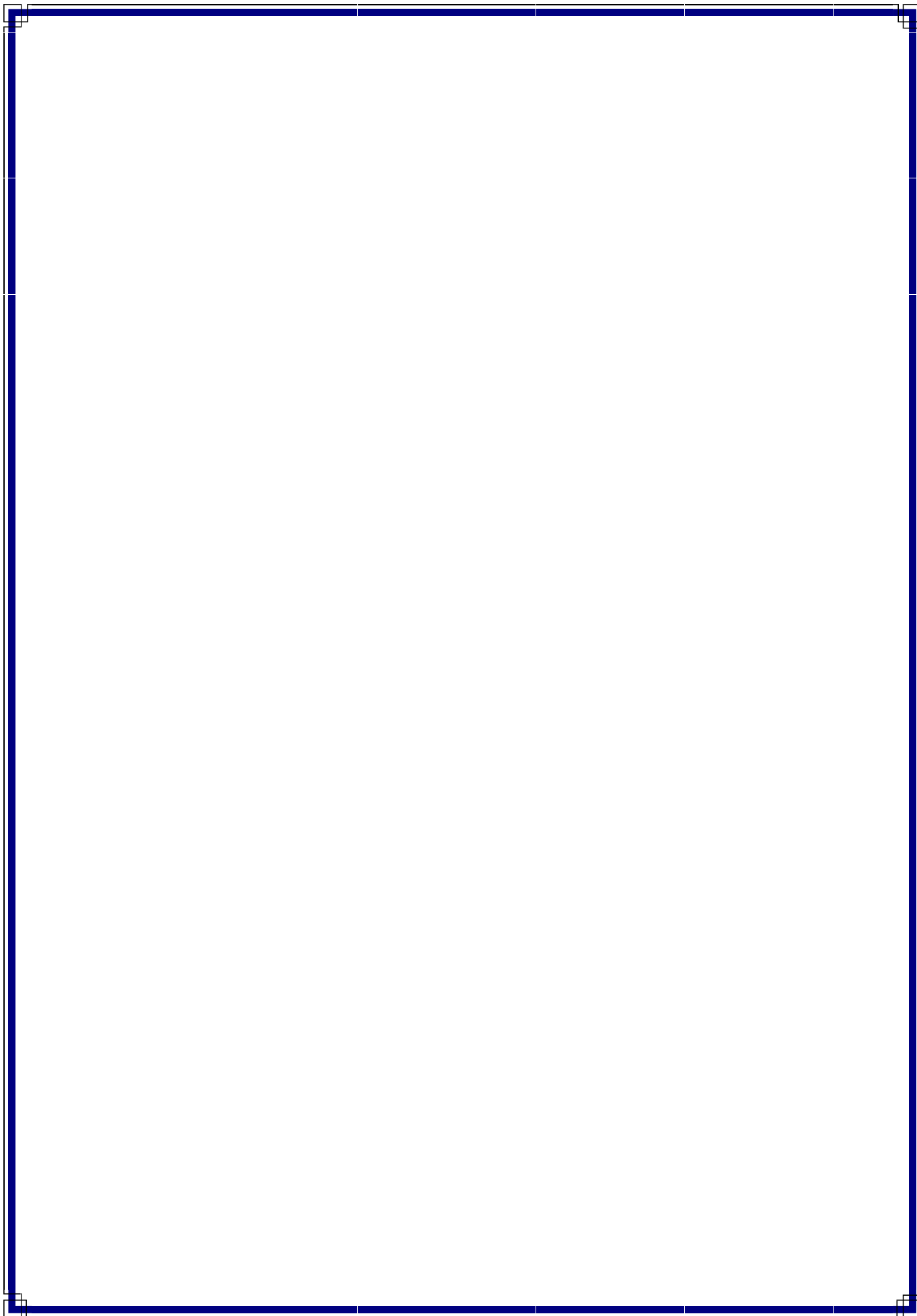
SESSION- II

FRAMING OF CHARGES

Paper Presentation

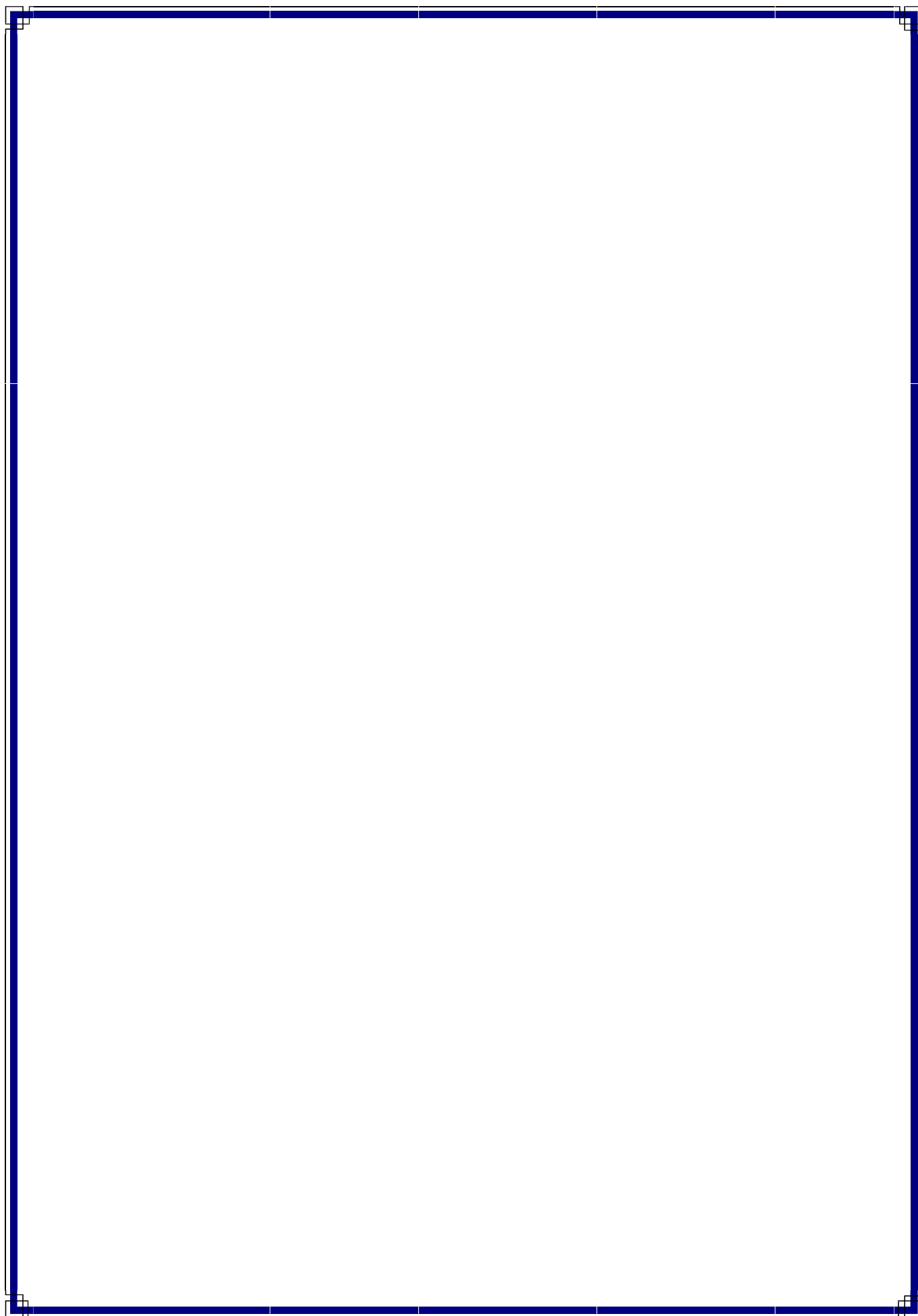
By

Smt. B.RAMYA,
Civil Judge (Junior Division),
AMADALAVALASA.



TOPICS

FRAMING OF CHARGES



FRAMING OF CHARGES

INTRODUCTION:

Firstly discussing about the importance of framing of charge. One basic requirement of a fair trial in criminal cases is to give precise information to the accused as to the accusation against him. This is vitally important to the accused in the preparation of his defence. In all trials under the Code, the accused is informed of the accusation in the beginning itself.

In cases of serious offences, the Court requires that the accusations are to be formulated and reduced to writing with great precision and clarity. These provisions relating to charge are aimed at giving full notice to the accused about the offence of which he is charged. It gives the accused accurate and precise information about the accusations made against him. Every charge under this Code shall state the offence with which the accused is charged.

(1A) Law regarding charges in criminal trials:

Different laws relating to the charges in criminal trials are as under:

- i) Sections 212 to 224 Cr.P.C. Now Section 234 to 247 of BNSS 2023. (General law relating to the charges)
- ii) Sections 226, 227, 228 Cr.P.C (Discharge or charge of accused by Sessions Judge)
- iii) Sections 239, 240 Cr.P.C (Discharge or charge of accused by Magistrate in State cases)
- iv) Sections 245 to 246 Cr.P.C (Discharge or charge of accused by Magistrate in complaint cases.
- v) Section 464 Cr.P.C (Error, omission, irregularity or misjoinder etc. in charges)
- vi) Charges under Special Acts
- vii) Judicial pronouncements of the Supreme Court and High Courts

(1B) Object of framing charge:

The object of framing of charge against an accused person in a criminal trial is to make him aware of what he is to be tried for by the court, by clearly explaining to him, the main facts sought to be established against him by the prosecution or the complainant, so that he may have a full and fair chance to defend himself at the trial.

At the stage of framing a charge, the court should consider the materials placed before the court; There is a prima facie case against the accused. The test to be determined prima facie case depends upon the facts and circumstances of each case.

Form and requirements:

- * The charge should be precise but should give the necessary particulars required by law.
- * Every charge shall state the offence with which the accused is charged.
- *. The charge shall be written either in English or in the language of the court.
- * For every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately.
- * The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.
- * The court framing charge should avoid all unnecessary words, abbreviations or recondite words should, as far as possible, be also avoided.
- * An omission, defect or error in the charge which does not prejudice or mislead the accused and does not result in any failure of justice cannot be regarded as material. (***Chandraprakash v. State of Rajasthan***²³).

²³ 2014 (86) ACC 836 (SC)

Contents of charges (Sections 211, 212, 213 Cr.P.C, now 234 to 236 of BNSS 2023):

(1C) The contents of a charge are:

- i) Name and designation of the judge or magistrate framing the charge.
- ii) Name of the accused charged.
- iii) Date, time and place of occurrence.
- iv) Particulars of the person against whom or the property in respect of which the offence was committed.
- v) Ingredients of the offence committed with Its penal section,
- vi) Name of the offence, if any, and the manner of its commission in brief.
- vii) Direction to the accused, to be tried on the charge framed by the court.
- viii) Signature of the judge or magistrate framing the charge (and also the signature of the accused on the paper sheet containing the charges).
- ix) Narration in brief that the charge has been read over/explained to the accused charged
- x) Expression, if any, of the accused whether he confesses to the offence or claims to be tried.

2) Material for framing charges.

At the time of framing charges, the Court can consider only the material placed before it by the Investigating Agency. While considering the question of discharge of the accused by the Session Judge under Section 227 CrPC or framing of

charge under Section 2208 CrPC and the Magistrate under Sections 239 and 240 CrPC, The Court of Sessions can consider only the materials submitted to it by the Magistrate at the time of commitment of the case under Section 209 CrPC. Scope of Sections 227 and 228 CrPC for Court of Sessions and that of the Magisterial Court under Sections 239 and 240 CrPC is the same. At the stage of charge, trial Court can consider only the police report referred to in Section 173(2) CrPC and the documents sent therewith. The only right, the accused has at this stage is of being heard and nothing beyond that. Material produced by the accused cannot be considered by the sessions Court under Section 227 or 228 Cr.P.C and by the Magistrate under Section 239 or 240 Cr.P.C. **{(i) *Bharat Parikh v. CBI*²⁴, ii) *Sachin Saxena alias Lucky v. State of UP*²⁵ }**

(3) Ingredients of offences should be seen in the material produced before the court for framing of charges.

(3a) Duty of the court at the stage of framing of charges is to see whether the ingredients of offences are available in the material produced before the court. Contradictions in the statements of witnesses or sufficiency or truthfulness of the material placed before the court cannot be examined at the stage of framing of the charges. For the limited purpose, the court may shift the evidence. Court has to consider material only with a view to find out if there is ground for presuming

²⁴ 2008 Cr.L.J 3540 (SC)

²⁵ 2008 (62) ACC 454 Allahabad

that the accused has committed an offence and not for the purpose of arriving at a definite conclusion. 'Presume' means if on the basis of materials on record, court can come to the conclusion that commission of the offence is a probable consequence, then a case for framing of charge exists. **{(i) State v. Jai Doraiswamy²⁶}.}**

(ii) State of Tamil Nadu v. Suresh Rajan ²⁷,

(iii) Chitresh Kumar Chopra v. State Government of NCT of Delhi ²⁸.

(3b) Charge can be framed on the basis of FIR, complaint or accompanying document or material brought on record during trial:

Charge must be founded on the material available on record. It can be framed on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial.**{Anantprakash Sinha v. State of Haryana} ²⁹.**

4. Production of documents or materials by the accused at the time of framing of charges or discharge not permissible.

At the time of framing of charges, the Court can consider only the material placed before it by the Investigating Agency. While considering the question of

²⁶ AIR 2019 SC 1518

²⁷ 2014 (84) ACC 656 (SC)

²⁸ (2009) 16 SCC 605

²⁹ 2016 (93) ACC 951 SC

discharge of accused under Section 227 Cr.P.C or framing charge under Section 228 Cr.P.C, The Court can consider only the material submitted to it by the Magistrate at the time of commitment of the case to sessions under Section 209 Cr.P.C. Scope of Section 227 and 228 Cr.P.C for Court of Sessions or Section 239 and 240 Cr.P.C for Magisterial Courts is the same. At the stage of charges, trial Court can consider only the police report referred to Section 173(2) Cr.P.C and the documents sent therewith. The only right the accused has at the stage is of being heard and nothing beyond that. Material produced by the accused cannot be considered by the Sessions Judge under Section 227 Or 228 Cr.P.C and the Magistrate under Section 239 or 240 Cr.P.C, for purposes of discharging the accused of framing of charges against him. *{(i)Bharat Parikh v. CBI* ³⁰, *(ii)Rukmini Narvekar v. Vijaya Satardeker*³¹}.

5. Power of court to summon documents under Section 91 of Cr.P.C, at this stage of framing of charges not permissible:

Section 91 Cr.P.C. Now Section 94 of BNSS 2023 has no application at the stage of Section 227 or 228 Cr.PC. Court of sessions cannot summon any document for the purpose of framing charge under Section 228 Cr.PC or discharging the accused under Section 227 Cr.P.C. Same is the position of law for the Court of Magistrate under Sections 239 and 240

³⁰ 2008 CrIj 3540 SC

³¹ AIR 2009 SC 1013

Cr.P.C. {(i) *State of Orissa v. Devendranath Pandey*³², ii) *State Anti-Corruption Bureau, Hyderabad v. Suryaprakasham*³³}.

(6a) No in depth assessment of material at the stage of framing of charges:

At the stage of framing charges, trial Court is not to examine and assess in detail the material placed on record by the prosecution, nor is it for the court to consider the sufficiency of the materials to establish the offence alleged against the accused persons. Martialing of facts and appreciation of evidence at the time of framing of charges is not in the domain of the court {(i) *Pulvinder Singh v. Pulvinder Singh*³⁴, (ii) *State of Delhi v. Gyandevi and others*,³⁵}

(6b) Standard of scrutiny of evidence at the stage of framing of charges:

The standard of Test, Proof and Judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Sections 227 or 228 and Sections 239 or 240 Cr.P.C. {(i) *Superintendent and Remembrance of Legal Affairs, West Bengal v. Anilkumar Bhunja*³⁶}.

³² 2005 (51) ACC 209 (SC) (three judge bench)

³³ 1999 SCC (Criminal) 373

³⁴ 2009 (65) ACC 399 (SC)

³⁵ 2001 (42) ACC, 39 (SC)

³⁶ AIR 1980 SC 52

(6C) No deep evaluation of material for framing of charges:

Roving and fishing enquiry at the stage of charges under Section 228 Cr.P.C or discharge of the accused under Section 227 Cr.P.C by the Sessions Judge and by the Magistrate under Section 239 or 240 Cr.P.C is not permissible, as it would amount to a mini trial at the stage of framing of charges or discharging the accused and against all settled principles of Criminal Jurisprudence. ***(i) State of Orissa v. Devendranath Padhi*³⁷**.

***ii) Sajjan Kumar v. CBI*³⁸,**

(6d) Truth and sufficiency of evidence at the stage of framing of charges not to be tested:

Assessment of truthfulness, efficiency and acceptability of the material produced cannot be done at the time of framing of charges, as the same can be done by the court only at the stage of trial { ***(i) State of Maharashtra v. Salman Salim Khan*³⁹, *ii) Liyagat v. State of UP*⁴⁰**.

(6e) Presumption of truth of material brought on record by prosecution at the stage of charge or discharge:

At the stage of consideration of discharge of accused under Section 227 Cr.P.C or Section 239 Cr.P.C, court has to proceed with the assumption that the material brought on record by the prosecution is true. Court has to find out from

³⁷ 2005 (51) ACC 209 SC (three judge bench)

³⁸ (2010) 9 SCC 368

³⁹ 2004 Cr.L.J. 920 (SC).

⁴⁰ 2008 (62) ACC 453 (Allahabad)

the material whether acts emerging, if taken on their face value, disclose ingredients constituting the alleged offence. Court is not required to go deep into the matter as would be required for conviction. While considering the plea of discharge, court is not permitted to appreciate evidence and act as appellate court. **{(i)State v. J.Doraiswami⁴¹, ii)State of Tamil Nadu v. Suresh Rajan⁴² }.**

(6f) Contradictions etc in the statements of witnesses at the stage of charge not to be seen:

Where the victim of offences under Section 363, 366, 376 IPC in her statement under Section 161 Cr.P.C she had named the accused, but in her statement recorded by the Magistrate under Section 164 Cr.P.C, she had not named the accused, it has been held that the contradictions, embellishments and discrepancies in evidence collected by the Investigating Officer will be of no help to the accused at the stage of charge or discharge under Section 227 or 228 Cr.P.C and under Section 239 or 240 Cr.P.C. { **(i)Ahmadullah v. State of UP ⁴³, (ii) Sajjan Kumar v. CBI ⁴⁴}.**

(6g) Accused not to be discharged on the ground of inconsistencies in evidence:

Where the accused was discharged on the ground of inconsistencies in the medical reports, the Supreme Court

⁴¹ AIR 2019 SC 1518

⁴² 2014 (84) ACC 656 (SC)

⁴³ 2014 (84) ACC 12 Allahabad (LB)

⁴⁴ 2010 (71) ACC 611 (SC)

held that, the stage to appreciate the evidence to find out inconsistencies in the medical reports would arise only when the prosecution would lead evidence by examining the doctors in support of their medical reports and not at the stage of Section 227 or 239 in Cr.P.C. The discharge of the accused on the said ground was held improper and set aside.

{(i) Bihari Lal v. State of Rajasthan ⁴⁵}

(7a) Charge to be framed even on strong suspicion :

Charge can be framed even on the basis of strong suspicion founded upon materials before the court, which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused. { **(i) Dinesh Tiwari v. State of UP⁴⁶, ii) Amit Kapoor v. Ramesh Chandra⁴⁷.**

(7b) When only suspicion and not grave suspicion the accused to be discharged:

If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the trial judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. { **Sajjan Kumar v. CBI⁴⁸ }**

⁴⁵ AIR 2019 SC 1995

⁴⁶ 2014 (86) ACC 872 (SC)

⁴⁷ (2012) 9 SCC 460

⁴⁸ 2010 (71) ACC 611 (SC)

(7c) Unexplained grave suspicion sufficient for framing of charge:

Where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge and proceeding with the trial. However, if two views are equally possible and the judge is satisfied that the evidence produced before him While giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his rights to discharge the accused{ ***Union of India v. Prafulla Kumar Samal*** ⁴⁹ }.

(7d) Charge to be framed even on confession of co-accused:

It cannot be said that for purpose of framing charges, the evidence of the co-accused in a form of confession is insufficient. No further corroborate evidence is required for framing charges. Charge can be framed even on strong suspicion regarding involvement of the accused in the commission of the offence. {***Subhash Sharma v. State of UP***⁵⁰ }.

(8a) Hearing of prosecution and accused before charge or discharge mandatory:

Section 226 & 227 Cr.P.C and Section 230 & 240 Cr.P.C require hearing of the prosecution and the accused before framing of the charge or discharge of the accused. Trial Court

⁴⁹ 1979 (3) SCC 4

⁵⁰ 2007 (57) ACC 1039 (Allahabad)

should give opportunity to prosecution and the accused to be heard before the charge or discharge.

Excerpts from the following Supreme Court ruling on the point of hearing is noticeable here: “Right of a man to be heard in his defence is the most elementary protection and is the essence of fair adjudication”.{**Suresh Chandra Nauharya v. Rajendra Razak**⁵¹}.

(8b) Passing of preliminary order before framing of charges is not mandatory:

Sections 226 and 227 Cr.P.C now Section 249, 250(2) of BNSS 2023 require hearing of the prosecution and the accused before the session judge before charging or discharging the accused. Passing of preliminary order before framing of charges under Section 228 Cr.P.C by the Sessions Judge or by the Magistrate under Section 240 Cr.P.C is not mandatory. It has been the settled practice in the trial courts that recording of preliminary order prior to framing of charges is not imperative or absolute because outright framing of charges itself amounts to a prima facie or preliminary order and recording of reasons for framing of charges separately is not required. {(i) **Omvati v. State of Delhi** ⁵²}, (ii) **Kanti Bhadra Saha v. State of West Bengal** ⁵³.

⁵¹ 2006 (65) ALR 333 (SC)

⁵² (2001) 4 SCC 333

⁵³ 2000 (40) SCC 441 (SC)

(8c) Recording of reasons for passing a preliminary order for framing charge is not a requirement of law:

Framing of charge by the Magistrate under Section 240 CrPC itself amounts to a prima facie order. Showing reasons for framing a charge separately is not a legal requirement. Court is required to record reasons only if it is to discharge the accused.{ *Kanthibhadra Shah v. State of West Bengal*⁵⁴}

(8d) Recording of detailed reasons for framing of charges under Section 228 or 240 CrPC is not required:

Recording of detailed reasons by court for framing of charges under section 228 or 240 Cr.P.C is not required.

(9) The various impacts of non framing of charges in criminal trial are:

(9a) Non framing of charges not to vitiate trial and conviction if the accused was aware of the accusations and had opportunity of defence:

Relying on a Constitution Bench decision reported in *Willie Slaney State of M.P*⁵⁵. The Supreme Court has in the case noted below held that absence of charge would vitiate conviction only if the non-framing of the charge had caused prejudice to the accused or he was deprived of the opportunity to defend himself at trial or he was not aware of

⁵⁴ AIR 2000 SC (522)

⁵⁵ AIR 1956 (SC)116 (5 Judge Bench)

the accusations or he was deprived of the protection of the principles of natural justice. Conviction of the accused for offence under Section 302/34 IPC was held proper even when no charge for the said offence under Section 302/34 IPC was framed. The charges framed by the Additional Sessions Judge Budanen were as under: "Court of Additional Sessions Judge, Budouen and charges, I, C.P.Singh, Special Judge(E.C Act), Budaun hereby charge you 1. Nazir S/o.Wali Mohammad, R/o.Oapart Para PS Kotwali, Budaun. 2. Adil 3.Kamil, S/o.Banney Mian as follows:

Firstly: that you Nazir on 03.01.1986 at about 4.00 PM in Mohalla Oopar Para near Larpul Budaun PS Kotwali Buduen formed common intention to make murderous assault on Akhlaq and anyone else who came to his rescue and in furtherance of said common intention. Rashid did commit murder by intentionally causing the death of aforesaid Akhlaq and you hereby committed an offence punishable under Section 302/ 34 of Indian Penal Code and within my cognizance.

Secondly: that you Adil on aforesaid date, time and place voluntarily caused injuries and thereby committed an offence punishable under Section 323 of Indian Penal Code and within my cognizance.

Thirdly: that on aforesaid date, time and place, you, Kamil and Nasir along with Rashid and Adil formed common intention to cause hurt to Akhlaq and anyone else and in furtherance of said common intention, Adil voluntarily

caused hurt to Akhlaq and you thereby committed an offence punishable under Section 323 r/w 34 of IPC and within my cognizance. And I hereby direct that you be tried by this court on the said charges (CP, Sing), Additional Sessions Judge, Special Judge (EC Act), Budau 18.06.1986, conviction of all the three accused namely Nasir, Adil and Kamil for the offence under Section 302/34 IPC was held proper by the Supreme Court, despite the fact, no charge under Section 302/34 IPC against the remaining two accused namely Nasir, and Kamil was framed by the trial Court. but all the three accused persons shared the same very intention of murdering Akhlaq. {**Kamil v. State of UP**⁵⁶}.

(9b) Conviction for offence under Section 306 IPC in a place of already framed charges for offences under Section 498A and 304B IPC held proper:

where in a dowry death case initially case under Section 306 IPC was Registered against the accused and a charge under Section 304B IPC was ultimately framed by the court but the accused was convicted for offence under Section 306 IPC only without framing any charge under Section 306 IPC, it has been held that absence of charge being framed under Section 306 IPC is immaterial when the relevant and material facts were already part of charge under Section 498A and 304B IPC. { **(i) Satish Shetty v. State of Karnataka** ⁵⁷.

(ii) Narwinder Singh v. State of Punjab ⁵⁸ }

⁵⁶ AIR 2019 SC 45

⁵⁷ AIR 2016 SC NO 2689

⁵⁸ AIR 2011 SC 686

(9c) Conviction under Section 304B IPC in a place of charge framed for offence under Section 302 IPC held proper:

Where the charge was initially framed by the session judge under Section 302 IPC and conviction was recorded under Section 304B IPC, it has been held by the Supreme Court that since the accused was aware of the accusations against him and had not raised/stated contrary in his statements under Section 313 Cr.P.C, his conviction for the offence under Section 304-B IPC was proper{ **(i) *Balbir Singh v. State of Punjab*⁵⁹**}

(9d) Conviction under Section 306 IPC when possible in the absence of framing of charge:

Accused was tried for the charge under Section 302, 304-B IPC and charges under Section 306 IPC was not framed. The Supreme Court, interpreting the provisions under Section 215, 386, 399, 401, 464 Cr.P.C held that the Revisional or Applied Court under Section 464 Cr.P.C can convict the accused, for the unframed charge under Section 306 IPC provided the following conditions are fulfilled.

(a) That the accused was aware of the basic ingredients of that offence. (b) That the main facts sought to be established against the accused were explained to him clearly.

⁵⁹ AIR 2006 SC 3221

(c) That the accused got a fair chance to defend himself. **{(i) Radha Mohan Singh alias Lal Saheb v. State of UP⁶⁰ , (ii) Dalbir Singh v. State of UP⁶¹ }**

(9e) Conviction for charge not framed held proper:

Where charges were framed against four accused for offences under Section 147, 148, 324, 302 r/w Section 149 IPC, but one of the accused alone was convicted under Section 302 IPC. It has been held that the accused can be convicted for which no charge was framed unless it had occasioned failure of justice. It is held in a case where **{Balraje v. State of Maharashtra ⁶²}**.

(9f) Defective charge and its effect:

The absence of a charge and one or the other of the various heads of criminal liability for the offence cannot be said to be fatal by itself and before a conviction for the substantive offence, without a charge can be set aside. Prejudice will have to be made out. If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established. **{ (i) Abdul Sayeed v. State of MP⁶³, (ii) Sanichar Sahini v. State of Bihar ⁶⁴}**.

⁶⁰ 2006 (54) ACC 862 (Three Judge Bench)

⁶¹ (2004) 5 SCC 334 (three judge bench)

⁶² (2010) 6 SCC 673

⁶³ (2010) 10 SCC 259

⁶⁴ 2009 (66) ACC 926 (SC)

(10a) Errors and omissions in framing charges when fatal?

Section 215 and Section 464 CrPC and now Section 238 and Section 510 of BNSS 2023 provide that the proceedings of a criminal trial do not get vitiated because of some error, omission or irregularity in the charge unless (I) the omission is vital, (ii) substance of accusation is totally different from what was sought to be established by the prosecution. (iii) accused was misled in defending himself and prejudice was caused to him for that reason and (iv) there was no material to frame charge of particular penal section.

(10b) No prejudice if the accused was aware of the error in charge:

There will be no prejudice or failure of justice when there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, ie., if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge. In judging a question of prejudice, as of guilt, the Court must act with a broad vision and looked to the substance and not to the technicalities and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. ***{(i)Mainpal v. State of Haryana⁶⁵}.}***

⁶⁵ AIR 2010 SC 3292

(11a) Framing of charge with the aid of Section 34 IPC:

Necessary conditions for the applicability of Section 34 IPC are common intention to commit a criminal act and participation therein of all the persons in furtherance of that intention. A specific overtact on the part of the accused is not necessary. Participation and action implies acting in concert. A solitary accused can be convicted with the aid of Section 34 IPC although all other accused have been acquitted. To attract Section 34 IPC, it is not necessary that each one of the accused must assault or cause injury. It is enough if it is shown that they shared common intention to commit the offence. **{(I) *Dayashankar v. State of MP* ⁶⁶.**

(ii) *Bishnu v. State of West Bengal* ⁶⁷.

(iii) *Saravanan v. State of Pondicherry* ⁶⁸}

(11b) Effect of absence of Section 34 IPC in charge:

If no prejudice is shown by the accused, non framing of charge under Section 34 IPC does not vitiate the trial and conviction. If conviction of accused with the aid of Section 34 IPC in place of Section 149 IPC is recorded, but no prejudice to accused is shown by such error, the trial and conviction will not be vitiated. It is held in a case in Abdul Shahid v. State of 10 SC 259 **{(I) *Dalip Singh v. State of Punjab* ⁶⁹, (ii) *Malhuyadav v. State of Bihar* ⁷⁰ }.**

⁶⁶ AIR 2009 (1) Supreme 298

⁶⁷ 2006 (54) Acc 441 (SC)

⁶⁸ 2005 (25) AIC 374 (SC)

⁶⁹ AIR 1953 SC 364

⁷⁰ (2002) 5 SCC 724

(11c) Challenged not to vitiate for want of Section 34 IPC:

When two accused persons had waited for the deceased, collected sticks and attack on the deceased by causing injuries on vital parts of body and the attack continued even after the deceased fell down. It has been held by the Hon'ble Supreme Court that the circumstances clearly indicate that the attack was pre-planned and the accused persons shared common intention to kill the accused and failure to show Section 34 IPC and the charge framed for the offence under Section 302 IPC would not vitiate the charge. {***Chinnam-Kameshwara v. State of AP***⁷¹ }

(11d) Conviction for offence under Section 302 IPC, without the aid of Section 34 IPC held proper:

where accused along with other co-accused was charged but the offences under Section 147, 148, 307, 302, 452, 326 IPC without any mention of Section 34 IPC in the charge, but the accusations were known to the accused and no prejudice was established, the Supreme Court held that absence of charge with the aid of Section 34 IPC was not fatal to prosecution and the conviction of the accused was proper.

{(I) ***Anil Sharma v. State of Jharkhand*** ⁷².

(ii) ***Kammari Brahmaiah v. Public Prosecutor***⁷³, (iii) ***Dhanna v. State of MP***⁷⁴ }.

⁷¹ AIR 2013 SC 3602

⁷² 2004 5 SCC 679

⁷³ 1999, 38 ACC 408 SC

⁷⁴ 1996, 10 SCC 79

(11e) Framing of charges with the aid of Section 149 IPC:

To address Section 149 IPC regarding constructive liability of members of an unlawful assembly, proof regarding overt act of any individual or accused is not necessary, direct evidence of common object is generally not available, and the same has to be gathered from the acts committed and result therefrom. If membership of Hon'ble Assembly is once established Section 149 IPC is to attract even if no definite role has been assigned to a particular accused. Common object need not be product of common concept but may be formed on spur of the moment. Nature of common object is a question of fact to be determined by considering the nature of arms, nature of assembly and behaviour of its members etc. { ***Muhmmud v. State of UP*⁷⁵, (ii) *Bhanwar Singh v. State of MP*⁷⁶**

***(iii) Bishnu v. State of West Bengal*⁷⁷ and in**

***(iv) Charan Singh v. State of UP*⁷⁸**

***(v) Bhagvan Singh v. State of MP*⁷⁹ 2002 44 ACC 111 to SCC}**

(11f) Total number of convicted accused plus unnamed accused should not be less than five for conviction with the aid of Section 149 IPC:

⁷⁵ AIR 2008 SC 515

⁷⁶ 2008 62 ACC 353 SC

⁷⁷ 2006 54 ACC 441 SC

⁷⁸ 2004, 4 ACC 2005

⁷⁹ 2002, 44 ACC 111 to SCC

Total six named accused and no unknown persons were involved in the murder. All accused persons were acquitted of all charges except the appellant. The acquittal attained finality. In such circumstances possibility of conviction of the appellant under Section 148/149 IPC could have arisen only if there would have been certain unknown persons besides the named five acquitted co-accused. Hence the appellant was also acquitted by the Supreme Court. Conviction with the aid of Section 148 or 149 IPC cannot be recorded in the absence of at least five accused. Either at least five accused should stand convicted or total number of convicted accused plus unnamed accused should not be less than five. {**Ramvir v. State of Utta Pradesh** ⁸⁰}

(12a) Alteration, addition or deletion of charges (Section 216 CrPC now Section 239 of BNSS 2023) :

Section 216 CrPC or Section 239 of BNSS 2023 empowers the court to alter or add any charge at any time before the pronouncement of judgment. { **Anantrakash Sinha Vs State of Haryana**⁸¹}.

Altering charge framed under Section 304 IPC to Section 302 IPC by Additional Sessions Judge held proper. {**Amresh v Sate of UP**⁸², 2006(54) ACC 515 (Allahabad) LB}

⁸⁰ 2019 2 SCC 237

⁸¹ 2016, 6 SCC 105

⁸² 2006 (54) ACC 515 (Allahabad) LB

(12b) Charge can be changed or altered under Section 216 CrPC or under Section 239 of BNSS 2023 any time if material is available on record:

Court can change or alter the charge if there is defect or something is left out. The test is that it must be founded on the material available on record. It can be on the basis of the complaint or the FIR accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say if the court has not framed a charge despite the material on record it has the jurisdiction to add a charge. Similarly, it has authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record, it is not to be understood that unless evidence has been led in, charges already framed cannot be altered, for that is not the purpose of Section 216 CrPC. It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are inbuilt safeguards in Section 216 CrPC. It is the duty of the trial Court to bear in mind that no prejudice is caused to the accused as that has the potential to effect a fair trial. { ***Anantprakash sinha v. State of Haryana*** ⁸³ }.

⁸³ 2016, 93 ACC 951 SC

(12c) Witness to be recalled if charge is altered or added.
Section 217 CrPC or Section 240 of BNSS 2023:

Section 217 Cr.P.C/Section 240 of BNSS provides that when a charge is altered or a new charge is framed or added, the PWs or DWs would be recalled by the court for fresh examination by the prosecution and the defence. Apart from the already examined witnesses, the prosecution and defence would be allowed by the court to examine additional witnesses as well if they so propose.

(12d) Conviction for charge under Section 302/149 IPC in place of already framed charge for offence under Section 302 IPC held improper:

Where charge was initially framed by the Session Judge under Section 302 IPC, but without altering the charge, the Session Judge Convicted the accused for offence under Section 302/149 IPC without having complied with the provisions of Section 216(2) CrPC. The Supreme Court held that it was obligatory on the part of the Sessions judge to bring to the notice of the accused about the Alteration of the charge and explain it to him that the charge from Section 302 IPC was altered to Section 302/149 IPC. {***Sabbi Mallesu v. State of A.P***⁸⁴ }.

(12e) Conviction for offence under Section 304B IPC in place of already framed charge for offence under Section 302 IPC held proper:

⁸⁴ (2006) 55 ACC 1020 (SC)

Where the charge was initially framed by the Sessions judge under Section 302 IPC and conviction was recorded under Section 304B IPC, it has been held by the Supreme Court that since the accused was aware of the accusations against him and had not raised/stated contrary in his statements under Section 313 CrPC, his conviction for the offence under Section 304B IPC was proper. {**Balveer Singh v. State of Punjab**⁸⁵}

(12f) Recall, cancellation and deletion of charge.:

Charge once framed cannot be deleted, recalled or cancelled under Section 216 CrPC. It can be rather withdrawn under Section 224 CrPC after the pronouncement of judgment. Having framed charges against an accused, a Magistrate has no jurisdiction in law to recall such order on the ground that the prosecution had failed to comply with the presence of Section 207 CrPC. {(I) **Bharat Parikh v. CBI**⁸⁶, (ii) **Vibhuthi Narayan Chaubey v. State of UP**⁸⁷}.

(12g) Charge under Section 302 IPC should be framed along with charge under Section 304B IPC:

The Supreme Court has directed all trial courts in India to ordinarily add Section 302 IPC to the charge of Section 304 B IPC so that death sentence can be imposed in heinous and barbaric crimes against women. { **Rajbir v. State of Haryana**⁸⁸}.

⁸⁵ AIR 2006 SC 3221

⁸⁶ 2008 CRLJ 3540 (SC)

⁸⁷ 2002 (2) JIC 613 (Allahabad)

⁸⁸ AIR 2011 SC568

Registrar generals of all High Courts have been directed by the Supreme Court to Circulate this judgment to all trial Courts in India for compliance.

(12h) Charge under Section 302 IPC to be added with Section 304-B IPC only when there is evidence for the same.

Discussing the earlier directions of the Supreme Court issued in a case in *Rajbir v. State of Haryana*⁸⁹, the Supreme Court, in the case noted below, has held that the trial court should not frame an additional charge under Section 302 IPC in a trial of dowry death case merely because of the directions in the *Rajbir's* case. In a dowry death case an additional Charge under Section 302 IPC, along with the charge of Section 304B, IPC should only be framed when framing of such Additional Charge under Section 302 IPC is justified on the basis of evidence on record. {**Jasvinder Saini v. State (Government of NCT of Delhi)**⁹⁰ }.

(12i) Court has unrestricted power under Section 216 CrPC to add or alter any charge whenever it finds a charge defective:

Relying upon its previous decisions in *Hasan Bhaivalibhai Qureshi v. State of Gujarat* ⁹¹ It has been held by the Hon'ble Supreme Court that the court has unrestricted power under Section 216 CrPC to add or alter any charge

⁸⁹ AIR 2011 SC 568

⁹⁰ AIR 2014 (SC) 841

⁹¹ (2004) 5 SCC 347 (Para 10)

whenever it finds the charge framed earlier defective. The Court can re-examine the question of framing of a charge against the accused and pass an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial Court comes to the conclusion that there is any room for doing so. {**Jaswinder Saini v. State (Government of NCT of Delhi)**⁹².

(12j) Conviction for charge not framed:

Provisions contained under Section 215, 218, 221, 222, 464 or 465 CrPC are relevant for the purpose of this subtopic. Where charge was initially framed by the Session Judge under Section 302 IPC but without altering the charge, convicted accused under Section 302/149 IPC, Without having complied with the provisions under Section 216(2) CrPC, the Supreme Court held that it was obligatory on the part of the Sessions Judge to bring to the notice of the accused of the alteration of charge and explained it him that the charge from Section 302 IPC was altered to Section 302/149 IPC. {**Sabbi Mallesu v. State of AP**⁹³}.

(13a) Conviction for minor offence in place of charges framed for major offences permissible:

It is well settled legal position of law that if an accused is charged of a major offence but is not found guilty there under he can be convicted of minor offence if the facts

⁹² (2013) 7 SCC 256

⁹³ (2006) 55 ACC 1020 (SC)

established indicate that such minor offence has been committed. {(i) **Ahmad v. State of UP**⁹⁴.

(ii) **Pandhari Nath v. State of Maharashtra** ⁹⁵}.

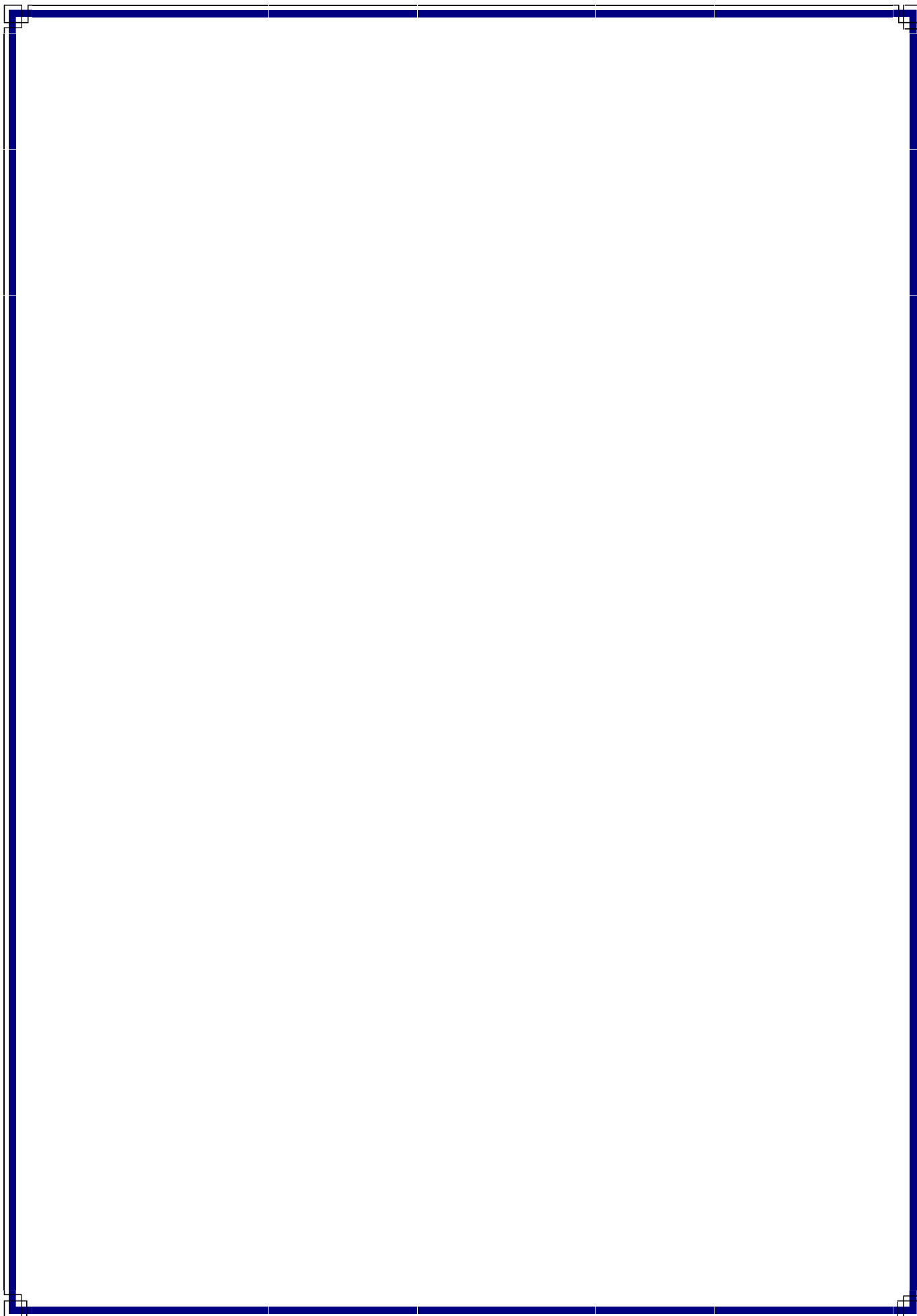
(13b) Conviction for charge not framed:

When a charge for offence under Section 397 IPC was not framed by the trial Court, but the accused was convicted for offences under Section 120B, 302, 392, 457, R/w section 34 IPC and also for offence under Section 397 IPC, the High Court had in appeal set aside the conviction and sentence awarded by the trial Court on the ground that charge for the offence under Section 397 IPC was not framed and remanded the case to the trial Court for retrial by framing a charge under Section 397 IPC, as well, the Supreme Court set aside the judgment of the High Court by holding that the charges framed by the trial Court did adequately encompass all essential facts, building up offences imputed against the accused persons and omissions to frame charge under Section 397 IPC was not fatal. {**Bharamappa Gogi v. Praveen Murthy and Others** ⁹⁶}

⁹⁴ 2011 (75) ACC-232 (SC)

⁹⁵ AIR 2010 SC 1453

⁹⁶ AIR 2016 SC 791



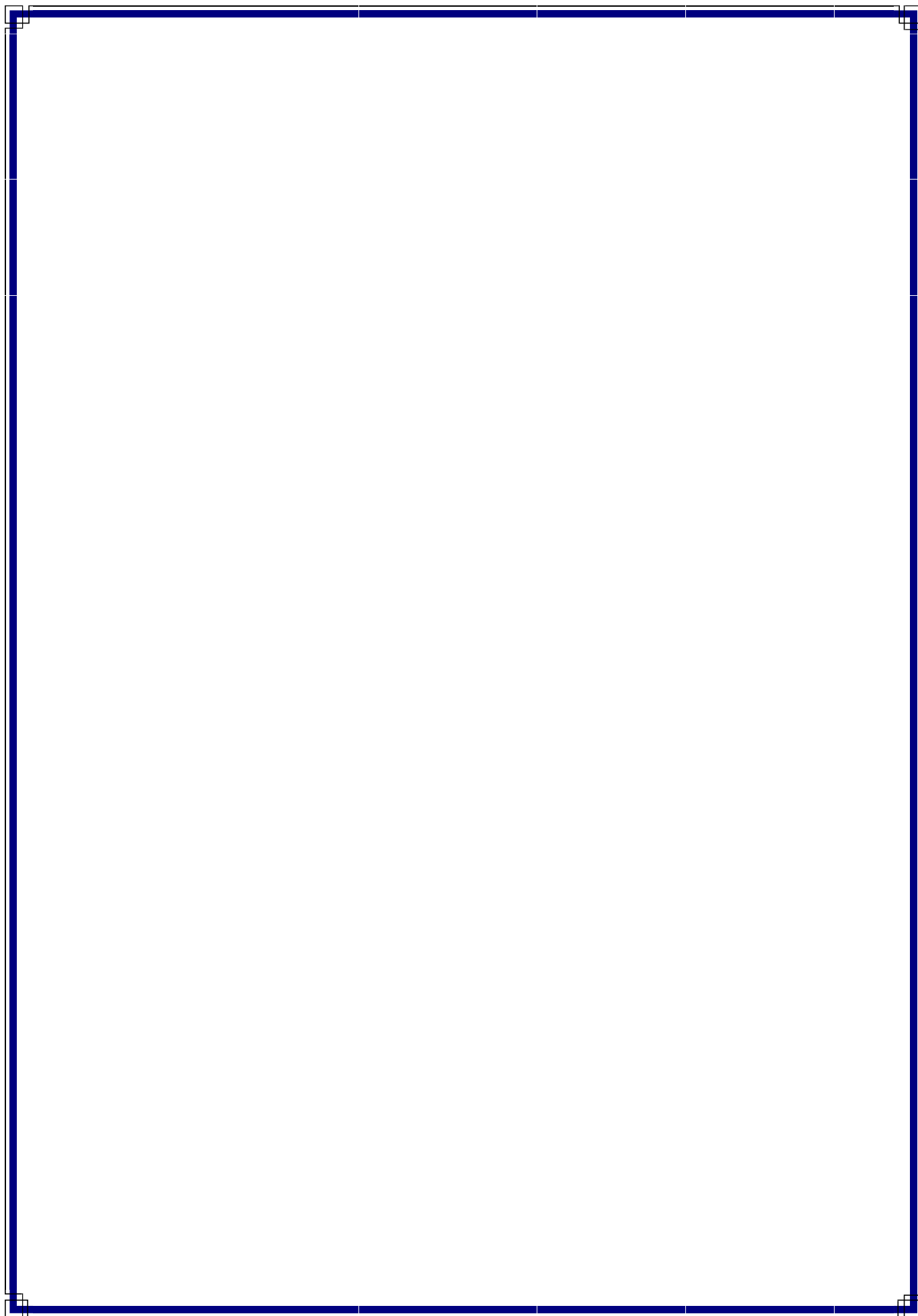
SESSION- III

DISCHARGE

Paper Presentation

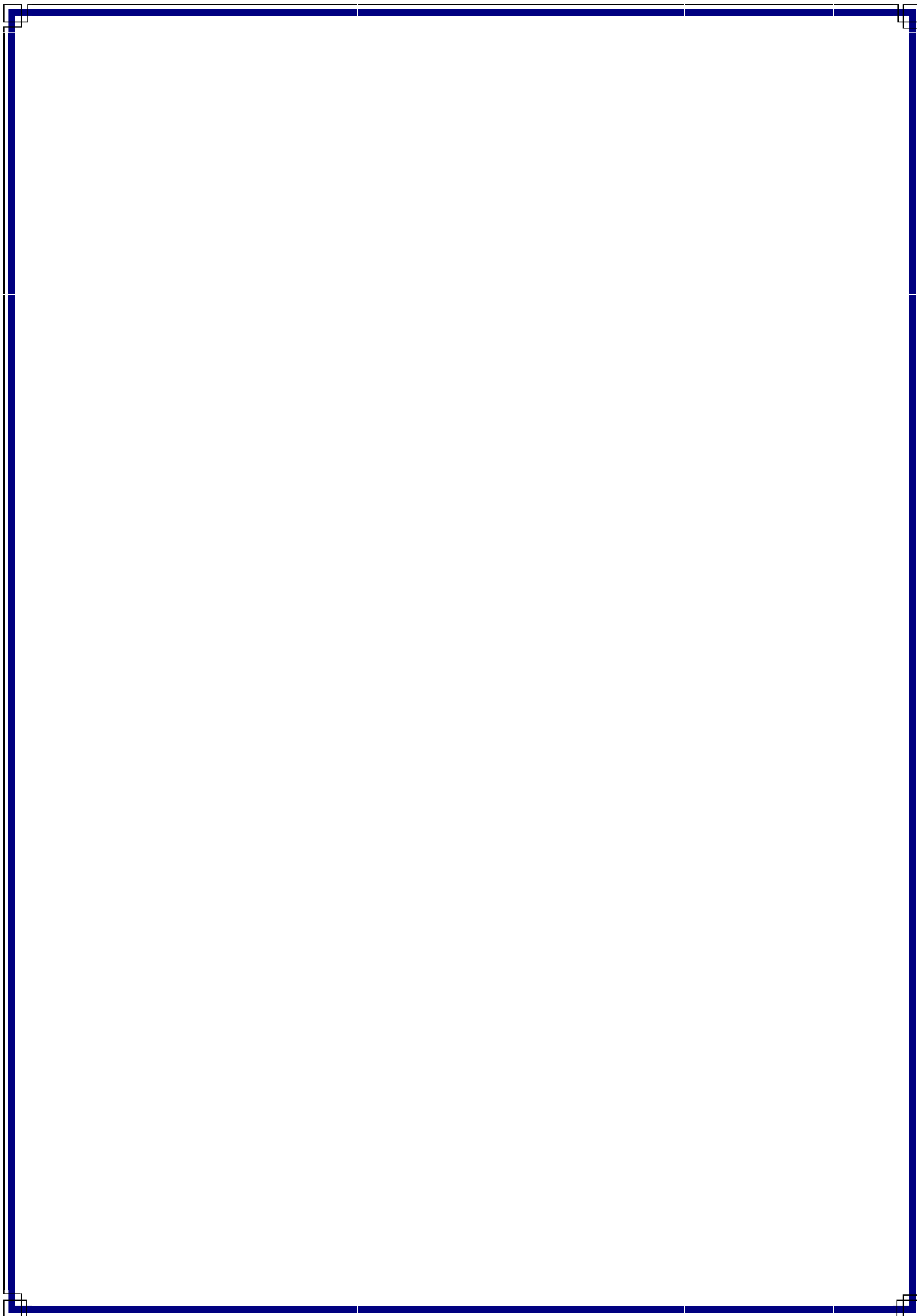
by

Sri. K.ANURAG,
Principal Civil Judge (Junior Division),
SRIKAKULAM



TOPICS

DISCHARGE.



**DISCHARGE: SCOPE, PRINCIPLES AND JUDICIAL
APPROACH UNDER CrPC & BNSS**

Personal liberty, deprived when least deserved, is denied when most needed; and that is the insensibility of law without justice.”

— Justice V.R. Krishna Iyer

This timeless reminder from Hon’ble Justice V.R. Krishna Iyer underscores that personal liberty is not a mere privilege but a constitutional guarantee that the criminal process must vigilantly safeguard

Discharge is not a mechanical procedural step. It is a structural safeguard embedded within criminal procedure, designed to ensure that no person is compelled to undergo the trauma of a full-fledged criminal trial unless the prosecution demonstrates the minimal threshold of a prima facie case. The philosophy underlying discharge is rooted in the broader guarantee of fair procedure under Article 21 of the Constitution. As the Hon’ble Supreme Court has repeatedly emphasised, procedural fairness is not an empty ritual but a living constitutional promise. The discharge inquiry thus serves as a judicial checkpoint—one that filters out cases lacking the essential factual or legal foundation to warrant the commencement of trial.

DISCHARGE BY THE COURT OF SESSION

(Section 250 BNSS and Section 227 CrPC)

Section 250 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”) is the provision that governs discharge in sessions cases. The corresponding provision under the Code of Criminal Procedure, 1973 (“CrPC”), is Section 227

Section 250 BNSS reads as follows:

- (1) The accused may prefer an application for discharge within a period of sixty days from the date of commitment of the case under section 232.
- (2) If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so.”

Section 227 CrPC is substantially similar. However, one material difference lies in subsection (1) of Section 250 BNSS, which introduces a specific time limit of sixty days from the date of committal for filing a discharge application.

The Hon’ble Supreme Court, in a series of decisions, has elaborated on the scope of this enquiry.

Union of India v. Prafulla Kumar Samal⁹⁷.

This decision remains the foundational exposition on Section 227 CrPC, the Hon'ble Supreme Court held that at the stage of discharge, the Sessions Judge is not a mere conduit for the prosecution but is required to apply judicial mind to the material on record. The Judge is entitled to sift and evaluate the material for the limited purpose of determining whether a prima facie case exists. The Court made it clear that the Judge does not act as a post office; however, the Judge must avoid conducting a mini-trial or assessing the sufficiency of evidence for conviction.

The Court laid down four guiding principles:

1. **Judicial mind must be applied** to determine whether there is a ground for presuming that the accused has committed an offence.
2. **Sifting and weighing of material** is permitted, but only to the extent necessary to determine the existence of a prima facie case.
3. If the material raises **grave suspicion**, charges must be framed; if only **mere suspicion**, discharge should follow.
4. The Judge must ensure that the accused is not unnecessarily subjected to the anxiety of a criminal trial.

Stage of Discharge and Procedural Posture

The discharge in a sessions trial occurs **after committal** and **before framing of charge**. Once the

⁹⁷(1979) 3 SCC 4

Magistrate commits the case to a Court of Session under Section 209 CrPC / Section 232 BNSS, the record and documents forwarded form the basis of scrutiny. The Sessions Judge must then determine whether sufficient ground exists to proceed.

The distinction between **“sufficient ground for proceeding”** (Section 227/250) and **“sufficient ground for conviction”** is fundamental. The test for discharge is not the same as the test for acquittal. The Sessions Judge is not concerned with whether the prosecution will ultimately succeed, but only whether the materials disclose the **basic factual ingredients** of the offence.

Scope of Enquiry Under Section 227 CrPC / Section 250 BNSS:

The scope of enquiry at the discharge stage has been settled through decades of judicial interpretation. Although the Hon’ble Sessions Judge must apply judicial mind, the enquiry is limited, and it cannot resemble a mini-trial. The Hon’ble Supreme Court has repeatedly clarified the contours of this power.

In *State of Rajasthan v. Ashok Kumar Kashyap*⁹⁸.

This recent decision comprehensively summarizes the principles governing discharge under Section 227 CrPC.

⁹⁸ (2021) 11 SCC 191

Facts:

The accused sought discharge in a corruption case. The Hon'ble High Court allowed the application on the ground that evidence was insufficient. The State appealed.

Issue:

Whether the Hon'ble High Court was justified in considering insufficiency and inconsistencies in evidence at the discharge stage.

Reasoning:

The Hon'ble Supreme Court held that at the stage of framing of the charge, it has to be seen whether or not a *prima facie* case is made out and the defence of the accused is not to be considered. The discharge stage requires only a tentative assessment of whether the material if unrebutted makes out the ingredients of the offence. Courts cannot examine contradictions, credibility, or sufficiency of evidence. These issues pertain to trial.

Principle reaffirmed:

- The Judge must determine whether there exists **grave suspicion**.
- "Grave suspicion" must be based on the record, not on proof.
- The Court cannot evaluate defence material or weigh prosecution evidence.

Prima Facie Test — Asim Shariff v. NIA⁹⁹.

This decision clarifies the difference between *prima facie case* and *suspicion*.

⁹⁹ (2019) 7 SCC 148

Facts:

The accused in a terrorism case sought discharge on the ground that evidence was circumstantial and incomplete.

Issue:

Whether incomplete or weak evidence can justify discharge.

Reasoning:

The Court held that even circumstantial evidence can raise a strong suspicion (“grave suspicion”) sufficient to frame a charge. The Judge is not expected to reach a conclusion regarding guilt but only whether the materials **prima facie** connect the accused to the offence.

Principle:

If the material discloses a **prima facie link**, discharge cannot be granted merely because the evidence may appear weak.

Distinction between Suspicion and Grave Suspicion

The distinction between these two levels of suspicion guides the discharge enquiry. The Hon’ble Supreme Court continues to apply the distinction articulated in:

- **Ramesh Singh (1977)** — foundational-- *State of Bihar v. Ramesh Singh*¹⁰⁰, that the suspicion that the accused has committed an offence must not be simple but grave. In other words, there must be a grave suspicion as against mere suspicion before the Court can frame charge against the accused.

¹⁰⁰ (1977) Cri.L.J. 1606

- **Dilawar Balu Kurane (2002)** — refined
- **Ashok Kumar Kashyap (2021)** — reaffirmed

Grave suspicion means:

- The facts and circumstances disclosed by the record point to the accused's involvement in a manner that warrants a trial.

Mere suspicion means:

- The material raises doubt or possibility, but does not disclose essential ingredients of the offence.

If grave suspicion exists, even if some doubts remain, **charge must be framed**. If only mere suspicion exists, **discharge is mandatory**.

Materials the Sessions Court May Consider

State of Orissa v. Debendra Nath Padhi,¹⁰¹.

This landmark judgment of Honble Apex court clarified the meaning of “record of the case.”

Holding:

The accused cannot produce defence documents at the discharge stage.

The Court must look **only** at prosecution materials.

Permitted material:

- Police report under Section 173 CrPC / 193 BNSS
- Statements under Section 161 CrPC / 180 BNSS

¹⁰¹ (2005) 1 SCC 568

- Statements under Section 164 CrPC / 183 BNSS
- Medical reports, forensic reports, seizure panchnamas
- All documents forwarded with the charge sheet

The accused may make submissions on this record, but **cannot supplement it with defence evidence.** This principle ensures that discharge does not evolve into premature adjudication on merits.

Requirement of Recording Reasons

Section 250(2) BNSS expressly requires **reasons to be recorded.**

Though Section 227 CrPC implied this duty, BNSS affirms it in text.

The purpose of reasons:

- ensures transparency,
- enables higher courts to conduct effective revision,
- protects the judicial process from arbitrariness.

The Hon'ble Supreme Court in *Ashok Kumar Kashyap* emphasised that reasons, even if brief, must reflect judicial application of mind.

DISCHARGE IN WARRANT CASES INSTITUTED ON A POLICE REPORT

(Section 262 BNSS and Section 239 CrPC)

Section 262 BNSS provides:

“262. Discharge in warrant cases instituted on a police report

(1) The accused may prefer an application for discharge within a period of sixty days from the date of supply of copies of police report and other documents under section 193.

(2) If, upon considering the police report and the documents sent with it under section 193, and making such examination, if any, of the accused as the Magistrate thinks necessary, and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge to be groundless, he shall discharge the accused, and record his reasons for doing so.”

Section 239 CrPC is substantively identical, except that CrPC does not contain the specific **60-day time limit** introduced by BNSS. This is a significant structural change. Under CrPC, discharge applications were filed at any time before framing of charge.

I. Standard for Discharge Under Section 262 BNSS / Section 239 CrPC

The test here is whether the charge is “**groundless.**”

A charge is *groundless* when the materials in the police report, even if accepted in their entirety and at face value, do not disclose:

1. the essential ingredients of the offence, or

2.any factual basis linking the accused to the alleged crime.

The Magistrate's enquiry is narrow but essential. The Magistrate must consider:

- the police report under Section 193 BNSS / Section 173 CrPC
- all documents forwarded with it
- statements of witnesses (161 BNSS)
- statements under 164/183
- any brief questioning of the accused

The Magistrate must then determine whether the materials disclose the ingredients of the alleged offence. Discharge is permissible only where **no reasonable basis** exists to proceed to trial.

Scope of Enquiry at the Discharge Stage

As with sessions trials, the Magistrate must apply judicial mind but cannot conduct a mini-trial. The Hon'ble Supreme Court has reiterated these principles in recent decisions.

Rashmi Chopra and Ors. vs. The State of Uttar Pradesh and Ors¹⁰².

The Honble Apex court held that at the stage of cognizance and summoning the Magistrate is required to apply his judicial mind only with a view to take cognizance of

¹⁰² (30.04.2019-SC) MANU /SC/0625 /2019 Neutral Citation : 2019 INSC 600

the offence, or, in other words, to find out whether prima facie case has been made out for summoning the accused persons. At this stage, the learned Magistrate is not required to consider the defence version or materials or arguments nor he is required to evaluate the merits of the materials or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the materials will lead to conviction or not.

It is also well settled that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused may seek discharge if he or she can show that the materials are absolutely insufficient for framing of charge against that particular accused. But such exercise is required only at a later stage, as indicated above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case. Even at the stage of framing of charge, the sufficiency of materials for the purpose of conviction is not the requirement and a prayer for discharge can be allowed only if the court finds that the materials are wholly insufficient for the purpose of trial. It is also a settled proposition of law that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law so that case of both the sides may be considered appropriately on conclusion of trial.

State by Inspector of Police v. S. Selvi¹⁰³, (2018) 13 SCC 455

Facts:

The Hon'ble High Court allowed discharge on the ground that there was a discrepancy in the time of the occurrence. In the complaint it was mentioned as 11:30 a.m. whereas in the complainant's statement, it was mentioned as 5:30 p.m.

The Hon'ble Supreme Court reversed the order.

Reasoning:

The discharge stage is not the forum to test the strength of prosecution evidence. Contradictions between witness statements or inconsistencies in the record belong to the trial stage. The Magistrate must accept the prosecution version at face value.

Principle:

The Magistrate cannot weigh evidence or adjudicate on credibility; only basic legal adequacy matters.

Yogesh @ Sachin Joshi v. State of Maharashtra¹⁰⁴,

The Honble Apex court held that “It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and

¹⁰³ (2018) 13 SCC 455

¹⁰⁴ (2008) 10 SCC 394

weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible”.

Magistrate’s Power to Examine the Accused

Section 262 BNSS (like Section 239 CrPC) allows the Magistrate to “examine the accused, if necessary.”

This power is discretionary and is intended to:

- clarify ambiguities in the prosecution material
- ascertain basic facts
- identify jurisdictional defects

It is **not** to be used to interrogate the accused or gather evidence.

Defence Material Cannot Be Considered

Held in **State of Orissa v. Debendra Nath Padhi** ¹⁰⁵, which

¹⁰⁵ (2005) 1 SCC 568

applies equally to Sections 239 and 227, prohibits the accused from producing defence documents at discharge.

VI. Requirement to Record Reasons

Section 262(2) BNSS, like Section 239 CrPC, requires the Magistrate to “record reasons” for discharge. Though reasons may be brief, they must:

- reflect application of mind
- identify the deficiency in material
- specify why ingredients are absent

This ensures transparency and facilitates revisional scrutiny.

**DISCHARGE IN WARRANT CASES INSTITUTED
OTHERWISE THAN ON POLICE REPORT**

(Section 268 BNSS and Section 245 CrPC)

Section 268 BNSS provides:

- (1) If, upon taking all the evidence referred to in section 267, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge the accused.**
- (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded, he considers the charge to be groundless.”**

Section 245 CrPC is identical in substance. It similarly contains two limbs:

- 1. Section 245(1) CrPC / Section 268(1) BNSS —**
Discharge after evidence before charge: After the complainant has led evidence under Section 244 CrPC / Section 267 BNSS, the Magistrate must discharge the accused if the evidence, taken at its highest, does not disclose any case warranting conviction.
- 2. Section 245(2) CrPC / Section 268(2) BNSS —**
Discharge at any earlier stage:

The Magistrate may discharge the accused at *any prior stage* if the charge appears groundless. This allows discharge even before any evidence is recorded.

BNSS adopts the same structure but clarifies the requirement for **recording reasons**, reinforcing judicial accountability and transparency.

Two-Tier Mechanism of Discharge: A Distinctive Feature

The dual mechanism under Section 245 CrPC / Section 268 BNSS distinguishes complaint-based warrant trials from other categories. The complainant is required to present evidence before charge — a procedural safeguard intended to prevent frivolous complaints from advancing into full trials.

Under Section 245(1): The Magistrate evaluates whether the evidence recorded under Section 244 CrPC, if left unrebutted, would warrant a conviction. This is a higher threshold than discharge under Sections 227 or 239, because evidence has actually been recorded and not merely alleged in the complaint.

Under Section 245(2): The Magistrate may discharge even before evidence if the allegations are inherently lacking or legally defective. This provision ensures that the accused is not forced to undergo unnecessary proceedings where the complaint itself is fundamentally flawed.

Judicial Interpretation: *Ajay Kumar Ghose v. State of Jharkhand*¹⁰⁶.

¹⁰⁶ (2009) 14 SCC 115

This is the leading authority on Section 245. The Honble Supreme Court clarified the procedural nuances of complaint-based warrant trials, drawing a clear distinction between:

- warrant trials on police report, and
- warrant trials instituted otherwise than on police report.

The Court held that in complaint-based warrant trials, the complainant gets an opportunity to lead evidence before charge. Therefore, discharge under Section 245(1) is not identical to discharge under Section 239 CrPC. The Magistrate is required to evaluate actual evidence and determine whether it discloses a case which, if unrebutted, would warrant conviction.

The Honble Supreme Court further held that:

- Section 245(2) grants wide discretion to the Magistrate to discharge at *any earlier stage*
- However, such discretion must be exercised judicially and with recorded reasons
- The examination is still preliminary; the Magistrate cannot weigh evidence as if at the final stage

Kewal Krishan v. Suraj Bhan¹⁰⁷.

The Court held that even at the stage of Section 245(1), the Magistrate must not conduct a detailed evaluation of evidence. The test is whether, on its face, the evidence

¹⁰⁷ (1980) 1 SCC 290

discloses the ingredients of the offence.

OTHER INTRICACIES OF DISCHARGE

Hearing of Submissions of the Accused :

Although discharge is fundamentally based on the “record of the case” and “documents submitted therewith”, the accused has a mandatory right of being heard at this stage. This right is not merely procedural; it is integral to natural justice. The Hon’ble Supreme Court in *State of Maharashtra v. Salman Khan* (2013) 12 SCC 235 clarified that the court must afford the accused an opportunity to make submissions oral or written to demonstrate that the prosecution material does not disclose sufficient ground to proceed. The court is not required to entertain evidence or materials from the accused, but the right to address the court is indispensable. Non-compliance may vitiate the discharge order.

Right of the De-facto Complainant / Victim to Be Heard at the Discharge Stage :

The Hon’ble Supreme Court in *Jagjeet Singh v. Ashish Mishra* (2022) has authoritatively held that a victim has a **legally vested right** to be heard at every stage of a criminal proceeding where his or her rights are affected, observing that the victim’s participation cannot be postponed until trial and that fairness demands meaningful hearing even during pre-trial stages. Although Sections 227, 239 CrPC and their

BNSS counterparts do not expressly mention the victim, the Court clarified that the victim's role is not subordinate to that of the State and that their right to participate flows directly from constitutional principles of dignity and fair procedure.

Consistent with this approach, the Hon'ble Bombay High Court in ***Prakash C. Sheth v. State of Maharashtra (2022)*** held that the informant is entitled to audience when the accused seeks discharge, rejecting the view that such participation requires prior permission under Sections 301–302 CrPC and affirming that denying hearing to the complainant vitiates the integrity of the discharge process. Together, these decisions firmly establish that the victim or de-facto complainant must be afforded an opportunity of hearing before a court decides whether to discharge an accused.

Prior discharge of the accused does not bar summoning under Section 319:

The power under Section 319 CrPC (Section 280 BNSS) is extraordinary and exists to enable the Court to summon any person as an accused if, during the course of trial, evidence surfaces demonstrating their involvement. This power is independent of earlier stages, including discharge.

The Hon'ble Supreme Court has consistently held that a prior discharge order **does not create any bar** to summoning the same person under Section 319, because discharge is based only on the police-report material, whereas Section 319 is triggered by **evidence coming before the Court during**

trial. Thus, if stronger or clearer material emerges in the form of witness testimony or additional documents, the person previously discharged may be validly summoned as an accused.

This principle was applied in Deepu @ Deepak v. State of Madhya Pradesh, Criminal Appeal No. 1277 of 2010, where the appellant had earlier been discharged after the Trial Court ignored a supplementary charge-sheet. However, during trial, multiple witnesses (PW5, PW6, PW7, PW8 and PW12) identified him and incriminating forensic material corroborated his involvement. The Hon'ble Supreme Court held that Section 319 could be invoked notwithstanding the earlier discharge, observing that "there is no bar to proceed against him under Section 319 Cr.P.C." and that the combined effect of the FSL reports, witness statements under Section 161, and depositions in court fully justified summoning him as an accused. The Court affirmed that the power under Section 319 is based on evidence recorded during trial and is unaffected by pre-trial discharge orders.

SCOPE OF DISCHARGE IN SUMMONS TRIALS

Unlike sessions trials or warrant trials, **there is no statutory provision for discharge** in summons cases. This position remains unchanged under the BNSS. Summons cases are governed by Sections 251 to 259 CrPC and their corresponding provisions in BNSS. These provisions do not contemplate the framing of a charge; instead, the accused is

informed of the particulars of the offence in simple language. It follows therefore that there is no stage for filing an application for “discharge” because there is no formal charge to be discharged from.

In *Subramaniam Sethuraman v. State of Maharashtra*, the Hon’ble Supreme Court of India held that a summons case covered by Chapter XX of the CrPC does not contemplate a stage of discharge like Section 239, which provides for discharge in a warrant case. The Court held that the Hon’ble High Court was correct in concluding that once the plea of the accused is recorded under Section 252 of the Code, the procedure contemplated under Chapter XX must be followed, taking the trial to its logical conclusion. The remedy under Section 482 CrPC before the Hon’ble High Court would still remain available to the accused.

Once charge is framed, there can be no discharge

This principle has been consistently reaffirmed in later jurisprudence. In **Bharat Parikh v. CBI (2008)**, the Hon’ble Supreme Court reiterated that after charges are framed, the trial court **cannot recall or review the order of framing charge** on any ground, including alleged non-supply of documents or belated production of records. The Court observed that reopening a concluded charge stage would contradict the structure of the Code, as laid down in *Mithani* and *Debendra Nath Padhi*, and emphasised that once charges are framed, the only available remedies are **revision under**

Section 397 CrPC / Section 460 BNSS or the Hon'ble High Court's **extraordinary inherent jurisdiction** under Section 482 CrPC / Section 528 BNSS in the narrow categories recognised in *State of Haryana v. Bhajan Lal*. Thus, as a matter of settled doctrine, **the power of discharge ceases the moment charges are framed.**

State of Bihar v. Ramesh Singh¹⁰⁸.

The Hon'ble Supreme Court held that the Court must decide discharge before charge, and once charge is framed the accused cannot seek discharge anymore. Trial must proceed.

The moment the Court frames charges, the stage of discharge **closes**. After framing charges, the only remedy available is:

- **Revision under Section 397 CrPC / Section 460 BNSS**, or
- **Petition under Section 482 CrPC / Section 528 BNSS**, in rare cases.

Case Law —

An Accused Added Under Section 319 CrPC Cannot Seek Discharge

A person added as an accused under Section 319 CrPC (Section 280 BNSS) does **not** have the right to seek discharge. This is because he is summoned on the basis of **evidence**

¹⁰⁸ (1977) 4 SCC 39

recorded by the Court, not on the basis of police report.

Case Law — Hardeep Singh v. State of Punjab¹⁰⁹.

The Hon'ble Supreme Court held that a person added under Section 319 is summoned on a higher threshold ("much stronger evidence") and therefore **cannot seek discharge**, unlike an accused arraigned at the initial stage.

Difference between Discharge and Acquittal

The discharge of an accused and his acquittal after trial are entirely different. An accused is **discharged** when no prima facie case is made out against him, even before he has entered his defence and prior to the framing of charges. **Acquittal**, on the other hand, occurs when the accused has been called upon to enter his defence, a charge has been framed against him, and the trial has been completed. A person who is discharged **may be charged again** for the same offence if new material is subsequently discovered. In contrast, a person who is **acquitted** cannot be tried again for the same offence. In *Municipal Corporation of Delhi v. Girdharilal Sapru*, it was held that an order of discharge terminates the proceedings and is therefore a **revisable order under Section 397(1) CrPC**.

¹⁰⁹ (2014) 3 SCC 92 (constitution Bench)

Revision Lies Against Discharge Order

A discharge order is **revisable**, not appealable.

- CrPC → Section 397 (Revision)
- BNSS → Section 460 (Revision)

Both accused and victim may file revision.

Conclusion:

The law of discharge, as crystallised through the decisions in *Ramesh Singh*, *Som Nath Thapa*, *Debendra Nath Padhi*, *Mithani*, *Bharat Parikh*, and *Jagjeet Singh* and *Prakash Sheth*, reinforces that the court's task at this stage is narrow yet profoundly significant. The inquiry is confined to prosecution materials, free from defence intrusions, and limited to determining whether the case is groundless or whether grave suspicion exists. At the same time, the victim's right to participate ensures that the process remains fair, complete, and transparent. Ultimately, the discharge stage functions as a constitutional checkpoint preventing unwarranted prosecutions, preserving personal liberty, and ensuring that only cases with a legitimate foundation proceed to trial. Properly exercised, it strengthens both the efficiency and the integrity of the criminal justice system.

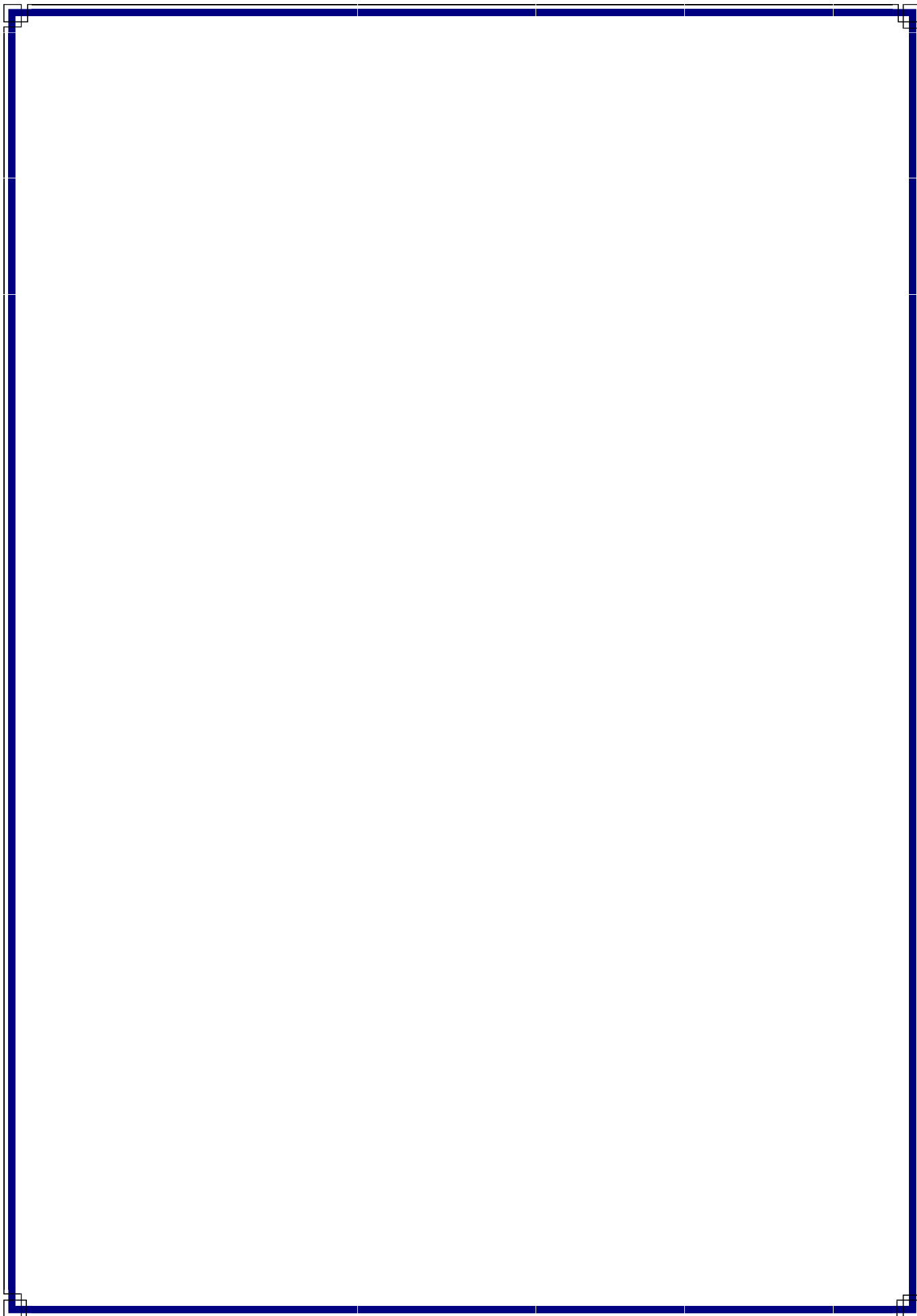
SESSION- IV

**ELECTRONIC DEVICES –
ELECTRONIC EVIDENCE –
CHANGING TRENDS.**

Paper Presentation

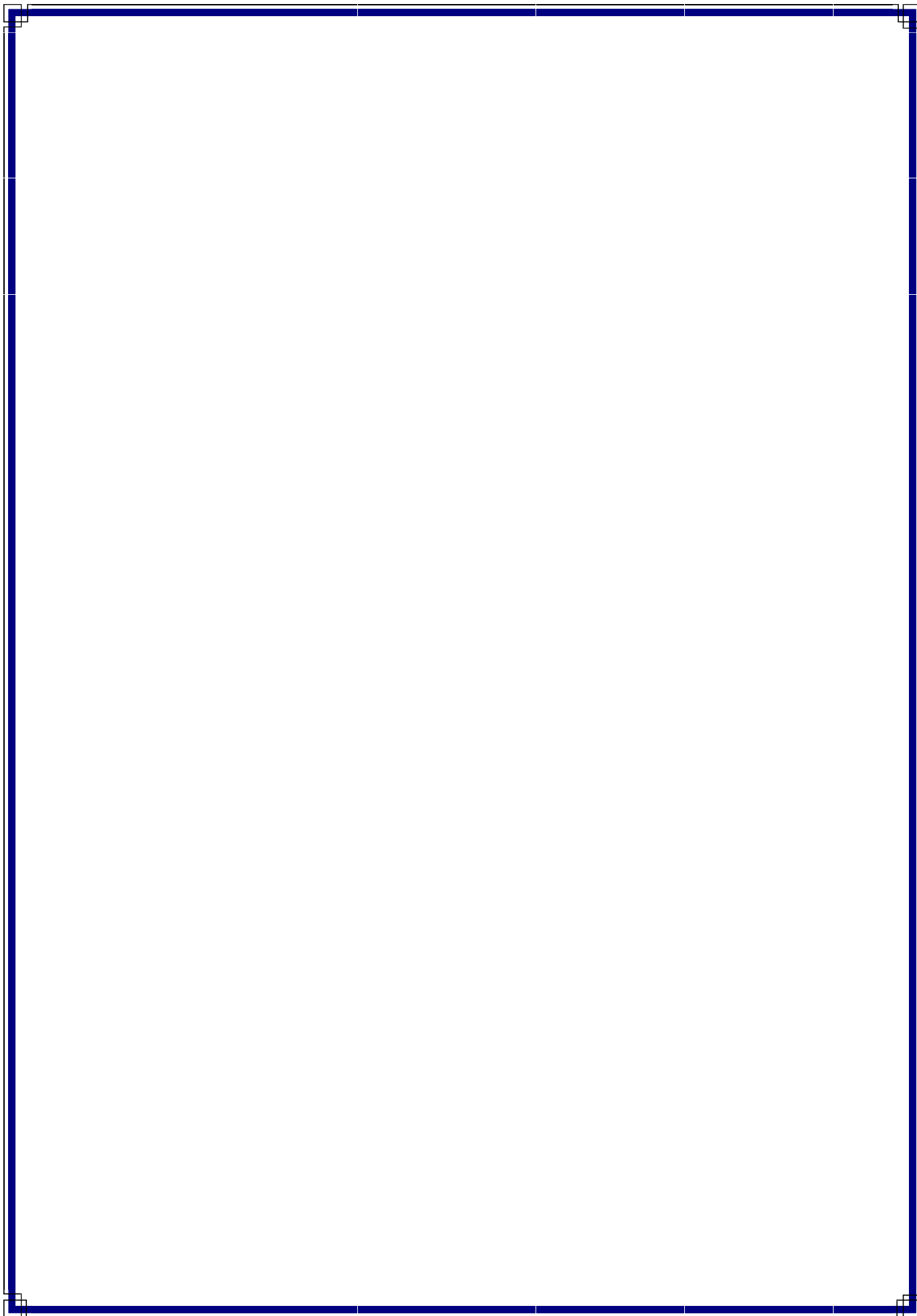
by

Sri. S.M.PHANI KUMAR,
IV Additional District Judge,
SRIKAKULAM.



TOPICS

**ELECTRONIC DEVICES –
ELECTRONIC EVIDENCE –
HANGING TRENDS**



POST CONVICTIONAL BAIL ELECTRONIC DEVICES – ELECTRONIC EVIDENCE – CHANGING TRENDS

“Law must be conscious of the speed which is the trend in the present day society with the invention of electronic devices and communication network through Online across the globe, which necessitates the judiciary also to adapt the advancement in the technology for effective justice delivery system”

Introduction:

With the expansion of Technology and advancement of Internet and Online transactions extensively across the globe has brought immense change in the life style of the individuals and further everyone is one way or the other is connected to the digital world. Therefore, the new statutes were brought into existence and existing statutes are amended to suit the present day requirements and to use the technology to the optimum level in the justice delivery system and also to bring uniform procedure to deal with the digital and electronic records whenever placed before the Courts of Law.

“With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. And that Production of scientific and electronic evidence is of great help to the investigating agency and also to the prosecution”.

Held by the Honb’le Supreme Court in **Tomaso Bruno & Anr vs State Of U.P.**

A computer can be a tool for the commission of an offence and it can be a repository of electronic evidence. Realising the importance of computer knowledge to Judges, the Hon'ble Supreme Court in the case of **Vijendra Kumar Verma v/s Public Service Commission, Uttarakhand & Ors**¹¹⁰ has observed that the Indian judiciary is taking steps to apply e-governance for efficient management of courts. **In the near future, all the courts in the country will be computerized. In that respect, the new judges who are being appointed are expected to have basic knowledge of the computer operation. It will be unfair to overlook basic knowledge of computer operation to be an essential condition for being a judge in view of the recent development being adopted. Therefore, the Supreme Court is of the considered opinion that requirement of having basic knowledge of computer operation should not be diluted.**

¹¹⁰ 2011 (1) SCC 150

1. **Electronic records are relevant to prove any facts.**

In **Shafhi Mohammad v/s State of Himachal Pradesh** ¹¹¹, the Hon'ble Supreme Court has held that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency.

Evidence is the basis for the Courts for adjudication of any case pending before it.

"Evidence" as defined under section 2(e) of Bharatiya Sakshya Adhiniyam, 2023 corresponding to Section 3 of Indian Evidence Act **includes all statements including statements given electronically which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence; and all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence.**

Therefore, evidence includes electronic and digital records.

As under Section 2 of Bharatiya Sakshya Adhiniyam, 2023 corresponding to Section 3 of Indian Evidence Act, a **"document"** means **"any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or**

¹¹¹ 2018 AIR (SC) 714

marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records.”

In electronic evidence jurisprudence, it must be bear in mind that possession of electronic evidence is one thing and proof of the same is another thing.

2. ELECTRONIC RECORD DEFINED UNDER INFORMATION AND TECHNOLOGY ACT:

Electronic records are placed at par with other forms of record. In ordinary common parlance, an electronic record is information recorded by a computer which is produced or received in initiation, conduct or completion of an agency or individual activity. For example, electronic record includes, email messages, word processed documents, electronic spreadsheets, digital images and data bases. However, **the term “electronic record” is defined in Section 2(t) of the Information Technology Act, 2000 as follows:**

“Electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.”

In paper documents we use ink for inputs. Likewise, in digital world, any data is fed into the computer system in ‘binary’ format. The word **‘meta data’** means data that provides crucial

information about other data. In other words, it is data about data. However, speaking legally, expression **“data” is defined in Section 2 (o) of the Information Technology Act as follows:**

“Data” means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.”

Therefore, it is clear that as per the Information Technology Act - 2000, electronic record means data, record or data generated image or sound stored, received or sent in an electronic form or micro film or computer generated micro-fiche.

Two separate and special provisions deal with electronic evidence. Section 59 of Indian Evidence Act says that all facts, except the contents of documents or electronic records, may be proved by oral evidence. It is based on the fundamental principle as best evidence rule. Section 65-A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65-B. Thus, Section 65-A provides for a

special procedure for proving of contents of electronic record. In furtherance thereof, Section 65-B provides for the procedure.

3. Other Provisions relating to electronic record:

The other relevant provisions provided in the Information Technology Act in respect of electronic records are as under:

- i. Section 4 relates to the legal recognition of electronic records. It states that if any information or matter is rendered or made available in an electronic form, and accessible so as to be unusable for a subsequent reference, shall be deemed to have satisfied the requirements of law which provides that information or any other matter shall be in writing or in the typewritten form.
- ii. Section 5 relates to the legal recognition of digital signatures.
- iii. Section 6 relates to the use of electronic records and digital signatures in Government and its agencies.
- iv. Section 7 related with retention of electronic records. It states that if any law provides that documents, records, or information are required to be retained by for any specific period, then, that requirement shall be deemed to have been satisfied if the same is retained in electronic form.

Moreover, digital evidence is information of probative value that is stored or transmitted in binary form. Digital evidence is not only limited to that found on computers but may also extend

to include evidence of digital device such as telecommunication or electronic multimedia devices. While so, it is appropriate to understand what is computer, computer system and computer network.

4. **Computer, Computer System and Computer Network:**

The I.T. Act defines computer in clause (i) of Section 2(1) of the Act. According to the definition, **'computer' means any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network.**

'Computer system' is defined in clause (1) of Section 2(1) of I.T. Act, as to mean a device or collection of devices, including input and output support devices which are programmable, capable of being used in conjunction with external files which contain computer programmes, electronic instructions, data storage and retrieval and communication control.

The I.T. Act also defines 'computer network' in **clause (j) of Section 2(1) of the Act**, which reads as under:

(j) Computer network means the interconnection of one or more computer through- (i) the use of satellite, microwave,

terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained.

While interpreting Section 2(1) of the IT Act, in **Syed Asifuddin V/S State of Andhra Pradesh**¹¹² it has been observed in Para 12 that a reading of clauses (i), (j) and (1) of Section 2(1) of the I.T. Act would show that any electronic, magnetic or optical device used for storage of information received through satellite, microwave or other communication media and the devices which are programmable and capable of retrieving any information by manipulations of electronic, magnetic or optical impulses is a computer which can be used as computer system in a computer network.

Computers work through source code. It is the source of a computer. It contains declaration, instructions, functions, loops and other statements which act as instruction for the program on how to function. While dealing with Computer source code, it has been stated in **Syed Asifuddin v/s State of Andhra Pradesh**¹¹³ that a computer has to be appropriately instructed so as to make it work as per its specifications. The instructions issued to the computer consists of a series of OS and is in different

¹¹² 2006 (1) ALD Cri 96 : 2005 CriLJ 4314 in Para 12

¹¹³ 2006 (1) ALD Cri 96 ; 2005 CriLJ 4314 in Para 13

permutations and combinations. This machine language can be in different forms in different manner, which is called computer language. The communicator as well as the computer understand "a language" and mutually respond with each other. When specified or particular instructions are given, having regarded to the capacity of the computer it performs certain specified functions. The instructions or programme given to computer in a language known to the computer are not seen by the users of the computer/consumers of computer functions. Known as source code in computer parlance, the programme written in whatever computer language by the person who assembled the programme are not seen by the users. A source code is thus a programme as written by the programmer. Every computer functions as a separate programme and thus a separate source code.

It has been further observed in Para 14 of the above judgment that computer source code or just source or code may be defined as a series of statements written in some human readable computer programming language constituting several text files but the source code may be printed in a book or recorded on a tape without a file system, and this source code is a piece of computer software. The same is used to produce object code. But a programme to be run by interpreter is not carried out on object code but on source code and then converted again. Thus, source code is always closely guarded by the computer companies, which develop different function specific computer programmes capable of handling various types of functions depending on the need. The law as we presently see is developing

in the direction of recognizing a copyright in the source code developed by a programmer. If source code is copied, it would certainly violate copyright of developer.

5. Forms of Digital evidence or records:

Digital evidence can be found in emails, digital photographs, ATM transaction logs, word processing, documents, instant message histories, files saved from accounting programmes, spreadsheets, internet browser histories databases, contents of computer memory, computer backups, computer printout, global positioning system tracks, logs from hotel's electronic door locks, digital video or audio files. In this context, it is also better to understand what is computer output and output devices.

6. Computer output and output devices:

Computer output means data generated by a computer. This includes data produced at software level. Devices that produced physical output from the computer are creatively called output devices. Any information that has been processed by and sent out from a computer or similar device is considered as output. At this juncture, it is better to understand certain important devices and its uses.

7.

ELECTRONIC DEVICES

a) CPU:

The device itself may be evidence of component theft, counterfeiting etc. The device contains digital devices with all the files and folders stored including deleted files and information, which may not be seen normally. Cyber Forensic is used to image, retrieve and analyze the data.

b) Display Monitor (CRT/LCD/TFT etc.) screens of Mobile Phones, if switched on:

All the graphics and files that are open and visible on the screen in switched on systems can be noted as electronic evidence. This evidence can be captured only in video, photographs and through description in seizure memo.

c) Smart Cards, Dongles and biometric scanners etc:

The device itself, along with the identification/authentication information of the card and the user, level of access, configurations and permissions.

d) Digital Cameras:

The device can be looked for images, videos, sounds, removable cartridges, time & date stamps.

e) Smart Phones:

Much information can be obtained from these devices like address book, appointment calendars/information, documents, emails, phone book, messages (text & voice), emails passwords etc.

f) Hard Disc Drives:

The basic storage location of any computer is HDD. The HDD can be both internal and as well as external. Internal HDD is integrated into the computer system. External HDD can be attached through USB portals and includes like pen drive or flash drive. It is generally referred to as secondary storage of the computer system. The primary being the Random Access Memory (RAM).

g) Local Area Network (LAN) Card or Network Interface Card (NIC):

The device itself and also MAC (Media Access Control) address can be obtained.

h) Modems, Routers, Hubs and Switches:

In routers, configuration files contain information related to IP addresses etc.

i) Servers:

Information like last logins, mails exchanged, contents downloaded, pages accessed etc. can be obtained.

j) Network cables and connectors:

Network cables are used to trace back to their respective computers. Connectors help in identifying the types of devices that are connected to the computers.

k) Printers:

The device has data like number of prints last printed and some maintain usage logs, time & date information. If attached to a network, they may store network identity information. In addition, it can also be examined for figure prints.

l) Scanners:

The device itself, having the capability to scan, may help to prove illegal activity.

m) Copiers:

Copies may contain some documents both physical and electronic, user usage logos, time and data stamps.

n) CD & DVD Drives:

These devices store files/data in which evidence can be found.

o) Digital Watches:

Some latest digital watches contain information like address book, notes, appointment calendars, phone numbers, emails etc.

Fax machine:

These devices contain some documents, phone numbers, send/receive logs, film cartridges that can be considered.

p) Global Positioning System (GPS):

The device may provide travel logs, home location, previous destinations, way point coordinators, way point name etc.

q) Keyboard & Mouse:

These devices can be examined for fingerprints.

8. Admissibility of electronic record or electronic document:

The word 'admissible' means the evidence which can be admitted in court and taken on record. The concept of admissibility is completely different from concept of relevancy and probative value of the evidence adduced. Section 65 B makes electronic evidence admissible, it does not dispense with the relevancy and probative value. In **State of Uttar Pradesh Vs. Raj Narain**¹¹⁴, it has been held that facts should not be received in evidence unless they are both relevancy and admissible.

The Apex Court in **State of Bihar Vs Sri Radha Krishna Singh**¹¹⁵ has further held that admissibility of document is one thing and its probative value is quite another thing – these two aspects cannot be combined.

In **Arjun Panditrao Khotkar**¹¹⁶ the Hon'ble Supreme Court has observed that Section 65 differentiates between existence, condition and contents of a document. Whereas

¹¹⁴ (1974) 4 SCC 428

¹¹⁵ 1983 AIR 684

¹¹⁶ (2020) 5 CTC 200

existence goes to '*admissibility*' of a document '*contents*' of a document are to be proved after a document becomes admissible in evidence. Section 22-A of the Evidence Act provides that if the genuineness of the electronic record produced is questioned, the oral evidence would be admissible as to the contents of the electronic records. However, the Hon'ble Madras High Court reiterated the same in **Santhoshkumar Vs State rep. by Inspector of Police Perundurai Police Station** ¹¹⁷ wherein it has been held that oral evidence cannot take the place of section 65-B (4) certificate. Further Section 4 of IT Act also provides that if a document in electronic form is (a) rendered or made available in an electronic form and (b) accessible so as to be usable for a subsequent reference, then it would be sufficient compliance. Moreover, the electronic evidence is made admissible by the amendment of section 92 of Information Technology Act-2000 in the Indian Evidence Act. Section 3(2) of Indian Evidence Act states that evidence includes all documents including electronic records produced for the inspection of the court. Such documents are called as documentary evidence.

9. **Requirement of Section 65-B of Indian Evidence Act corresponding to Section 63 of Bharatiya Sakshya Adhiniyam, 2023 :-**

Section 63. Admissibility of electronic records.

(1) Notwithstanding anything contained in this Adhiniyam, any information contained in an electronic record which is

¹¹⁷ 2021 (2) MLJ (CrI) 225

printed on paper, stored, recorded or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely...

(a) the computer output containing the information was produced by the computer or communication device during the period over which the computer or Communication device was used regularly to create, store or process information for the purposes of any activity regularly carried on over that period by the person having lawful control over the use of the computer or communication device;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer or Communication device in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer or communication device was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer or Communication device in the ordinary course of the said activities.

(3) Where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by means of one or more computers or communication device, whether--

(a) in standalone mode; or

(b) on a computer system; or

(c) on a computer network; or

(d) on a computer resource enabling information creation or providing information processing and storage; or

(e) through an intermediary,

all the computers or communication devices used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer or communication device; and references in this section to a computer or communication device shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or a communication device referred to in clauses (a) to (e) of sub-section (3);

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate; and for the

purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate specified in the Schedule.

(5) For the purposes of this section,---

(a) information shall be taken to be supplied to a computer or communication device if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) a computer output shall be taken to have been produced by a computer or communication device whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment or by other electronic means as referred to in clauses (a) to (e) of sub-section (3).

Primary evidence means when the document itself is produced for the inspection of the Court. In **Anvar P V V/S P K Basheer And Others**¹¹⁸ in Para 24 it is clarified that primary evidence of electronic record was not covered under Section 64A and 65B of the Evidence Act.

The expression “document” is defined in Section 3 of Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more

¹¹⁸ 2014 LawSuit (SC) 783 in para 24

than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

In Anvar PV (stated supra), it is observed in Para 14 that any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non-obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2).

Following are the specified conditions under Section 65B(2) of the Evidence Act corresponding to Section 63 of Bharatiya Sakshya Adhiniyam :

- i. The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store

or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer.

ii. The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity.

iii. During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

iv. The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B (4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- a. There must be a certificate which identifies the electronic record containing the statement;
- b. The certificate must describe the manner in which the electronic record was produced;
- c. The certificate must furnish the particulars of the device involved in the production of that record;

- d. The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- e. The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

It is further clarified in **Anvar PV (stated above)** that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

In **Arjun Panditroa Khotkar Vs Kailsh Kushanrao Goraytyal**¹¹⁹, the Hon'ble Supreme Court has held as follows :

“The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic

¹¹⁹ 2020 (5) CTC 200 : 2020 (7) SCC 1

evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies.”

Next important position of law to be bear in mind is that only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

The above said position has been well explained in **Arjun Panditroa Khotkar Vs Kailsh Kushanrao Goraytyal**¹²⁰ , wherein the Hon'ble Supreme Court has held in Paras 21 to 23 that Sections 65A and 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65A indicates that “special provisions” as to evidence relating to electronic records are laid down in this provision. The marginal note to Section 65B then refers to “admissibility of electronic records”. Section 65B (1) opens with a non-obstante clause, and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that “document” as defined by Section 3 of the Evidence Act does not include electronic records. Section 65B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B(2(a) to 65(2(d)) is that the computer be regularly used to store or process information for

¹²⁰ 2020 (5) CTC 200 : 2020 (7) SCC 1

purposes of activities regularly carried on in the period in question. The conditions mentioned in sub sections 2(a) to 2(d) must be satisfied cumulatively. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of “relevant activities” – whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the “best of the knowledge and belief of the person stating it”

It has been held in **Anvar P V v/s P K Basheer And Others**¹²¹ that the Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India. It has been further reiterated in **Ravinder Singh VS State of Punjab**¹²² that the certificate under Section 65B(4) of the Evidence Act is mandatory to produce electronic evidence and that the oral evidence in the place of such certificate cannot possibly suffice.

However, interestingly, while deciding the question as to who is to give certificate under section 65-B of the Evidence Act,

¹²¹ 2014 Law Suit (SC) 783 at Para 14

¹²² 2022 (7) SCC 581

in **Shafhi Mohammad v/s State of Himachal Pradesh** ¹²³ it has been held that the applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

However, regarding the interpretation of section 65-B of the Indian Evidence Act, a Bench of Three judges made reference to

¹²³ 2018 AIR (SC) 714 at para 11

the Hon'ble Larger Bench of the Supreme Court in the case of **Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal**¹²⁴ wherein the Hon'ble Supreme Court (Four Judges Bench) has **overruled the judgment rendered in Shafhi Mohammad's case** and upheld the law down in the PV Anvar case.

As held in Arjun Panditroa Khotkar (*stated supra*), only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A opinion of Examiner of Electronic Evidence.

It is also pertinent to bear in mind that non-production of certificate at an earlier stage is not fatal, it is a curable defect. The Hon'ble Supreme Court, in **Union of India & Ors v/s CDR Ravindra Vs Desai**¹²⁵ has held as follow :

"We are in agreement with the aforesaid findings. Learned counsel for the appellants rightly argued that non-production of the certificate under Section 65-B of the Indian Evidence Act, 1872 on an earlier occasion was a curable defect which stood cured".

¹²⁴ Civil appeal No 20825 -20826 dated 14.07.2020

¹²⁵ 2018 Law Suit (SC) 358

10. **Proving various kinds of electronic records:**

There are various forms of electronic records. Let us consider some of the important electronic records often produced before the court of law and how it can be proved.

11. **Proof of identity of mobile telephone:**

There is no point of doubt that the mobile phone is a computer. Often it is a moot question as to whether how to prove the identity of mobile phone. Before knowing it we may now consider in brief the technological aspects of a cell phone and how it works.

In **Syed Asifuddin v/s State of Andhra Pradesh** ¹²⁶ the working of cell technology explained in detail as follows:

All cell phone service providers like Tata Indicom and Reliance India Mobile have special codes dedicated to them and these are intended to identify the phone, the phone's owner and the service provider. To understand how the cell phone works, we need to know certain terms in cell phone parlance. System Identification Code (SID) is a unique 5-digit number that is assigned to each carrier by the licensor. Electronic Serial Number (ESN) is a unique 32-bit number programmed into the phone when it is manufactured by the instrument manufacturer. Mobile Identification Number (MIN) is a 10-digit

¹²⁶ 2006(1) ALD Cri 96 : 2005 CriLJ 4314 at Para 17, 18 and 19

number derived from cell phone number given to a subscriber. When the cell phone is switched on, it listens for a SID on the control channel, which is a special frequency used by the phone and base station to talk to one another about things like call set-up and channel changing. If the phone cannot find any control channels to listen to, the cell phone displays "no service" message as it is out of range. When cell phone receives SID, it compares it to the SID programmed into the phone and if these code numbers match, cell knows that it is communicating with its home system. Along with the SID, the phone also transmits registration request and MTSO which keeps track of the phone's location in a database, knows which cell phone you are using and gives a ring. When MTSO gets a call intended to one.

The essential functions in the use of cell phone, which are performed by the MTSO, is the central antenna/central transmitter and other transmitters in other areas well coordinated with the cell phone functions in a fraction of a second. All this is made possible only by a computer, which simultaneously receives, analyses and distributes data by way of sending and receiving radio/electrical signals.

So as to match with the system of the cell phone provider, every cell phone contains a circuit board,

which is the brain of the phone. It is a combination of several computer chips programmed to convert analog to digital (Analog - Anything analogous to something else).

Analog computer - A computing machine so designed and constructed as to provide information in terms of physical quantities analogous to those in which the problems are formulated.

The question is whether a cell phone is a computer?

In **Syed Asifuddin** (stated supra) it is held that it is not possible to accept the submission that a cell phone is not a computer. Even by the very definition of the computer and computer network as defined in IT Act, a cell phone is a computer which is programmed to do among others the function of receiving digital audio signals, convert it into analog audio signal and also send analog audio signals in a digital form externally by wireless technology.

As to burden of proof, in the case of **Arun Maruthi Wahchaure Vs State of Maharashtra**¹²⁷, it has been laid down that whenever the identity of mobile number is questioned, it is the duty of the investigation agency to prove the IMEI number of the mobile instrument number. Therefore, it is clear that identity of the mobile number can be proved by proving IMEI number.

¹²⁷ Crl Appeal No. 1291 of 2012 dated 19.03.2015 at page 13

12. COMPACT DISC:

A compact disc is a portable storage medium that can be used to record, store and play back audio, video and other data in digital form. It is available in many formats like CD-ROM, CD-I (inter active), CD-RW (re writable), CD-R (Recordable), Photo CD, and Video CD etc.,

In **Shamsher singh Verma v/s State of Haryana** ¹²⁸ it is made it very clear that the definition of 'document' in Evidence Act includes the compact disc and it is also a document. Therefore, in **Balasaheb Gurling Todkar and Ors vs. State of Maharashtra and Ors** ¹²⁹, it has been held that in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.,

A case on the point is **K K Velusamy v/s N Palanisamy**¹³⁰, wherein the appellant involved in that case wanted to cross-examine the witnesses with reference to the admissions made during some conversations, recorded on a compact disc (an electronic record). While deciding the same, the Supreme Court has observed as follow at Para 7:

¹²⁸ Criminal appeal No 1525 of 2015 dt 24.11.2015: 2015 Law Suit (SC) 1145

¹²⁹ 2015 Law Suit(Bom) 1060

¹³⁰ SC 2011 Law Suit (SC) 271

"The amended definition of "evidence" in section 3 of the Evidence Act, 1872 read with the definition of "electronic record" in section 2(t) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation. Section 8 of Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. In R.M Malkani vs. State of Maharashtra ¹³¹-, this court made it clear that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. The SC Court further held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence".

¹³¹ AIR 1973 SC 157

Another interesting question arose as to when and how the admissibility of CD can be questioned before the Court of law. The question is answered in **Sonu @ Amar v/s State Of Haryana**¹³², which run as follows:

“It is nobody’s case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue

¹³² 2017 Law Suit (SC) 704 at page 27

which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr. P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

Therefore, an objection as to the admissibility of CD must be taken at the time of marking it cannot be raised at the appellate stage.

So far as authentication of CD is concerned, it needs to be noted that comparison of hash values of original data and the data copied on CD is an important means of authentication. The importance of comparison of hash value of a source data and CD was underlined by Punjab and Haryana High Court in the case

of **Ram Kishan Fauji son of Shri Dharam Pal Vs State of Haryana**¹³³ that if the CD cannot stand the test of authenticity by its comparison with its hash value with the source, then the transcript of what has been obtained through its audio footage or what it purports to capture cannot be taken as of value.

In **Shamsher singh Verma v/s State of Haryana**¹³⁴, it has been held that if the accused wishes to rely on some part of CD, which the prosecution does not admit, then the accused can insist on playing the contents of the said CD/DVD in the court and can also insist for sending it to the forensic laboratory for further analysis.

However, preserving the integrity of CD is the main issue faced by the Courts. A valuable piece of evidence may be vanished if it is not properly preserved. CD must be stored or packaged in Faraday Bags or Static bags to preserve the integrity of the information contained therein. Faraday bags are a type of Faraday cage made of flexible metallic fabric. They are used to block remote wiping, alternation of wireless devices recovered in criminal investigations and to protect against data theft.

13. **TAPPING OF PHONE CALLS:**

A voice print is a visual recording of voice. It mainly depends on the position of “formants”. These are concentrates of sound energy at a given frequency. It is stated that their position

¹³³ SCC Online P & H 5058

¹³⁴ Criminal Appeal No. 1525 of 2015 dated 24.11.2015 : 2015 Law Suit (SC) 1145

in the “frequency domain” is unique to each speaker. Voice prints resemble finger prints, in that each person has a distinctive voice with characteristic features dictated by vocal cavities and articulates. (87th Report of the Law Commission dated 29th August, 1980).

Nowadays, courts are spending much time as to the admissibility, proof, evidentiary value of call records and conversations in mobile phone or telephone. The court has to make a striking balance between privacy of an individual and larger public interest in detecting the crime. Because, in **People's Union of Civil Liberties ... vs Union Of India (Uoi) And Anr**¹³⁵, it has been held that the right to privacy-by itself-has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case.

But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone-conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of

¹³⁵ AIR 1997 SC 568 at Para 19

one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. Hence it is clear that telephone tapping is permitted only under procedure established by law.

While so, the next question arises as to what are the procedure involved in Interception of phone calls and how it can be recorded. In **Peoples union for civil liberties V/S Union of India**, (cited supra), at Para 28, 29, 30 it has been laid as follows:

- i) An order for telephone-tapping in terms of Section 5(2) of the Indian Telegraph Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.
- ii) The order shall require the person to whom it is addressed to intercept in the course of their transmission by means a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to

disclose the intercepted material to such persons and in such manner as are described in the order.

iii) The matters to be taken into account in considering whether an order is necessary under Section 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

iv) The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

v) The order under Section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two month period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

14. **The authority which issued the order shall maintain the following records:**

- (a) The intercepted communications,
- (b) The extent to which the material is disclosed,
- (c) The number of persons and their identity to whom any of the material is disclosed.
- (d) The extent to which the material is copied and
- (e) The number of copies made of any of the material.

The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Indian Telegraph Act.

There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect.

The above are the position with regard to the tapping of telephones.

15. **Proof of Call Data Record:**

A Call Data Record is a detailed record of SMS and calls that are sent and received by a subscriber of a service provider. The main benefits we can reap from Call Detail Record are identifying the suspect's day location , night location, handset details, maximum contact number, date, time , tower location at the time of occurrence of the offence, coordinates of his movement etc., It can also be disseminate the details regarding call duration, connection status, source number, destination number, accurate identification of telephone exchange, unique sequence number identifying the record, the route by which the call entered the exchange, the route by which the call left the exchange.

Regarding the proof and admissibility of mobile phone call records, it needs to be proved by producing certificate under Section 65-B of Evidence Act. In **Bala Saheb Gurling Todkari Vs. State of Maharashtra**¹³⁶ it has been held in Para 36 that absence of certificate would render the CDR inadmissible in law. Being inadmissible it cannot be considered.

However, in **State of NCT of Delhi Vs Navjot Sadhu** ¹³⁷, the accused side raised a submission that no reliance can be placed on the mobile phone call records , because the prosecution has failed to produce the relevant certificate under section 65-B of the Evidence Act, The Supreme Court has concluded that a cross examination of the competent witness

¹³⁶ 2015 SCC Online Bom 3360

¹³⁷ AIR 2005 SC 3820

acquainted with the functioning of the computer during the relevant point of time and the manner in which the printouts of the call records were taken was sufficient to prove the call records.

In **Sonu Vs State of Haryana** ¹³⁸ it has been held in Para 32 by the Supreme Court that an objection that CDRs are unreliable due to violation of procedure prescribed in section 65-B (4) cannot be permitted to be raised at the appellate stage as the objection relates to the mode or method of proof. In **Union of India Vs. Ravindra Desai**, the Hon'ble Supreme Court has also held in Para 22 that non production of the certificate under Section 65-B on an earlier occasion was a curable defect. Similarly, in the case of **State of Karnataka Vs M.R. Hiremath** ¹³⁹ reported in it has been held that the non-production of a certificate under Section 65-B of the Indian Evidence Act at a prior stage is a curable defect.

16. **Proof of CCTV Footage:**

There are 3 types of CCTV. Firstly, Stand alone which is self contained camera having inbuilt memory device. Secondly, Wired, which has a wire to connect a camera and to a recorder. Thirdly, IP which uses Wi-Fi to communicate with recorder or uses the cloud storage facility whereby the footage can be viewed from anywhere with an internet connection. CCTV camera has a CCD Sensor (Charge Coupled Device) which converts lights into an electronic signal and which is then converted into a video signal

¹³⁸ (2017) 8 SCC 517

¹³⁹ 2019 (7) SCC 515

recorded or displayed in screen. CCTV works by camera or cameras taking constant sequence of images that are then transmitted by cable or wirelessly to the recording device and then on to the display monitor, which enables the individual to see the sequence of images as video footage. In criminal trial, the evidence of CCTV footage assumes very much importance. It helps to prove the presence of the accused in the scene of crime. It is equal to ocular evidence. Though CCTV footage is the best evidence, the mode and manner of proof is always a challenge.

As held in **TOMASO BRUNO & ANR V/S STATE OF U P** ¹⁴⁰, **CCTV** footage is a strong piece of evidence. In **K .RAMAJAYAM @ APPU V/S INSPECTOR OF POLICE** ¹⁴¹, the Hon'ble Madras High Court has observed that it is axiomatic that CCTV footage does not suffer ills and human fragilities, and they are indubitably superior to human testimony of facts.

One has to understand the science of CCTV Recordings in the light of the Information and Technology Act, 2000, for the purpose of its optimum usage as evidence in the Court of Law. Gone are the days when Hindustan Photo Films produced film rolls for loading in the camera and on the click of the button the image gets imprinted on the film. The imprint is called the negative, which is the primary evidence, and the positive developed there from is considered as the secondary evidence. That technique has now become defunct. Today, the physical images captured by the

¹⁴⁰ 2015 Law suits(SC) 54

¹⁴¹ 2016 Law Suits (Mad) 136at para 31

camera is converted by a computer software into information, capable of being stored as data in electronic form and the stored data is electronic record. It has been further observed in Para 32 that the images captured by the cameras were transferred to a Digital Video Recorder (DVR), which is a rectangular box, through wires. DVR has a computer programmed circuit to receive the images from the four cameras and convert them into electronic form in binary and store them in the hard disk. The software is so programmed that it cannot only receive and store, but also play back the images on a screen, be it a monitor, Television screen, or Cinema Screen. The information so stored are not tangible information for the Court to inspect and see with its naked eyes. The DVR is an electronic record within the meaning of Section 2(t) of the Information Technology Act, 2000, as it stores data in electronic form and is also capable of output.

Regarding the procedure to be followed to ascertain the integrity of CCTV footage, the Bombay High Court has given certain directions in the case of **Vaijinath Vs State of Maharashtra**¹⁴². A CCTV footage must also be proved by producing a certification under section 65-B of the Evidence Act.

17. **Proof of Email:**

Email is the most often produced in a court of law. Generally, email is not sent directly from the sender to the receiver but it uses a '*store and forward method*'. Because if the user is not online, then the email may get lost and hence internet service provider store the mail, till the recipient is on online and retrieves it. A

¹⁴² 2019 SCC Online Bom 1357

computer dedicated to the transfer of email is called a mail server. Microsoft Exchange, Gmail, yahoo mail are some of the known examples. Every email service provider has its own dedicated email server which transfers email from the sender, firstly the destination address is verified. If the destination address also belongs to the same email service provider then the mail server directly sends it to the recipient's mail box. However, if the recipient's email service provider is different than the sender's email server, it will first find the recipient's email server and would send it to that email server. The receiver's email server then pushes the email to the recipient.

Such being the working of email system, In **Smt bharathi V Rao Vs. Sri Pramod G. Rao**, it has been held that email comes under the definition of electronic record under section 2(t) of IT Act and is admissible in evidence. In **Abdul Rahman Kunji vs. The State of West Bengal**¹⁴³ it has been further held that an email downloaded and printed from the email account of the person can be proved by virtue of section 65-B r/w 88A of Evidence Act. The testimony of the witness to carry out such a procedure to download and print the same is sufficient to prove the electronic communication. It is further held in **Babu Ram Aggarwal & Anr v/s Krishan Kumar Bhatnagar & ors**¹⁴⁴. that as per Section 65B of the The Indian Evidence Act, 1872, for such emails to be proved, it has to be proved/established that the computer during the relevant period was in the lawful control of the person proving the

¹⁴³ 2016 CrLJ 1159

¹⁴⁴ 2013 Law Suit (Delhi 422 at Para 19)

email; that information was regularly fed into the computer in the ordinary course of the activities; that the computer was operating properly and the contents printed on paper are derived from the information fed into the computer in the ordinary course of activities and a certificate identifying the electronic record has to be proved.

Section 88-A of the Evidence Act corresponding to Section 90 of Bharatiya Sakshya Adhiniyam, 2023 provides for a presumption about electronic messages. It is necessary to understand that the presumption merely states that the message received by the addressee is the same, which was fed into the originator's computer for transmission. As held by Madras High Court, in **S. Karunakaran Vs Srileka** ¹⁴⁵, the court shall not make any presumption as to the person by whom such message was sent. Therefore, it is clear that mere filing of email does not give rise a presumption that it is sent by the originator. Similarly, the High Court of Punjab and Haryana, in **Nidhi Kakka vs Munish Kakkar**¹⁴⁶ has held in Para 6 that the correctness and exact reproduction in print out version of the mail could still be issues in the cross examination and the court will have to consider whether the text could have been altered or morphed.

Presumptions for Electronic Evidence under Indian Evidence Act

- Section 81A Presumption as to Gazettes in electronic forms.

¹⁴⁵ 2019 SCC Online Mad 1402

¹⁴⁶ 2011 SCC Online P & H 2599

- 85A. Presumption as to electronic agreements
- 85C. Presumption as to Electronic Signature Certificates
- 88A. Presumption as to electronic messages
- 90A Presumption as to electronic records five year old

18. **Proof of Hard Disc:**

Hard disc is a magnetic storage medium for a computer. It is a non-volatile storage device. Non volatile refers to storage devices that maintain stored data when turned off. The word 'data' includes not only the active memory of the computer, but even the subcutaneous memory like Hard Disc. Hard Disc is not merely a physical object, but a document within the meaning of Section 3 of the Evidence Act. Explaining the position of law, about hard disc, mirror image and subcutaneous memory, the Delhi High Court in the case of **Dharambir; Jagdish Chandra; Ajay Khanna; Anand Mohan Sharan Vs Central Bureau of Investigation**¹⁴⁷ (48 (2008) DLT 289), at Para 8.9 and 8.10 it has been observed as follows:

"Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 the IEA, read with Sections 2(o) and (t) IT Act, there can be no doubt that an electronic record is a document. The further conclusion is that the hard discs are themselves documents. A hard disc is an electronic device used for storing information, once a blank hard disc is written

¹⁴⁷ 48 (2008) DLT 289 at Para 8.9 and 8.10

upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programmes it is possible to find out the precise time when such changes occurred in the hard disc. To that extent even a blank hard disc which has once been used in any manner, for any purpose will contain some information and will therefore be an electronic record. This is of course peculiar to electronic devices like hard discs. Therefore, when Section 65B EA talks of an electronic record produced by a computer (referred to as the computer output) it would also include a hard disc in which information was stored or was earlier stored or continues to be stored. There are two levels of an electronic record. One is the hard disc which once used itself becomes an electronic record in relation to the information regarding the changes the hard disc has been subject to and which information is retrievable from the hard disc by using a software programme. The other level of electronic record is the active accessible information recorded in the hard disc in the form of a text file, or sound file or a video file etc. Such information that is accessible can be converted or copied as such to another magnetic or electronic device

like a CD, pen drive etc. Even a blank hard disc which contains no information but was once used for recording information can also be copied by producing a cloned had or a mirror image.

19. Admissibility of Satellite Sketch:

It is also be noted that satellite sketches to find out the location of the accused and spot of the incident can be admitted. In **V.S. Lad and Sons vs. State of Karnataka** ¹⁴⁸, the state of Karnataka relied on super imposition of leased out area on satellite map on the basis of satellite emergency obtained by Karnataka State Remote Sensing Application Centre to initiate action against the accused to show encroachment of forest land. The court has accepted it as a evidence and refused quash the FIR.

20. ATM:

In a case reported in 2005 AIR Knt. HCR 9, it was held that Automated Teller Machines was held to be not a computer by itself nor it is a computer terminal.

21. Proof of Whatsapp messages:

Whatsapp message is legal evidence under law. The IT Act recognizes the electronic evidence as proof in court. The messages

¹⁴⁸ 2009 CriL LJ 3760

sent through whatsapp messaging app are valid legal evidence under law and the blue tick over the messaging is a valid proof that the recipient read it. Mobile whatsapp and facebook chat are taken as evidence proof in the court of law. In **Suo moto writ petition (C) No. 2/2020, dated 10.7.2020** the Hon'ble Supreme Court has allowed to serve summons, notices through instant messaging services such as whatsapp, Telegram, signal.

Since mobile phone is computer the print out taken is a computer output, it requires certificate under section 65-B of the Evidence Act. However, in **Aryan Shah Rukh Khan Vs Union of India**¹⁴⁹ it has been held that such a certificate is not necessary in the stage of investigation.

22. **Memory Cards :**

Normally memory cards are the integral parts of every digital device. In P. **Gopalakrishnan Vs. State of Kerala**¹⁵⁰, it is held that contents of memory card would be a matter and it would be treated as a substance. Hence it can be treated as document.

23. **Proof of Copy of computer generated statement of account :**

Often it happens that the parties are producing computer generated account statements in order prove their money claims. The question arises as to whether certificate under section 65-B

¹⁴⁹ ADPS Bail Application No 2571 of 2021 dated 20.10.2021

¹⁵⁰ (2020) 9 SCC 161

of Evidence Act is necessary to prove the transaction. When a similar question arose in **M/s. IOCEE Exports Ltd., Chennai Vs. Mr. Moosa Ahmed (Deceased)**, the Hon'ble Madras High Court has held in Para 11 that the statement of accounts Ex.P.32 is not accompanied by a certificate certified by a person who is in charge of the operation of the relevant activities as per Section 65B of the Indian Evidence Act. Therefore, merely on the basis of some transactions and on the basis of Ex.P.32, the suit claim cannot be countenanced. In the absence of any proof with regard to the statement of accounts and any corresponding entries in the ledger and day book, the plaintiff cannot recover the entire suit amount from the defendants, merely on the basis of inadmissible document Ex.P.32.

24. **Presumption of electronic records:**

Section 81-A of Indian Evidence Act corresponding to Section 81 of Bharatiya Sakhsya Adhiniyam, 2023 deals about presumption as to genuineness of electronic records. It says that genuineness of the electronic record shall be presumed in respect of official gazette or purporting to be electronic records directed by any law to kept by any person if such record is kept substantially in the form required by law and is produced from proper custody.

25. **YouTube and Liability of Intermediary:**

It is further held that the basic function of the YouTube website permits users to "upload" and view video clips free of

charge. Before uploading a video to YouTube, a user must register and create an account with the website. The registration process requires the user to accept YouTube's Terms of Use agreement, which provides, inter alia, that the user "will not submit material that is copyrighted ... unless [he is] the owner of such rights or ha[s] permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein." When the registration process is complete, the user can sign in to his account, select a video to upload from the user's personal computer, mobile phone, or other device and instruct the YouTube system to upload the video by clicking on a virtual upload "button." The same is the procedure in Google Website. Thus, if the actual knowledge to the intermediary is proved, then intermediary cannot escape its liability. (at Para 87, **Google India Private Limited V/S Visaka Industries Limited And 2 Others**¹⁵¹).

26. **Altering computer programme or source is an infringement of copy right:**

Therefore, reading Section 2(o), (ffc) and Sections 13 and 14 together, it becomes clear that a computer programme is by very definition original literary work and, therefore, the law protects such copyright. Under Section 63 of the Copyright Act, any infringement of the copyright in a computer programme/source code is punishable. Therefore, prima facie, if a person alters

¹⁵¹ 2016 Law Suit (Hyd) 548

computer programme of another person or another computer company, the same would be infringement of the copyright.

27. Rights of the accused and digital records:

Once we deal about proof of electronic records, it is equally important that opportunity must be given to disprove it. Needless to say, right to fair trial is a fundamental right and valuable right to an accused. In **Manu sharma Vs State NCT of Delhi** ¹⁵², it has been observed in Para 220 that the right of the accused with regard to disclosure of document is a limited right but it is codified and is the foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portion which are permitted to be excluded from the document annexed to the report under Section 173(2) as per order of the court. It has been further held that right of the accused to claim documents stemmed from the sections 207, 243 and 91 CrpC. Therefore, when the prosecution proposes to rely upon the tap recorded conversation, accused is entitled to get copies of the same. In a case, the court has to proceed on the basis that the CBI proposes to rely upon the 19 CDs containing 768 calls in addition to the document listed by it in the annexure to the charge sheet. Therefore, each of the accused is entitled to be provided with copies of the 19 CDs containing the 768 calls. (**Dharambir; Jagdish Chandra; Ajay Khanna; Anand Mohan Sharan V/S Central Bureau Of Investigation** ¹⁵³).

¹⁵² (2010) 6 SCC 1

¹⁵³ 148 (2008) DLT 289

Regarding the right of the accused to get copies and fair trial, the Supreme Court in **P. Gopalakrishnan Vs. State of Kerala**¹⁵⁴ has held that it is cardinal that a person tried for serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposed to rely against him during the trial. Any other view would not only impinge upon the salutary mandate contained in the 1973 code, but also the right of the accused of a fair trial enshrined in Article 21 of the Constitution of India.

28. **CHANGING TRENDS IN LAW**

The Bharatiya Nagarika Suraksha Sanhitha provides that all the proceedings under the Act can be conducted through electronic means.

Section 2 (a) of BNSS defines "audio-video electronic means"

shall include use of any communication device for the purposes of video conferencing, recording of processes of identification, search and seizure or evidence, transmission of electronic communication and for such other purposes and by such other means as the State Government may, by rules provide;"

Section 2 (i) of BNSS defines "electronic communication"

means the communication of any written, verbal, pictorial information or video content transmitted or transferred (whether

¹⁵⁴ 2019 SCC Online SC 1532

from one person to another or from one device to another or from a person to a device or from a device to a person) by means of an electronic device including a telephone, mobile phone, or other wireless telecommunication device, or a computer, or audio-video player or camera or any other electronic device or electronic form as may be specified by notification, by the Central Government;

29. Investigation and Trial through electronic means under Bharatiya Nagarik Suraksha Sanhitha, 2023:

Section 532 of BNSS, states that all trials, inquiries and proceedings under this Code, including—

- (i) summons and warrant, issuance, service and execution thereof;
- (ii) holding of inquiry;
- (iii) examination of complainant and witnesses;
- (iv) trial before a Court of Session, trial in warrant cases, trial in summons-cases, summary trials and plea bargaining;
- (v) recording of evidence in inquiries and trials;
- (vi) trials before High Courts;
- (vii) all appellate proceedings and such other proceedings, may be held in electronic mode, by use of electronic communication or use of audio-video electronic means.

Section 173 (1)(ii) of BNSS states that information relating to the commission of a cognizable offence, may also be given by electronic communication to an officer in charge of a police station, and when such information is given by electronic communication, it shall be taken on record by the officer in charge of a police station, on being signed within three days by the person giving

information, and the substance of the same shall be entered in a book to be kept by such officer in such form as may be prescribed.

Therefore, the above provision makes it clear that an FIR can be lodged through electronic communication to the police from any place without physically going to the police station for lodging the report but, however the person who gave the report shall sign on the report within three (3) days of making such electronic communication. This was included in the BNSS recently to avoid delays in lodging the FIRs and to put the Law into motion as early as possible.

30. **Search and Seizure by electronic means:**

Section 105 of BNSS, provides that the process of conducting search of a place or taking possession of any property, article or thing under section 105 or under section 185, including preparation of the list of all things seized in the course of such search and seizure and signing of such list by witnesses, shall be recorded through any audio-video electronic means preferably cell phone and the police officer shall without delay forward such recording to the District Magistrate, Sub-divisional Magistrate or Judicial Magistrate of the first class.

This provision makes it clear that every search and seizure made by the police during investigation must be recorded through audio video electronic means.

Section 183 of BNSS recording of confessions and statements

S.183 - Any Magistrate of the District in which the information about commission of any offence has been registered, may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards but before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub- section may also be recorded by audio video electronic means in the presence of the advocate of the person accused of an offence;

Section 183 (6) (a) In cases punishable under section 64, section 65, section 66, section 67, section 68, section 69, section 70, section 71, section 74, section 75, section 76, section 77, section 78, section 79 or section 124 of the Bharatiya Nyaya Sanhita, 2023, the Magistrate shall record the statement of the person against whom such offence has been committed in the manner specified in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided also that if the person making the statement is temporarily or permanently, mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall

be recorded through audio-video electronic means preferably by mobile phone;

- (b) a statement recorded under clause (a) of a person, who is temporarily or permanently, mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 142 of the Bharatiya Sakshya Adhiniyam, 2023 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.**

Section 187 of BNSS - Procedure when investigation cannot be completed in twenty-four hours.

- (4) No Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the audio-video electronic means.**

Section 193 of BNSS - Report of police officer on completion of investigation.

- (3)(ii) The police officer shall, within a period of ninety days, inform the progress of the investigation by any means including electronic communication to the**

informant or the victim.

(8) Subject to the provisions contained in sub-section (7), the police officer investigating the case shall also submit such number of copies of the police report along with other documents duly indexed to the Judicial Magistrate for supply to the accused as required under section 230:

Provided that supply of report and other documents by electronic communication shall be considered as duly served.

Conclusion: It is known to all that the digitalization of records in all the Courts across the country has taken up. Very soon, e-filing of cases through Online and paperless Courts may come into existence in the near future. The advancement in the technology should be embraced by the judiciary to its advantage for effective justice delivery system. The communication through e-mails and Whatsapp and other modes has been accepted by the Hon'ble Apex Court. Moreover, the recent enactments like Bharatiya Nagarik Suraksha Sanhita, 2023 also emphasizes that the proceedings can be conducted through electronic means. Therefore, the judicial officers are also expected to equip with the special skills with regard to the use of electronic devices and gadgets and how the data will be stored or transferred and the mode of checking the manipulations in respect of the data and to preserve the electronic evidence safely in the Courts, so that, the valuable evidence can be preserved to render effective

justice to the parties. Therefore, all the judicial officers shall observe the changing trends in Law in respect of electronic evidence and imbibe the same in their minds as the physical documents will be replaced by electronic records within no time. Therefore, the judicial officers should possess basic knowledge of digital and electronic records and the emerging Law on the subject and adopt the changing trends.

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