THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINAL PROCEDURE, 1973

Judgment reserved on: 28.02.2013

Judgment delivered on: 22.03.2013

WP(C) 195/2013

VIJAY SINGHAL & ORS. .....Petitioners

Vs

GOVT. OF NCT OF DELHI & ANR. .....Respondents

ADVOCATES WHO APPEARED IN THIS CASE:
For the Petitioner: Ms Meenakshi Lekhi, Mr Harish Pandey & Mr Jitendra Kr. Tripathi, Advocates.
For the Respondents: Mr Dayan Krishnan, ASC with Ms Manvi Priya, Advocate.

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. 16 December, 2012 once again heightened the sense of insecurity which women of this city and perhaps in most parts of this country carry in their sub conscious mind. A young lady was raped and mauled in a moving bus and left to die on the street, without a stitch of cloth on herself. Her companion was brutalized and beaten when, he attempted to intervene.

2. The news of this heinous and dastardly act spread like wild fire. There was revulsion and disgust at the sheer bestiality of the act.

3. People spilled out on roads, in spontaneous groups. Some came to express solidarity with the young lady (who at that point of time was battling for her life), some to express their disapproval at the ineffectiveness of the State apparatus and others to exhort the administration, to deal sternly with the perpetrators of the crime.

4. There were impassioned debates on these and various other aspects, connected with crime against women in the print and electronic media. The social media was not far behind. Views were expressed by all and Sundry, from the experts to lay people. Views ranged from opinions on what should have been done, to what ought to have been done. An already complex debate went into a free fall when it was discovered that one of the accused may be a juvenile.

4.1. Fortunately, the accused were caught in quick time. A Commission of Enquiry was set up with an eminent jurist Chief Justice J.S. Verma (Retd.) at its head followed by another Commission headed by Ms.Usha Mehra, a retired Judge of this Court. Since then the J.S. Verma Committee has submitted its recommendations to the Government of India, as a consequence of which an ordinance has been passed. The Government of India is mulling over a draft Criminal Law (Amendment) Bill of 2013. This Court also lent its shoulder to the issue, by setting up Fast-track Courts to deal with cases of sexual offences against women.

5. The debate is on, to lower the age of juveniles in conflict with law. Strident voices heard on television and, views expressed through print media, debate : as to how the Juvenile Justice Act, 2000 (as the JJ Act) should be interpreted and how such interpretation would render JJ Act inapplicable, to such like crimes.

5.1 It is professed in some quarters that in the very least the JJ Act should be amended to either lower the age of juvenility or exclude such like crimes, committed by juveniles, from the purview of the JJ Act.

5.2 There is a contra view as well, which cautions against a knee-jerk reaction. This Section of the populace seeks status quo on JJ Act, advises against awarding death penalty to rapists or punishment of castration, whether chemical or otherwise; categorising such punishments as degrading and inhuman.

6. Both, the discourse as well as debate is on. There is, thus, undeniably a huge public interest in the prosecution of the case. With the victim dead, (she lost her battle for survival on 29.12.2012 in a Singapore Hospital),

committal proceedings over and the accused charged; the trial has commenced. The six accused before the trial Court and eighty (80) witnesses, the prosecution wishes to examine; the Police; the Prosecutor; and the Court; are in the public gaze. As one speaks, one of the accused has died in custody.

7. With this background, to deny, that there is a seering public interest in the prosecution of the case, would be to act like an ostrich, whose head is buried in sand. But then, law made by Parliament which has the will of the very same people behind it, who seek access to Court proceedings, should ride this tumultuous phase.

8. The question is, therefore, what is the law on the subject. Section 327 of the Code of Criminal Procedure, 19731 (hereinafter referred to as Cr.P.C.) provides in the first instance for an open trial which, is caveated with a directive that, in a case involving rape, trial "shall" be held in camera. Simultaneously, it confers jurisdiction on the Court to either, on its own, or on an application of parties, allow access to any particular person of their choice.

9. The Court is also conferred with the discretion to lift the ban on reporting.

10. Therefore, the questions which come to fore are:-
(i) Is open trial, a rule?
(ii) Does Sub Section (2) of Section 327 of Cr.P.C., which provides for an in camera trial in a rape case, envisage access? If so, in what manner?
(iii) What are the factors to be kept in mind when, a Court decides to exercise its power under Section 327 (2) of Cr.P.C.

11. Before I proceed further with regard to the issues raised in the writ petition, it may be relevant to sketch out briefly the background circumstances adverted to in the writ petition and the submissions of the counsels for both sides.
11.1. As indicated above, the incident of gang rape occurred on 16.12.2012. Consequently, an FIR bearing no.413/2012 was registered, initially, under Section 376 of the Indian Penal Code, 1860 (in short IPC).
11.2. The victim was given treatment in a local hospital in the city. On her condition deteriorating, she was removed for treatment to a hospital in

Singapore. The victim, as indicated above, succumbed to her injuries, on 29.12.2012.

11.3 On completion of investigation, a chargesheet was filed by the State with the Metropolitan Magistrate, South District, Saket, New Delhi (in short the Magistrate).

11.4 It appears, since the prosecution somehow failed to advert to the provisions of Section 302 of the IPC, in the chargesheet; an application was moved to rectify the error. Apparently, this application was allowed.

11.5 Evidently, on 05.01.2013, an advisory was issued by the Public Relations Officer, of the Delhi Police advising people at large that since the Magistrate had taken cognizance of the chargesheet filed in FIR No.403/2012, with PS Vasant Vihar, on 05.01.2003, the provisions of Section 327(2) and (3) of the Cr.P.C. had got triggered, as cognizance had been taken under the provisions of Section 302 and Section 376(2)(g) of the IPC. In other words, the advisory indicated that, it would not be lawful for any person to print or publish any matter in relation to such proceedings except with the previous permission of the Court.

11.6 Apparently, on 07.01.2013, an application was moved by some, amongst the Petitioners, to seek permission of the learned Magistrate to report on the case. It is the say of the Petitioners that, the learned Magistrate refused to entertain the application on the short ground that no order had been passed by the Court, in that behalf. The application filed though, is not on record.

11.7 It is averred though: that it is the Respondents who were responsible for creation of an unruly situation by failing to regulate the ingress of persons to the Court premises; a situation which resulted in the learned Magistrate passing the impugned order.

11.8 In the order dated 07.01.2013, which was apparently passed at 2.00 p.m., the learned Magistrate noted that the accused, who were in judicial custody, and had been brought to Court from the Central Jail, Tihar, pursuant to a production warrant, could not be produced as the Lockup-Incharge was not assured of a safe passage for the accused. The apprehension of the Special Public Prosecutor, that the safety of the undertrials was an issue, was also noted by the learned Magistrate.

11.9 Having regard to the aforesaid, the learned Magistrate invoked the provisions of Section 327(2) and (3) of the Cr.P.C. The specific observations made and directions issued in this behalf are as follows :-

"…Keeping in view the situation which is arisen in the present case, making it impossible to proceed with the Court proceedings, I am invoking section 327(2) and (3) Cr.P.C. The proceedings in this case will from now on

proceed u/s. 327(2) Cr. P.C. i.e., the inquiry and the trial shall be held in camera. Hence, all the public persons and everybody who is present in the Court room unconnected with this case are directed to clear the Court room and also the passage from the judicial lockup till the Court room in order to ensure safe passage of the accused persons and also in order to enable the Court to proceed.

I am also invoking provision u/s. 327(3) Cr.P.C. at the request of ld. Special Public Prosecutor for the State. It shall not be lawful for any person to print or publish any matter in relation to the proceedings in this case except with the permission of the Court…"

11.10. It appears that, a Criminal Revision Petition was preferred by two Advocates, namely, one Ms. Poonaj Kaushik and Mr.D.K. Mishra, in their personal capacity, before the District & Sessions Judge, which was dismissed by order dated 09.01.2013.

12. It is in the background of these facts that, the present writ petition was moved for the first time on 11.01.2013. Notice was issued on the said date. At that stage, it was made clear by me, that no interim orders could be passed and that pendency of proceedings would not come in the way of the committal proceedings, which at that point in time, were pending before the learned Magistrate. It was, however, left to the discretion of the Metropolitan Magistrate to examine the manner in which proceedings would be recorded at the end of each day. The notice was made returnable on 13.02.2013.

13. On 13.02.2013, the Respondents sought time to bring their counter affidavit on record. The learned counsel for the Respondents also informed the Court that in the meanwhile, an order had been passed by the Additional Sessions Judge (Special Fast Track Court), Saket, New Delhi (in short ASJ) dated 21.01.2013, taking the same view as that which was taken by the learned Magistrate, in order dated 07.01.2013.

14. It appears that the learned ASJ passed a separate order on 21.01.2013, pursuant to an application dated 17.01.2013 being filed by one, Swami Omji, purported founder and Chairman of Sexual Rape Victims Federation. By this application, a prayer was apparently made to lift the ban imposed by the learned Magistrate to hold proceedings in camera as also with respect to publication of matters pertaining to FIR No.413/2013. This application is

also not on record, though a reference to the same is made in the order dated 21.01.2013, passed by the learned ASJ.

15. Consequently, an application being : CM No.2557/2013 was filed, seeking to amend the writ petition. The said application was allowed by order dated 28.02.2013, as the amendments sought were formal in nature, and were not opposed by the Respondents. Since, the Respondents did not wish to file a fresh counter affidavit and were desirous of having the counter affidavit already filed as being read in opposition to the amended writ petition, arguments in the matter were heard.

SUBMISSIONS OF THE COUNSELS

16. On behalf of the Petitioners, arguments were advanced by Ms. Meenakshi Lekhi, while on behalf of the Respondents, submissions were made by Mr. Dayan Krishnan.

16.1 Ms. Lekhi broadly made the following submissions :-

(i). The Petitioners seeking access to Court proceedings are responsible senior correspondents of both print and electronic media. The ghastly incident came to light because of the intercession and involvement of the media.

(ii). The advisory dated 05.01.2013 was issued at 09.00 p.m. on the said date by the Respondents to cover up their inadequacy. The Respondents had failed to advert to the provisions of Section 302 of the IPC which was brought to light by the correspondens. The power to issue a direction under Section 327(2) and (3) of the Cr. P.C. vests with the Court and not with the Respondents.

(iii). The primary object of Section 327 of the Cr. P.C. is to provide for a fair trial in an open Court which would safeguard the right of the accused to be tried fairly and hence, advance the cause of justice.

(iv). Sub Sections (2) and (3) of Section 327 of the Cr. P.C. were brought onto the statute book by virtue of Criminal Law (Amendment) Act, 1983 (in short 1983 Act) with the object of protecting the dignity of a rape victim and to enable the victim to depose comfortably in surroundings which she may not be too familiar with. The essence of the provision being to improve the quality of evidence brought forth by the prosecutrix i.e., the victim.

(v). In view of the fact that, in the instant case the victim has died, the provisions of Section 327(2) and (3) would have no applicability. Both the advisory and the impugned order dated 07.01.2013 and 21.01.2013 issued by

the learned Magistrate and learned ASJ violate the fundamental rights of the Petitioner under Article 19(1)(a) and 21 of the Constitution of India. The impugned advisory and the orders of the Court below amount to a gag order, which is an anti-thesis to the principle that Court trials should be held in public gaze, to which, public should have access.

(vi). The Media has acted with due responsibility and restraint despite the fact that the name of the victim and her family members is in public domain. The media applied self-restraint, even prior to the impugned advisory and / or orders issued in that behalf by the Respondents and Courts below, respectively. The fact that the victim's name is in public domain was sought to be established, by drawing my attention to the affidavit dated 04.02.2013, apparently filed by the father of the victim with the South Delhi Municipal Corporation so that they could dedicate a park or a school or any other welfare institution or a scheme to the memory of the victim.

(vii). To buttress her submission, Ms. Lekhi also pointed to the fact that, the sole eye witness to the crime had appeared on television and given his version of the events as they transpired on the fateful day.

(ix). It was further contended that because the media highlighted the case, both this Court as well as the Supreme Court, commenced suo motu proceedings; albeit qua other aspects involving the same crime.

(x). The provisions of Section 327 cannot be used to cover the inadequacy of the State, in particular those of the police.

(xi). A blanket ban is illegal. Reasonable restrictions can be imposed, where for example testimony of one witness may affect the testimony of another witness. The Court, while passing the impugned order, failed to apply the test of "necessity" and "proportionality", adverted to, by the Constitution Bench of the Supreme Court in the case of Sahara India Real Estate Corporation Limited and Ors. Vs. Securities and Exchange Board of India and Anr., (2012) 10 SCC 603.

(xii). The Court was required to balance the two competing rights, that is, the right of the public to know and have access to Court trials as against right of the victim's family and that of the accused to confidentiality. In the instant case, neither the family of the victim nor the accused has sought in camera trial, and instead, in camera trial, is sought by the State.

(xiii). If access is granted to the Petitioners, they would abide by the principle of confidentiality qua the name of the victim and her family members and also adhere to any reasonable restrictions imposed by the Court from time to time in the interest of prosecution of the case and the endeavour of the Court to reach a just conclusion in the matter. In support of her submissions, reliance was also placed on the following judgments :-

Naresh Shridhar Mirajkar and Ors. Vs. State of Maharashtra and Anr., AIR 1967 (54) SC 1, Trilochan Singh Johar and Anr. Vs. State and Anr. 98 (2002) DLT 228; In Re Vijay Kumar (1996) 6 SCC 466; Kehar Singh and Ors. Vs. State (Delhi Administration), AIR 1988 SC 1883.

17. On the other hand. Mr Dayan Krishnan, on behalf of the Respondents made the following submissions in opposition to the contentions raised on behalf of the Petitioners.

(i) The writ petition was not maintainable. The Petitioners instead of approaching this Court by way of a petition under Article 226 of the Constitution of India, ought to have either filed a revision petition under Section 397 or a petition under Section 482 of the Cr.P.C.;

(ii) The provisions of Section 327(2) of the Cr.P.C. mandates that an inquiry as also a trial in respect of an offence of rape should be carried out in camera. The accused in this case are inter alia charged with offences under Section 376(2)(g) and Section 377 of the IPC. In respect of this proposition reliance was placed on two judgments of the Supreme Court: State of Punjab vs Gurmit Singh (1996) 2 SCC 384 and Sakshi vs Union of India and Ors. 2004 (5) SCC 518. In addition, reference is also made to the 84th report of the Law Commission pursuant to which Sub Sections (2) & (3) were incorporated in Section 327 of the Cr.P.C. in addition to, the insertion of Section 228A in the IPC;

(iii) To emphasise the point, that the in camera trial was mandatory while trying cases pertaining to sexual offences, reliance was placed on the directions passed by the Supreme Court in Sakshi's case, whereby it is now declared that the provisions of Section 327(2) of the Cr.P.C. would, in addition, apply even in respect of an inquiry and/or trial of offences under Section 354 and 377 of IPC.

(iv) The right of the media to report Court proceedings is not an absolute right, which is why, Sub Section (3) of Section 327 of Cr.P.C. makes it unlawful for any person to print or publish any matter in relation to proceedings where section 327(2) has been triggered.

(v) Since the Petitioners have not challenged the constitutional vires of Section 327(2) of Cr.P.C., the Petitioners are required by law to comply with the orders passed by the Court below. This argument was sought to be supported, once again, by relying upon extracts from the 84th report of the Law Commission.

(vi) The object of a trial is to meet the ends of justice, and if, in order to achieve that end there is a competition, in a manner of speaking, between the

right to a free trial as against the right to freedom of expression, the former would trump the latter. In respect of this proposition reliance was placed on the judgments of the Supreme Court in Mirajkar's case and the Sahara's case.

(vii) The judge, presiding over the trial, has the power under Section 327 of the Cr.P.C. to regulate access in any given case depending on the circumstances and atmosphere prevailing in the Court. This right is vested in the presiding Judge or Magistrate statutorily by the proviso to Sub Section (1) of Section 327 of the Cr.P.C. The fact that the presiding judge has discretion even in circumstances where order is passed, under Sub Section (2) of Section 327 of the Cr.P.C., is apparent on a reading of the first proviso to Section 327(2) and the proviso to Section 327(3) of the Cr.P.C. This discretion would naturally be exercised in the light of facts and circumstances obtaining in each case. The Courts below have taken the necessary circumstances into account, while passing orders under Section 327(2) of the Cr.P.C.

(viii) The media had been repeatedly cautioned against excessive publicity, in cases where it has led to interference in administration of justice. Reliance in this regard was placed on the judgment of the Supreme Court in Sidhartha Vashisht alias Manu Sharma vs State (NCT of Delhi) 2010 (6) SCC 1 as also the judgment of the Supreme Court in the Sahara's case and the judgment of the Bombay High Court, in the case of, Mustaq Moosa Tarani vs Govt. of India dated 31.03.2005 passed in WP(C) 269/2005.

(ix) Publication of information in respect of trials which are ordered to be held in camera tantamounts to contempt of Court under the provisions of Section 7 of the Contempt of Courts Act, 1971.

(x) There was no illegality in the Delhi Police issuing the impugned advisory since, Section 327 (2) and (3) of the Cr.P.C. are mandatory in nature and no specific order is required to be issued by the trial Court in this behalf. The advisory was issued as a measure of "Courtesy" to the media, as violation of the provisions of Section 327(2) and (3) of the Cr.P.C., would require the police to register FIRs under Section 228A of the IPC.

(xi) The provision in Sub Section (2) of Section 327 of the Cr.P.C. which mandates in camera trial is not unique to this particular statute, as there are several other statutes which provide for in camera trial. Reference in this regard was made to Order 32A Rule (2) of the Code of Civil Procedure, 1908 (in short CPC); Section 22 of the Hindu Marriage Act, 1955; Section 43 of the Parsi Marriage and Divorce Act, 1936; Section 33 of the Special Marriage Act, 1954; Section 11 of the Family Courts Act, 1984; Section 16 of the Protection of Women from Domestic Violence Act, 2005; Section 22

(eeee) of the Mental Health Act, 1987; Section 237(2) of the Cr.P.C. in respect of prosecution of defamation under Section 199(2) of the Cr.P.C.; Section 265B(4) in a case involving plea bargaining; Section 17 of the National Investigation Agency Act, 2008; Section 36AJ of the Banking Regulation Act, 1949; Section 52 M of the Insurance Act, 1938; Section 17 of the State Bank of India (Subsidiary Banks) Act, 1959. Reference was also placed to statutes of other nations as well as international covenants and treaties to emphasise the point that exclusion of media in order to ensure fair trial was not peculiar to India. Reliance in this behalf was placed on the Sexual Offences (Amendment) Act, 1992; Youth Justice and Criminal Evidence Act, 1999; Sexual Offences Act, 2003 which amended Section (2) of the Sexual Offences (Amendment) Act, 1992 whereby the array of offences in respect of protection of the identity of the victim was widened; Section 41 of the Criminal Procedure and Investigation Act, 1996; Judicial Proceedings (Regulation of Reports) Act, 1926; Section 8 and 8C of the Magistrate Courts Act 1980; Part 16 of the Criminal Procedure Rules, 2012; Section 46 of the Youth Justice and Criminal Evidence Act, 1999; Section 8(1)(d) of the Court Suppression and Non-Publication Orders Act, 2010 No.106 of New South Wales; Article 68 of the Rome Statute of the International Criminal Court; Article 14 and 19 of the International Covenant on Civil and Political Right (ICCPR); Article 10 of the European Convention on Human Rights; Siracusa Principles on the Limitation and Derogation provisions in the ICCPR; the Madrid Principles on the Relationship between the Media and Judicial independence. In addition, the Canadian position was sought to be explained by referring to the following publication: The Canadian Justice System and the Media by the Canadian Judicial Council and the judgment of the Canadian Court in Dagenais v. Canadian Broadcasting Corporation and National Film Board of Canada (1994) 3 S.C.R. 835 (Per Lamer C.J.C., at p. 878).

18. The sum and substance of Mr Dayan Krishnan's submission was that the impugned orders have been passed taking into account the sensitivity of the case, the safety of the accused and the concern of the Court to maintain anonymity qua the identity of the victim, her family, as also, the accused. These concerns, according to Mr Dayan, outweighed the right of the media conferred under Article 19(1)(a) of the Constitution of India.

REASONS

19. The issues raised in the present case quite undeniably not only paint a wide canvas, but also demonstrates the increasing awareness of the citizenry to know, how the three principal organs of the State are functioning. These being: the Executive, the Legislature and the Judiciary, represented by Courts. For the citizenry to know the health of the State organs, which operate in their own well defined orbits, i.e., jurisdictional space, it requires a surrogate, which is, the media. It is, therefore, for good reason, that this medium of access, available to the public at large, is called the Fourth Estate.

20. It is for this reason that open trial is a rule, and wherever exceptions are carved out, they are made only to secure the ends of justice. The Courts as an institution have for ages now, in most democracies across the world followed the principle of open trials fundamentally to provide for itself the moral authority, which has the backing of the Will of the people in the form of the Constitution or otherwise, to decide the fate of people whose cases are brought before it for adjudication. It may sound clichéd but it is true, a Court enhances and secures authority for itself by functioning in full public glare, as it neither has the power of the purse nor the sword of the State, to lend support to its core area of work, which is adjudication.

21. Therefore, it cannot be argued in this day and time that open trials are not the rule. This fundamental principle is recognized by our Courts as also the Supreme Court in judgment after judgment, including judgments cited before me, i.e., the Naresh Mirajkar case, the Sahara case and the Kehar Singh case. Reference may also be made to :-

Cora Lillian Mc Pherson Vs. Oran Leo Mc Pherson, AIR 1936 PC 246 at page 250; Kailash Nath Agarwal Vs. Emperor, AIR 1947 (34) Allahabad 436, Prasanta Kumar Mukherjee Vs. the State, AIR (39) 1952 Calcutta 91 and In Re M.R. Venkataraman, AIR (37) 1950 Madras 441.

22. On the aspect of the importance of a public trial, the observations of Mr Justice Jagannath Shetty (as the then was) in Kehar Singh's case are most apposite. It would be important to remind ourselves that the Supreme Court in that case was dealing with a case which involved the assassination of a sitting Prime Minister of this country, i.e., late Mrs Indira Gandhi, and on an appeal preferred by the accused against their conviction by this Court, one of the preliminary question which the Court was to called upon to deal with was: whether shifting of the trial of the case to Tihar Jail impeded a public trial, which was contemplated under Section 327 (1) of Cr.P.C. Though the Court went on to hold that the mere fact that trial in that case was held in

Tihar Jail, could not be construed as not being a trial open to public in the facts which emerged in that case, it emphasised the importance of a public trial. While doing so, it touched upon various facets which emanate in the course of a public trial, and thus, highlighted its importance qua public at large. Though the discussion on this aspect begins from paragraph 177 of Mr Justice Jagannanath Shetty's judgment, I may only extract some of the observations which are instructive and relevant for the purposes of this case:

"….186. It may now be stated without contradiction that jail is not a prohibited place for trial of criminal cases. Nor the jail trial can be regarded as an illegitimate trial. There can be trial in jail premises for reasons of security to the parties, witnesses and for other valid reasons. The enquiry or trial, however, must be conducted in open Court. There should not be any veil of secrecy in the proceedings. There should not even be an impression that it is a secret trial. The dynamics of judicial process should be thrown open to the public at every stage. The public must have reasonable access to the place of trial. The Presiding Judge must have full control of the Court house. The accused must have all facilities to have a fair trial and all safeguards to avoid prejudice.

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192. The main part of Sub-sec(1) embodies the principle of public trial. It declares that the place of inquiry and trial of any offence shall be deemed to be an open Court. It significantly uses the words "open Court". It means that all justice shall be done openly and the Courts shall be open to public. It means that the accused is entitled to a public trial and the public may claim access to the trial. The Sub Section however goes on to state that "the public generally may have access so far as the place can conveniently contain them". What has been stated here is nothing new. It is implicit in the concept of a public trial. The public trial does not mean that every person shall be allowed to attend the Court. Nor the Court room shall be large enough to accommodate all persons. The Court may restrict the public access for valid reasons depending upon the particular case and situation. As Judge Cooley states (Cooley's Constitutional Law, Vol. I, 8 Ed. 647):

It is also requisite that the trial be public. By this is not meant that every person who seems fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where regard for public morals and public decency would require that at least the young be excluded from hearing and

witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility into the importance of their functions and the requirement is fairly observed if, without partiality or favouritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.

193. The proviso to Sub Section (1) of Section 327 specifically provides power to the Presiding Judge to impose necessary constraints on the public access depending upon the nature of the case. It also confers power on the Presiding Judge to remove any person from the Court house. The public trial is not a disorderly trial. It is an orderly trial. The Presiding Officer may, therefore, remove any person from the Court premises if his conduct is undesirable. If exigencies of a situation require, the person desiring to attend the trial may be asked to obtain a pass from the authorised person. Such visitors may be even asked to disclose their names and sign registers. There may be also security checks. These and other like restrictions will not impair the right of the accused or that of the public. They are essential to ensure fairness of the proceedings and safety to all concerned.

194. So much as regards the scope of public trial envisaged under Section 327(1) of the code. There are yet other fundamental principles justifying the public access to criminal trials: The crime is a wrong done more to the society than to the individual. It involves a serious invasion of rights and liberties of some other person or persons. The people are, therefore, entitled to know whether the justice delivery system is adequate or inadequate. Whether it responds appropriately to the situation or it presents a pathetic picture. This is one aspect. The other aspect is still more fundamental. When the State representing the society seeks to prosecute a person, the State must do it openly. As Lord Shaw said with most outspoken words {Scott v. Scott: 1913 A.C. 417:

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. “In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.” “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under

trial". "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise...."
(emphasis supplied)

22.1 It may also be important to note that the Court in that case closely examined the records of the Court to see as to whether those who were desirous of attending the trial were allowed to attend the trial, subject to permission and adherence to regulatory measures, put in place. It was also noticed that members of both domestic and international press, who approached the trial Judge were granted permission to cover the proceeding. As a matter of fact, even law students were allowed to witness the trial though in batches. (See paragraphs 197 to 202).

22.2 That there are exceptions to the rule of open trial, is also no longer in doubt. It is recognized by the Supreme Court in Naresh Mirajkar's case that in order to secure the ends of justice, a Court has the right to order in camera trials whether wholly or in part. This was the law which has prevailed in this country for several decades. What is, therefore, to be examined in this particular case is: whether the statute provides for something which was not already the declared law on the issue.

22.3 Sub Section (1) of Section 327 of Cr.P.C2. clearly mandates an open trial. It encapsulates the Statutory Will, which is, that the place in which any criminal Court holds an inquiry or tries an offence, shall be deemed to be an open Court, to which public would generally have access subject to constraints, if any, of space. The proviso to Sub Section (1), undoubtedly, confers a discretion on the Court to exclude the public or any particular person from access to a proceeding, room or the building in which the Court is housed. The emphasis on judicial discretion and manner in which it is to be employed is best described in the observation made in Kailash Nath Agarwal and Anr. Vs. Emperor A 1947 ALL 436 at page 489. Also see

Nathusing Vs. Emperor, (1925) 26 Cri. LJ 1130. In Kailash Nath, Justice Malik observed :-

"..22. I cannot lightly brush aside the complaint that was made to me, while I was receiving applications, by more than one senior counsel, practicing in this Court, of the treatment that they had received while they were engaged to do their duty in defending their clients. Everyone of them complained that there was inordinate amount of delay outside the jail and inside the jail; the learned Magistrate failed to realize that he must, as far as possible, try to reproduce the atmosphere of a Court room. The learned Magistrate may have been compelled to hold his inquiry inside the jail by reason of the Standing Order mentioned by the District Magistrate in his order rejecting the application for transfer. I can find no provision in the Criminal Procedure Code which compels a Magistrate to hold his Court in the usual Court room. Section 352 Cr.P.C.3, probably contemplates that a Magistrate can hold his Court anywhere he likes. The Standing order cannot bind the learned Magistrate in his judicial capacity, but as both the Executive and the judicial functions are not separated, the executive order directing the Magistrate to hold his Court inside the jail is probably binding on him. But the learned Magistrate, wherever he may be compelled to sit by executive orders, is bound by the provisions of section 352 Cr.P.C., and he must realize that the place where the trial is held must be something that an open Court to which the public generally may have access so far as the same can conveniently contain them. The discretion to exclude the public generally or any particular person at any stage of any inquiry or trial must be a judicial discretion exercised by him. I am laying emphasis on this point because, to my mind, if the Magistrate is compelled to hold a trial in jail, then the jail must become something like an open Court where any member of the public may have a right of access, if the room in which the trial is being held can conveniently contain him and unless the learned Magistrate, for reasons which he must, to my mind, record, decides to exclude the public or any particular person. In a jail the Magistrate must himself be subject to the jail rules and subject to the authority of the officer in charge of the jail, and though in theory, if the public is given free access, I can see no objection to a trial being held in jail, in practice I do not think it is possible, unless the jail rules make provision for such enquiries or trials in jail when any member of the public may have a right to attend.
(emphasis supplied)

23. In A.I.R. 1917 Lah. 311 where the trial was held in jail, it was argued that it was vitiated on that account. The learned Judge observed :

"There is nothing to show that admittance was refused to any one who desired it or that the prisoners were unable to communicate with their friends, or counsel. No doubt it is difficult to get counsel to appear in the jail and for that reason if for no other such trials are usually undesirable, but in this case the executive authorities were of the opinion that it would be unsafe to hold the trial elsewhere."

I am, however, of the opinion, with great respect to the learned Judge, that it is not necessary for the accused to prove that any person who actually desired admittance was refused. It is for the prosecution to satisfy the Court that any person who desired to attend could do so and there was no prohibition against his admittance.

24. It is well established in England that every Court of justice is open to every subject of the King and that a right to an open trial is one of the cherished rights of the subject. It is not necessary for me to give a historical survey of how the right has grown, but the point has now been settled by a decision of the House of Lords in 1913 A. C. 417 where it was emphasized that even in a case where the parties had agreed that a case may be heard in camera, a Judge would have no right to exclude the public, except in some special class of cases, unless the parties agreed to appoint him an arbitrator and to hear the case as such. Those special cases are : wardship and relation between the guardian and ward, and secondly the care and treatment of lunatics. A third ground was mentioned by Viscount Haldane, L.C., that if it was strictly necessary for the attainment of justice and the Court was satisfied that by noting short of the exclusion of the public it is possible to do justice, can a judge decide to sit in camera. Even this ground was not accepted by the Earl of Halsbury who though that this would be leaving the matter too much to the discretion of individual Judges, who might think that in their view the paramount object of the administration of justice could not be attained without a secret hearing. It is not necessary for me to go into this question further as, unlike the law in England, the Criminal Procedure Code in India gives a Criminal Court a right to exclude the public generally or any particular person, but this being an exception to a very well settled rule, to my mind, the Magistrate must record his reasons for doing so if he decides to exclude either the public or a section of the public; and it must be understood that it is a matter within the judicial discretion of the Magistrate

himself and not a matter about which he can be controlled by executive orders.

25. Though, therefore, I am of the opinion that it was not illegal for the learned Magistrate to hold the enquiry in jail or anywhere else, the learned Magistrate must realize that the place where the enquiry is held must be deemed to be an open Court where the public as such have a right to attend and that such right may be controlled in a proper case on special grounds by the Court and not by the jail rules or by the officer incharge of the jail. If the Magistrate cannot have the absolute right to regulate proceedings at the place where he is holding trial, he ought not to hold the trial or the enquiry at such a place.

22.4 The principle of open trial was altered with the Criminal Law (Amendment) Act of 1983 with respect to inter alia an inquiry or trial of an offence of rape and allied offences. Pursuant to the recommendations of the Law Commission made in its 84th report and Sub Section (2) alongwith the first proviso and Sub Section (3) were inserted, while the earlier provision was re-numbered as Sub Section (1).
22.5 While, Sub Section (2) begins with a non-obstante clause, and thus, goes on to state that an inquiry into a trial of rape and allied offences, “shall be conducted in camera”, Sub Section (3) of Section 327, makes it unlawful for any person to "print" or "publish" any matter in relation to any such proceedings save and except with the previous permission of the Court.
22.6 Both Sub Section (2) and (3) of Section 327 are followed by two vital provisos. The first proviso in Sub Section (2) confers a discretion on the Court to allow access to or, be or, remain in the room or building in which the Court is housed, to any particular person either on its own or, on an application moved by either party. Similarly, the proviso to Sub Section (3) confers a discretion on the Court to lift the ban on printing or publishing of trial proceedings, in relation to a proceeding of rape, subject to maintenance of confidentiality of the names and addresses of the parties.

23. Having regard to the fact that open trial, (which is based on the principle that sunlight is the best disinfectant), is both a shield and a sword, in a manner of speaking, available to the Court to protect itself from baseless and scurrilous rumours of having done a hatchet or a shoddy job based on extraneous influence - it is a weapon which only the Court can wield.
23.1 There is, to my mind, intrinsic evidence with regard to the same in the form of the provisos inserted in Sub Section (2) and (3) of Section 327. The

Court is the best judge of how it is to regulate its proceedings, keeping in mind its polestar that, its discretion to exclude or regulate access to Court proceedings is to be exercised only in the best interest of administration of justice.

23.2 Having regard to the above, in my opinion, the State had no business to issue an advisory in that behalf. Therefore, the argument of Mr Dayan Krishnan that the advisory was issued by the police only as a measure of "Courtesy" to the media, is completely untenable, keeping in mind the statutory purpose and the manner in which Courts are required to function. By such an action, the State in a sense sought to usurp the discretion which was vested entirely in the Court.

24. In order to appreciate why such a discretion was conferred on the Court, in respect of inquiry and/or trial into an offence of rape, one would have to advert to the recommendations of the Law Commission contained in its 84th report. Suffice it to say, the recommendations quite clearly provided for exception being made to the general rule of public trial based on its concerns qua the following, in cases involving sexual offences: (i) narration of intimate details in the course of trial; (ii) embarrassment to the victim in the event, narration of the incident is made in full public glare, which may affect the quality of evidence; (iii) the burden which the complainant and the accused are required to discharge in a case involving commission of sexual offence, which infuses "a real risk of Court room defamation repeated in the press"; and (iv) lastly, the stigma which is attached to the accusation of rape which may follow the accused years after his acquittal leading to "unpleasant", "humiliating" and "embarrassing" experience.

24.1 As regards publication of names of victim and the accused, in cases involving charges of rape, the Law Commission considered the issue both from the point of view of victim and the accused at the stage of investigation and trial. In so far as anonymity of the victim and the accused at the stage of investigation was concerned, it left it to the good sense of "journalistic profession", while qua trial, in relation to rape and other allied offences insertion of a new provision, i.e., Section 228A, was recommended. The relevant extracts of the Law Commission report in respect of the changes to be brought about in Section 327 of the Cr.P.C. as it was then obtaining, were as follows:

"...5.7 In the light of the above discussion, a specific proviso should be added to Section 327 of the Code of Criminal Procedure, as under: -

proviso to be added to section 327 of the Code of Criminal Procedure, 1973.

"Provided further that unless the presiding judge or magistrate, for reasons to be recorded directs otherwise, the inquiry into and trial of rape or allied offence shall be conducted in camera.
Explanation - In this Sub Section, the expression 'rape or allied offence' applies to -
(a) an offence punishable under section 354 or section 354A of the Indian Penal Code;
(b) an offence punishable under section 376, section 376A, section 376B or section 376C of that Code;
(c) an attempt to commit, abetment of or conspiracy to commit any such offence as is mentioned in clause (a) or (b) of this Explanation.
Further, the following Sub Section should be added to section 327:-
Sub Section to be added to section 327, Code of Criminal Procedure, 1973 after re-numbering present section of Sub Section (1).
"(2) Where any proceedings are held in camera, it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the Court...."
.....
.....

Section 228A, IPC
(to be inserted)

"228A. Where, by any enactment for the time being in force, the printing or publication of any matter in relation to a proceeding held in a Court in camera is declared to be unlawful, any person who prints or publishes any matter in violation of such prohibition shall be punished with fine which may extend to rupees one thousand."

24.2 It is interesting to note that even though the recommendation of the Law Commission did not provide for the insertions of a proviso, a proviso was nevertheless was introduced in the statute. The first proviso to Sub Section (2) introduced at the time of enactment of the Criminal (Amendment) Act 1983.
24.3 The second proviso to Sub Section (2) of Section 327, which provides for in camera trials to be conducted, as far as practicable by a woman judge or a Magistrate, was as a matter of fact introduced by Act 5 of 2009 w.e.f. 31.12.2009.
24.4 Similarly, the proviso to Sub Section (3) of Section 327, which provides that the ban on printing and publication of trial proceedings in relation to an offence of rape may be lifted subject to maintenance of

confidentiality of name and addresses of parties, was also introduced by the same Act, i.e., Act 5 of 2009 w.e.f. 31.12.2009.

24.5 A perusal of the recommendations would show that in certain respects the legislature went beyond the recommendations of the Law Commission, while in other aspects it held back.

24.6 The legislature, under Sub Section (2) of Section 327 widened the scope by encapsulating within its realm even the stage of inquiry and not just the trial of offence of rape and other allied offences. The legislature further widened the scope by allowing access to the proceedings or for grant of permission to any particular person to remain in the room or the building in which the Court is housed, by inserting a proviso to that effect in Sub Section (2) of Section 327. As indicated above, as a matter of fact, in 2009 the legislature has gone further by conferring upon the Court, the discretion to lift the ban on printing and publication.

24.7 In so far as the recommendation of the Law Commission was concerned, on the aspect of extension of anonymity both to the victim as well as the accused, the legislature held back by according protection only to the victim.

24.8 Therefore, a composite and a close reading of the provisions of Section 327 of the Cr.P.C. clearly, in my view, point to the fact:

(i) that the general principle of open public trial is a rule, which ought not to be disturbed except in exceptional circumstances;

(ii) under proviso to Sub Section (1) of Section 327, it is the Court which is empowered to exclude the public generally or any particular person having regard to the facts and circumstances of each case. For example, where the case involves examination of say indecent material which could embarrass women and children, if present in Court; the Court could ask for their exclusion.

(iii) even with offences involving rape and other allied offences, referred to in Sub Section (2) of Section 327, there is discretion vested in the Court to grant access to any particular person or persons based on the Presiding Judge's wisdom or on an application of any of the parties. It is not as if the use of the word 'shall' in the main part of Sub Section (2) of Section 327, has emasculated the Presiding Judge of his/her discretion in the matter.

(iv) The fact that there is discretion vested in the Judge to permit printing or publication of trial proceedings, is evident both on a plain reading of the provisions of Sub Section (3) of Section 327 alongwith the proviso.

25. Therefore, the contention on behalf of the Respondents that if there is an inquiry or a trial of an offence of rape and other allied offences referred to

in Sub Section (2) of Section 327, then as a matter of law, the proceedings will have to be held in camera without the Court employing the necessary discretion in the matter, is a submission which cannot be accepted. The scheme of Section 327, in my opinion, runs counter to the submission made on behalf of the Respondents.

25.1 Any other interpretation of Sub Section (2) of Section 327 of Cr. P.C. will open up the provision to the danger of falling foul of Articles 14 and 19 of the Constitution. The proviso, by conferring the necessary discretion on the court saves such a situation from coming to pass. Thus the word "shall" in Sub Section (2) would not prevent the court from employing its discretion to grant access to proceedings for good and substantial reasons. The Petitioners, therefore, in my view were not required to challenge the constitutional vires of Sub Section (2) of Section 327 as contended by Mr.Krishnan.

25.2 The proviso has to be read with the main provision. It has to have schematic theme. A proviso cannot be read in a manner which will render it redundant. (See observations in Government of the Province of Bombay v. Hormusji Manekji, AIR 1947 (34) P.C. 200 at page 205 in paragraph 24 followed in Kush Saigal & Ors. v. M.C. Mitter & Ors. (2000) 4 SCC 526).

25.3 The word "shall" thus appearing in the main part of Sub Section (2) of Section 327 will have to be read in the contextual framework of the entire provision. The real intention of Sub Section (2) of Section 327 being to leave the matter to the discretion of the court, that is, whether access has to be granted and if so, to what extent. And in employing this discretion, substantial weight would have to be given to the fact that enquiry or trial deals with an offence of rape. That the word "shall" is not always to be construed as directory admitting of no discretion is best illustrated by the following observations of the Supreme Court in State of U.P. Vs. Babu Ram Upadhya, AIR 1961 SC 751 where the court observed that :-

"…29. The relevant rules of interpretation may be briefly stated thus : When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is for is not visited by some penalty, the

serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered…"

25.4 Also see judgment of Supreme Court in Basavaraj R. Patil and Ors. Vs. State of Karnataka and Ors, AIR 2000 SC 3214 at page 3222 paragraph 24 where the Court relaxed the rigour of Section 313(1)(b) of the Cr.P.C. which uses the word "shall", by allowing examination of accused, in appropriate cases, without being physically present.

26. The question, therefore, really is: if this is a discretion; which as adverted to hereinabove, only a Court can exercise, what is the mode and manner in which such a discretion is to be exercised.

27. Undoubtedly, if it is a discretion vested in the Court before whom proceedings are being conducted, no directions can be issued which are cast in stone. What can, however, be set forth based on the principles deducible from the judgment of both the Supreme Court and other Courts, are broad guidelines in such like cases.

(i) In a case involving inquiry or trial into rape ordinarily the proceedings will be held in camera. The concerned Court, while passing the order will take into account the concerns of the victim; the family members of the victim, if the victim is dead; the concerns of the accused, as also the interest, of the witnesses.

(ii) In employing this discretion, what would have to be borne in mind, would be whether affording access to the trial by public at large, would lead to embarrassment to the victim or the family of the victim, effect on the quality of evidence that may be placed before the Court in the form of testimonies, the issues concerning safety and security of the parties, including witnesses and accused. In so far as the aspect of safety and security is concerned, the Court would engage the state authorities for provision of adequate measures in that behalf. The measures, however, cannot include complete ouster of access to Court proceedings by members of public. Safety and security issues can be met, as experience has taught us, by either shifting the venue of trial or by beefing up the security. (See Kehar Singh's case and recent trial in Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra, (2012) 9 SCC 234).

(iii) The concerns with regard to the victim and her family can also be met by Court excluding wholly or in part the members of public during the trial. The Court could also direct redaction of portions of the testimony if the same is found to be indecent or impacts the character and reputation of the victim or the accused.

(iv) The status of the party should be least of the Court concerns.
(v) The court should assess whether access to public, and by necessary implication its surrogate, that is, the media, impede administration of justice. It will have to be borne in the mind that freedom of speech and expression under Article 19(1)(a) of the Constitution of India includes the freedom of press. A right which is subject to reasonable restriction under clause (2) of Article 19(1)(a). See observations in Sakal Papers (P) Ltd. and Ors. Vs. The Union of India, AIR 1962 SC 305. This right is conferred upon not only the disseminator of the speech (i.e., the media in this case) but also the recipient, which would be the public at large. See Tata Press Ltd. Vs. Mahanagar Telephone Nigam Ltd. and Ors., (1995) 5 SCC 139 at page 156 paragraph 24, Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. Vs. Cricket Association of Bengal and Ors., (1995) 2 SCC 161 at page 196 paragraph 20. The Court in Tata Press went further by holding that even commercial speech was part of free speech and thus protected under Article 19(1)(a) of the Constitution. In gauging the situation at hand, the test of "necessity" and "proportionality" would have to be employed (see Sahara's case).
(vi) The right to fair trial will have to be kept in a balance alongwith the right to know. The weight used, will be the "ends of justice". This weight will determine the tilt of the balance.

28. Let us examine whether the two impugned orders of the Courts below meet the broad principles set forth hereinabove: The victim is dead. The identity of the victim and family members is known. The domestic media, in this case, as expected has acted with maturity and self-restraint by refraining from disclosing either the identity of the accused or that of the family members. The orders of the Court below show at least one of the accused demanded, though orally, that proceedings be made open to public. One will have to assume that this request was not made in the pejorative sense (see Sahara case). At the close of arguments, I was informed that 35 witnesses out of the total of 87 witnesses cited have been examined, the number today would be much more.
28.1 There is a huge public interest, apart from the criminality, in knowing whether there was a lapse, if any, in the working of the State apparatus. The case will perhaps provide empirical material to bring about a systemic change in the State apparatus.
28.2 The impugned orders were passed almost in anticipation that there will be trial by media. Therefore, the judgments cited by Mr Dayan on this

aspect have no relevance at this stage. This was put to Mr Dayan, who in his usual fairness accepted this position.

28.3 The Courts below seem to have been overtaken by the event. A gathering of large number of people can never be reason for imposing complete ban on access to Court proceedings. These concerns can be addressed by putting in place appropriate regulatory measures. The State will have to lend its might to ensure that Court proceedings are held without impediment in a smooth and orderly fashion.

28.4 None of this was considered by the Courts below, in a holistic manner. While the first order of the learned Magistrate was passed prior to committal of proceedings, the second order, which is the order of the learned ASJ, was passed after the case was committed to the session Court. The first order, by virtue of subsequent events, has lost its legal efficacy. In so far the order dated 21.01.2013 is concerned, it cannot be sustained for the very reasons set out above. The Courts below in that sense acted with material irregularity in exercise of jurisdiction vested in it in law. There is a high purpose in the provisions of Section 327 of Cr.P.C. Even in a rape trial, the Court is required to consider the various facets and dimensions obtaining in the case before taking a decision one way or the other. A mechanical approach is to be abjured.

29. Ordinarily, I would have directed the Court concerned to employ its discretion in the light of the discussion above. Given the time and resource constraint and since it is not desirable that the sessions Court spend time and energy which is presently required to be used for bringing about an expeditious closure of the proceedings, I propose to pass the following directions so that a calibrated access is granted to Court proceedings:

(i) The Court will allow access to one representative journalist of each of the accredited National dailies. The Petitioners before me represent some of them.

(ii) The reporting shall not include the name of the victim or those of the members of the family of the victim or the complainant or witnesses cited in the proceedings.

(iii) The reportage shall exclude that part of the proceedings, which the Court specifically so directs.

(iv) The reporters of UNI and PTI and other national dailies shall share their stories with representatives of other newspapers and members of the electronic media.

30. Before I conclude, there are a couple of submissions, which I propose to deal with.

30.1 In the course of arguments an important question came to be raised, which is, that failure to grant access to Petitioners, who are members of the press, violates their fundamental right under Article 19(1)(a) of the Constitution. Ms Lekhi, impugned both, the advisory issued by the Respondents as well as the two orders of the Courts below, one passed by the learned Magistrate and the other by the learned ASG, on this very ground. While the advisory could be challenged on this very ground, the same cannot be said qua an order of the Court. An order of the Court cannot be challenged on the ground that it violates fundamental rights.

30.2 A Court decides a matter or an issue which has a collateral effect on the main matter. Such a decision is amenable to challenge ordinarily by taking recourse to statutory or constitutional remedies. The judicial verdict by itself, delivered by a Court, in relation to a matter brought before it for adjudication, cannot effect fundamental rights of a citizen, much less under Article 19(1)(a) of the Constitution. The impugned orders, can be challenged though, either under Article 226 or under Article 136 of the Constitution of India. The orders by themselves cannot thus violate the Petitioners' right under Article 19(1)(a) of the Constitution. (See the observations made in Naresh Mirajkar's case at pages 11 to 15 in paragraphs 38 to 50.)

30.3 This aspect was also considered by Mr Justice Jagannath Shetty (as he then was) in the Kehar Singh's case. [see paragraph 203 at page 709]. The Court, after considering the extract from Naresh Mirajkar's case referred to three decisions of the Supreme Court of United States in paragraphs 205 to 207. These being: Gannet Co. vs De Pasquale (1979) 443 US 368; Richmond Newspaper Inc. vs Virginia (1980) 448 US 555 and Globe Newspaper Co. vs Superior Court (1982) 457 US 596. After examining the judgments Mr Justice Jagannatha Shetty concluded as follows:

"…208 It will be clear from these decisions that the mandatory exclusion of the press and public to criminal trials in all cases violates the First Amendment to the United States Constitution. But if such exclusion is made by the trial Judge in the best interest of fairness to make that exclusion, it would not violate that constitutional right….."

31. The other objection taken by the learned counsel for the Respondents is that the present proceeding is not maintainable as the Petitioners ought to have taken recourse to the provisions of Section 397 and 482 of the Cr.P.C. and not to a proceeding under Article 226 of the Constitution of India.

According to me this argument is untenable as all three proceedings would lie in the High Court, as presently positioned. The mere fact that the Petitioners have chosen to approach this Court by way of a petition under Article 226 of the Constitution of India, will not come in the way of the Court entertaining a petition. The power under Article 226 of the Constitution, which is available to the Court, is far wider. As a matter of fact, the Petitioners, not being a party to the criminal proceeding, would perhaps not be entertained if, a revision petition were to be filed under Section 397 of the Cr.P.C. or a petition under Section 482 of the Cr.P.C. This would, however, not fetter the Court from entertaining proceedings on its own against orders of the Courts below, if deemed fit, in a given case. (see Sarveshwar Singh Vs. State, 1999 "Cr. LJ 2179)

31.1 The power of the High Court to issue writs extends not only for enforcement of rights conferred under Part III of the Constitution but also for "any other purpose". The Petitioners in this case seek access to a Court proceeding, which they say has been denied to them, based on an erroneous and/or irregular exercise of jurisdiction conferred on the Courts below. The challenge is also to the advisory issued by the Respondents on the ground that it violates the Petitioners' fundamental right under Article 19(1)(a) of the Constitution. To my mind, the present petition filed under Article 226 of the Constitution is, the appropriate remedy.

32. The argument advanced by Mr. Krishnan, based on the judgment of the Supreme Court in the case of Gurmit Singh and Sakshi has relevance to the extent that ordinarily in an enquiry or trial of an offence of rape and / or allied offences, should be held in camera. The Supreme Court's exhortation in that regard, however, cannot be construed in manner so as to exclude the trial Courts' discretion to act otherwise for good reason. The Supreme Court, in my opinion, consciously uses the words "invariably" as against exclusionary words such as "must" and "without fail" when opining in paragraph 24 at pages 404 and 405 of its judgment that such trials should be held in camera and that trial Courts should "liberally" take recourse to the provisions of Sub Sections (2) and (3) of Section 327 of Cr.P.C.

32.1 To my mind there could be myriad situations in which the trial Court may not want to take recourse to Sub Section (2) of Section 327 of Cr.P.C. even in a rape trial. Take a case where the victim is a woman of small means, who is put into flesh trade by a group of persons, enjoying power and pelf. The accused in such case may want the entire proceedings to be held in camera. The trial Court while protecting the victim from unwanted public glare may still consider opening certain phases of the trial to public. One of

the reasons for adopting such a course, out of many, could be to send out a signal that a fair trial would be held, which would remain impervious to powerful influences.

32.2 Every case therefore to my mind needs employment of judicial discretion which would cater to a given fact situation. It cannot be, as is sought to be argued by Mr. Krishnan, that once it is established that offence to be tried is an offence of rape (or other allied offences), the Judge would have no choice, but to hold the trial in camera.

32.3 Furthermore, in Sakshi's case, the Petitioner had approached the Supreme Court in a petition filed under Article 32 of the Constitution of India seeking a declaration that the term "sexual intercourse", as contained in Section 375 of the IPC would include all kinds of penetration and not be confined to penile / vaginal penetration. While the Supreme Court declined relief in respect of this prayer, it issued two significant directions. The first direction issued was that provisions of Section 327(2) of the Cr.P.C. would also apply to an inquiry or trial of offences under Section 354 and 377 of the IPC.

32.4 The second direction issued was qua precautions to be taken while holding a trial in a child sex abuse or a rape case. The Supreme Court had no occasion to deal with the issues raised in the present writ petition.

33. At the end, it is hoped that the reportage will confine itself to the news as it is, and not transgress into areas which are, the domain of the Court. There is a thin, but a clear and distinct, line dividing the two which, if respected, will augur well for institutional integrity.

34. Accordingly, the writ petition is allowed in terms of prayers (i) and (ii). The advisory dated 05.01.2013 and order dated 22.01.2013 passed by learned ASJ are set aside; order dated 07.01.2013 having lost its legal efficacy. The Sessions Court shall hereon allow access to Court in terms of directions contained in paragraph 29.

Sd/-
RAJIV SHAKDHER, J

MARCH 22, 2013