NATIONAL JUDICIAL ACADEMY

ORIENTATION COURSE FOR NEWLY ELEVATED HIGH COURT JUSTICES

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15TH & 16TH OCTOBER, 2022

PROGRAMME REPORT

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OVERVIEW OF THE PROGRAMME

The National Judicial Academy organized an Orientation Course for Newly Elevated High Court Justices on 15th & 16th October, 2022 with the aim to discuss contemporary issues on the theme of criminal justice administration. The Course was designed to facilitate discussion on relevant themes like evolving bail jurisprudence; contours and boundaries of due process and procedural fairness; sentencing practice; compounding of offences; inherent powers of the court; emerging challenges in view of crimes in the digital world and issues in assessing electronic evidence; provisions relating to search and seizure and burden of proof under special legislations; and development of victim participation as a right. The course also provided a platform for the participant justices to share experiences, insights and suggestions relating thereto.

DAY 1

Session 1 – Bail Jurisprudence

Session 2 – Financial Crimes

Session 3 – Development in Criminal Justice Practice

DAY 2

Session 4 – Emerging Challenges

Session 5 – Constitutional Remedies relevant in area of Criminal Jurisprudence

DAY – I

SESSION 1

THEME – BAIL JURISPRUDENCE

PANEL – JUSTICE M.M. SUNDRESH & JUSTICE ASHUTOSH KUMAR

The session commenced by accentuating upon the distinction between 'liberty' and 'freedom' while discussing the discretion available with the judges to protect the liberty of citizens. In this regard, Edmund Burke was quoted to the effect that "judges are guided and governed by eternal laws of justice". It was clarified that while 'freedom' is a constitutional value, 'liberty' is an inherent attribute of every individual. It was remarked that great remedies could be fashioned with the aid of Article 21 of the Constitution even when stringent statutory provisions relating to bail exist. In fact, Article 21 forms the basis of reiteration of the principle *"bail is the rule and committal to jail an exception".* The discourse found expression in Lord Denning's opinion on the role of the court to prioritize the protection of liberty of a citizen. Further, it was advised that judges while hearing bail applications must keep in mind the social realities of our times such as illegal arrest, torture in prisons, corruption, political motive etc. and the fact that incarceration tends to alter human personality in more ways than one. Numerous instances were cited wherein the bail applications pending long incarceration were unjustly rejected by the High Courts. This trend has compelled the Supreme Court to entertain an array of bail applications filed under Article 136 of the Constitution.

It was agreed that India must have a legislation to govern principles relating to bail much like the Bail Act, 1976 of United Kingdom. In this regard, the Supreme Court decision in ***Satender Kumar Antil v. CBI and Another***[1] was cited which lays down guidelines with respect to arrest and bail while striking a balance between the rights of the accused and the interest of a criminal investigation. It was however, averred that much of the issues related to bail would be resolved if Section 41A of the Code of Criminal Procedure (Cr.P.C.) is followed in letter and spirit. The decision of the Apex Court in ***Arnesh Kumar v. State of Bihar***[2] was referred.

It was pointed that right to bail under first proviso to Section 167(2) Cr.P.C. is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be

[1] (2021) 10 SCC 773
[2] (2014) 8 SCC 273

released on bail. With respect to anticipatory bail, Section 173(2) was highlighted as the guiding principle and the decision in ***P. Chidambaram v. Directorate of Enforcement***[3] was elaborately discussed. In ***Sushila Aggarwal and Ors. v. State (NCT of Delhi) and Anr.***[4] it was stated that grant of anticipatory bail under Section 438 of Cr.P.C. is ordinarily not limited to a fixed time period and should inure in favour of the accused till the conclusion of the trial. In ***Arnab Manoranjan Goswami v. State of Maharashtra***[5] it was noted that High Court must exercise its power under Article 226 to grant interim bail with caution and circumspection, cognizant of the fact that this jurisdiction is not a ready substitute for recourse to the remedy of bail under Section 439, Cr.P.C. Various other issues such as expeditious disposal of bail applications, participation of victim in criminal proceedings, bail by magistrate in non-bailable offences, distinction between an appeal from an order granting bail and an order of cancellation of bail, dealing with successive bail applications were also discussed.

Apprehensions were raised regarding consideration of gravity of the offence while deciding bail applications on the ground that it appears contradictory to the principle of presumption of innocence and may amount to pre judging the issue at hand. It was remarked that the real test is not the consideration of the gravity of the offence alone but the likelihood of the accused having committed it. Another dilemma posed was with regard to the need to give reasons in a bail order without commenting upon the merits of the case. It was highlighted that it is vital to pen down the principles/reasons which govern the grant/rejection of bail so that discretion does not appear to be arbitrary. In ***Brijmani Devi v. Pappu Kumar***[6] it was observed that while elaborate reasons may not be assigned for grant of bail, at the same time an order de hors reasoning or bereft of the relevant reasons cannot result in grant of bail and the same would entitle the prosecution or the informant to assail it before a higher forum. Section 437(1) and 437(6) provides statutory backing to the issue. The necessity of reasoned bail orders was delineated through a number of judgments delivered by the Supreme Court, such as ***P. v. State of Madhya Pradesh and Another***[7], ***Jaibunisha v. Meharban***[8] and ***Ram Govind Upadhyay v. Sudarshan Singh and Others***[9].

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[3] (2020) 13 SCC 791
[4] (2020) 5 SCC 1
[5] (2021) 2 SCC 427
[6] (2022) 4 SCC 497
[7] 2022 SCC OnLine SC 552
[8] (2022) 5 SCC 465
[9] (2002) 3 SCC 598

SESSION 2

THEME – FINANCIAL CRIMES

PANEL – MR. ANAND GROVER & MR. AMIT DESAI

The session commenced by deliberating upon the purpose of bringing about special legislations as part of the obligation towards the global community to deal with the menace of 'organized crime' impacting the financial integrity of the nation. Such legislations and the procedures specified therein operate to the effect of denuding the rights accorded to the accused under general laws of the land. Another concern that was perpetuated was frequent amendments to the special legislations which was seen as a departure from the original intent of the statute. The discussion further focused upon the manner in which legislations like Prevention of Money Laundering Act, 2002 (PMLA) and Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) compromises established constitutional values, in particular, the right against self-incrimination. In this regard, the decision of the Apex Court in ***Selvi v. State of Karnataka***[10] was highlighted wherein it was categorically stated that the right against self-incrimination must be examined in respect of its relationship with multiple dimensions of personal liberty under Article 21 which includes right to fair trial and substantive due process. It was reflected that such exceptions encroach dangerous territory especially in the ever evolving legislative landscape.

It was recognised that the power of search and seizure is fundamental to criminal investigation and inherent to successful prosecution. However, it was remarked that certain statutory provisions are in direct conflict with Article(s) 14, 20 and 21 of the Constitution and therefore, the judges were cautioned in favour of balancing the power of investigation and prosecution as against the rights of the citizens so as to uphold the rule of law. In this regard, the judgments in ***M.P. Sharma v. Satish Chandra***[11]***, Kharak Singh v. State of U.P & Ors.***[12] ***and Gobind v. State of M.P. & Anr.***[13] were discussed. The participant judges were advised to assess the principles relating to search and seizure in light of ***Justice K.S. Puttaswamy v. Union of India***[14]. It was reiterated that PMLA, in its current form sees well-established principles of the constitutional law and criminal law at its cross roads. This is primarily due to the phenomenon

[10] AIR 2010 SC 1974
[11] AIR 1954 SC 300
[12] AIR 1963 SC 1295
[13] AIR 1975 SC 1378
[14] (2017) 10 SCC 1

of the statute and its reach being expanded consistently to implicate and involve an enormous array of offences which perhaps, the context, origin and rationale of the statute never intended to take within its gamut. It was stressed that contrary to the general principles of criminal jurisprudence the entire process of enquiry and investigation till the issuance of show cause notice takes place *ex parte*.

It was opined that a balance need to be struck between the letter and intent of the legislation in consonance with the constitutional mandate. However, on the other hand it was asserted that the constitutionality of these provisions relating to non-disclosure of information at the initial stage can be justified on the grounds that the crime syndicate tentacles run wide and have the potential to destroy evidence and control witnesses. Therefore, in order to protect the integrity of the investigation, the legitimacy of such provisions can be argued. The decision in ***Vijay Madanlal Choudhary v. Union of India***[15] was elaborately discussed wherein the Supreme Court upheld the wide investigative powers of the Directorate of Enforcement with respect to arrest, attachment, search & seizure and the restrictive bail conditions under the PMLA while asserting that the enumerated procedural safeguards are effective measures to protect the interests of person(s) concerned. On the issue of burden of proof, it was pointed that the change effected in Section 24 of the PMLA is the outcome of the mandate of international Conventions and recommendations made in that regard. It allows the person charged or any other person involved in money-laundering to disclose information and evidence to rebut the legal presumption in respect of facts within his personal knowledge during the proceeding before the Authority or the Special Court and hence the provision cannot be regarded as unconstitutional. It was however, opined that the position taken in the judgment is erroneous as constitutional guarantees accorded to the citizens cannot be tweaked based on recommendations of FATF.

It was asserted that the courts need to re-look into the principles enshrined in ***Director of Inspection of Income Tax (Investigation) v. Pooran Mal & Sons***[16] which states that the only test of admissibility of evidence is that of relevancy and not the manner in which it has been obtained. It is significant especially in view of the huge amount of digital evidence being generated and presented before the courts in which case the process of collection and preservation of such evidence is crucial. Further, doctrine of *'fruit of poisonous tree'* was discussed and judges were advised to clinically examine the evidence produced before them in

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[15] 2022 SCC OnLine SC 929
[16] (1975) 4 SCC 568

light of the principles laid down in ***State of Punjab v. Baldev Singh***[17]. It was also stated that courts must monitor the safeguards provided under PMLA as also in UAPA cases by according a cautious approach to the term 'reasons to believe' while examining the Investigating Officer (IO). The session also involved deliberation on various issues including transfer of case to special court; effect of non-obstante clauses in two special legislations and ambit of power of special courts to provide interim relief. The session concluded with the remark that such special legislations are extremely important for the nation and its economy, however, it must not fail in its spirit due to the manner in which it gets implemented.

SESSION 3

THEME – DEVELOPMENTS IN CRIMINAL JUSTICE PRACTICE

PANEL – JUSTICE JOYMALYA BAGCHI & MR. SALMAN KHURSHID

The session included discussion encompassing expanding horizons of liberty, sentencing practice, compromise between parties and quashment of criminal complaint upon settlement. It was remarked that though the Constitution envisages a robust notion of liberty it is the judiciary which has tendered protection to this cherished principle. Reference was made to Ronald Dworkin's *Taking Rights Seriously* wherein he suggests that in law, a distinction has to be made between principles and policies. While principles formulate rights for the people, policies are merely aspirational goals for the society. In this regard, it was pointed that right to privacy was inherent in Article 21 of the Constitution and it was merely disclosed as a fundamental right by the Supreme Court in ***Justice K.S. Puttaswamy v. Union of India***[18]**.** That is to say, when legislature formulates a law declaring certain rights then such rights are said to arise out of policy and not on principle. The national security – human rights conundrum came to light in the ***Foundation for Media Professionals v. Union Territory of Jammu & Kashmir & Anr***[19] amidst the substantive rights oriented jurisprudence. The decision was critiqued on the ground that although Supreme Court expresses inclination towards striking balance between security and liberty, it fails to examine whether such balance is sought to be attained in government's orders.

On the issue of sentencing, it was stated that judges must be concerned with liberty as an intrinsic attribute of every individual in society. There is a lot of subjectivity in the award of

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[17] (1999) 6 SCC 172
[18] (2017) 10 SCC 1
[19] (2020) 5 SCC 746

sentence which gives rise to inconsistencies. Referring to ***State of Punjab v. Prem Sagar***[20] it was further stated that there is no sentencing policy in India although judge made law does provide some guidelines. The lawmakers thought it fit to leave the element of discretion in matters relating to the quantum of sentence except when minimum sentence has been prescribed by the statute itself. The Supreme Court in ***Mohan Anna Chavan v. State of Maharashtra***[21] red flagged the idea of divesting judicial discretion and standardizing guidelines in matters of sentencing on grounds such as (a) degree of culpability cannot be measured in each case; (b) criminal cases cannot be categorised there being infinite and unpredictable variations; (c) sentencing process would cease to be a judicial function; and (d) standardization being a legislative function and policy decision, courts have no role to play.

However, it was emphasized that the doctrine of proportionality must be adhered to while awarding sentence by exercising judicial discretion. In ***Santosh Kumar SatishBhushan Bariyar v. State of Maharashtra***[22] while emphasizing upon the doctrine of prudence and proportionality, it was held that when imposing the death sentence, courts must show why the convict cannot be reformed or rehabilitated in any way. The discussion elucidated pertinent issues concerning sentencing guidelines, its absolute need in the present criminal jurisprudence, their application and implication and a look at sentencing guidelines in other jurisdictions. Further, the various theories of punishment such as deterrent theory, reformative theory, retributive theory etc. were discussed in the course of the session. The most debatable form of sentence i.e. death sentence was discussed at length. The doctrine of 'rarest of rare' propounded in ***Bachan Singh v. State of Punjab***[23] and subsequently implemented in ***Machhi Singh v. State of Punjab***[24] provides high standard of scrutiny in this regard. The concept of concurrent and consecutive sentences was also clarified while emphasizing that elaborate reasoning must be given when either of these is awarded. The aggravating and mitigating factors in awarding sentences was also discussed. It was remarked that the modern trend in penology and sentencing procedures is to emphasize the humanist principle of individualising punishment to suit the offender and circumstances. It was further noted that the introduction of alternative sanctions in Indian sentencing policy such as probation, parole, community service, compensation, etc. has been one of the most important developments in the past few decades.

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[20] (2008) 7 SCC 550
[21] (2008) 7 SCC 561
[22] (2009) 6 SCC 498
[23] AIR 1980 SC 898
[24] AIR 1983 SC 1957

It was stressed that elements of impartiality, equality before law and preservation of legal principles must be apparent while awarding sentence.

On the issue of inherent powers of the court under Section 482 of the Cr.P.C. the decision in ***State of Haryana v. Bhajan Lal***[25] which lays down detailed guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint were discussed. Also, in ***Madhu Limaye v. State of Maharashtra***[26] it was held that where the impugned interlocutory order clearly brings about a situation which is an abuse of the process of the court then for the purpose of securing the ends of justice, interference by the High Court is absolutely necessary and nothing contained in Section 397(2) can limit or affect the exercise of the inherent power of the High Court. The scheme of compounding of offences under Section 320 of the Cr.P.C. was also discussed with reference to specific instances such as cases of Section 498-A, Indian Penal Code (IPC), disproportionate assets, food adulteration and pollution. Further, while discussing the effect of compromise in serious cases on society and law on quashment of non-compoundable offences, the decisions in ***State of Madhya Pradesh v. Laxmi Narayan and Others***[27] and ***Narinder Singh v. State of Punjab***[28] were cited wherein it was held that while exercising the powers under Section 482, Cr.P.C. the court should scan the entire facts to find out the thrust of the allegations and the crux of the settlement and detailed guidelines were laid down for High Courts to form a view under what circumstances it should accept the settlement between parties and quash the proceedings and when it should refrain from doing so.

[25] 1992 Supp (1) SCC 335
[26] (1977) 4 SCC 551
[27] (2019) 5 SCC 688
[28] (2014) 6 SCC 466

DAY – II

SESSION 4

THEME – EMERGING CHALLENGES

PANEL – DR. DEBASIS NAYAK & MS. N.S. NAPPINAI

The session commenced with the assertion that in view of our increased dependency on technology the rate of cyber-crime is on the rise and we knowingly or unknowingly may have become victim of such crimes. The fallacy of privacy in the digital world was pointed in this regard. Reference was made to the Pegasus malware and the manner in which it broadcasts individual data to state agency or corporate. A recent phenomenon of 'deepfake' evidence was discussed particularly in respect of family law matters. It was expressed that the current legal scenario is not adequate to deal with the intricacies of the cyber world. Law is tasked with the tough job of having to use outdated processes which may not be well equipped to deal with technology moving at a breakneck speed. The conundrum of applying legal principles of ownership and adverse possession to property owned in the virtual world was also discussed. In this context, it is significant to find ways to utilize the existing legal remedies in a more effective manner. As electronic evidence becomes more and more significant judges will be required to adjudicate upon its veracity, authenticity and admissibility as legal evidence in various cases. The participant judges were apprised of the concept of disinhibition effect and dissociative anonymity in view of rise in demography of cyber perpetrators between the age of 13 and 18. While discussing cases of revenge porn and cyber flashing, it was advised that till the time India legislates upon these aspects recourse can be had to the existing provisions of the Information Technology Act, 2000 (IT Act) and IPC in order to hatch appropriate remedies.

The usage of artificial intelligence in tackling the menace of fake news and hate speech with its implication on free speech was also deliberated upon. Some significant cases such as ***Tehseen Poonawalla v. Union of India***[29], ***Kodungallur Film Society v. Union of India***[30] and ***Alakh Alok Srivastava v. Union of India***[31] were referred in this context. Further, the warning, flagging and restraint procedure adopted by Facebook and WhatsApp in view of the *'Infodemic'* was taken note of during the course of discussion. In ***In Re: Videos of Sexual***

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[29] (2018) 9 SCC 501
[30] (2018) 10 SCC 713
[31] 2020 SCC OnLine SC 345

Violence and Recommendations[32] use of innovative solutions such as artificial intelligence, machine learning, deep learning, hash technology and expanding use of crawler technology as a tool to fight such crimes was focused upon in order to curb rampant circulation of gang rape/child pornography content on social media. One of the most significant impacts of the ***Prajwala case*** has been in terms of improvement in the reporting mechanism of such content to the service providers and India has led the way for social media platforms to change their architecture across the globe.

While discussing the issue of liability of intermediaries in the Indian context, it was clarified that Section 79 of the IT Act is a qualified right in view of subsection (2) and (3) dealing with the conditions of exemption when due diligence had been carried out. It was opined that when an intermediary is involved in moderating, modulating, verifying or censoring content it ceases protection under the existing legal framework. It was pointed that the challenge in modern times is that since digital evidence has wider scope it is sensitive, mobile and requires special tools to retrieve with cautious collection and preservation to be worthy to be admissible in a court of law. It was emphasized that if identified, collected and analysed in a forensically sound manner, electronic evidence can prove crucial to the outcome of civil, criminal and corporate investigations. The changes brought about to the Indian Evidence Act vis-à-vis 'electronic records' was discussed with reference to Sections 3(a), 5, 17, 22A, 39 65A and 65B of the Act. Section 81A and 84A was also discussed in relation to presumptions regarding digital evidence. Section 65B which deals with the admissibility of electronic record requires special procedure for presenting such material as admissible evidence in a court of law. It also provides for technical and non-technical conditions to be complied with in this regard. While dealing with the interpretation of Section 65 B ***Anvar P.V. v. P.K. Basheer***[33] was referred. It was pointed that post the decision in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Others***[34] it has been mandated that all the conditions specified under Section 65B (2) of the Evidence Act must be fulfilled. The Supreme Court reiterated that the certificate required under Section 65B (4) is a condition precedent to the admissibility of evidence by way of an electronic record and that oral evidence in place of such certificate would not suffice. It was also clarified that certificate under Section 65B (4) is unnecessary when the original document itself is

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[32] (2018) 15 SCC 551
[33] (2014) 10 SCC 473
[34] (2020) 7 SCC 1

produced. Section 79A of the IT Act and 45A of the Evidence Act were discussed in relation to the relevance of expert opinion on electronic evidence.

SESSION 5

THEME – CONSTITUTIONAL REMEDIES RELEVANT IN AREA OF CRIMINAL JURISPRUDENCE

PANEL - JUSTICE R. BASANT & MS. MADHAVI G. DIVAN

The session elucidated upon the evolving dynamics of criminal jurisprudence with specific reference to transparency in justice administration, access to justice and rights of victim. The participant judges were also advised on certain elements of judicial behaviour such as neutrality and professionalism, practicality, timeliness, analytics, open mindedness, impartiality, moral courage and ethics and perceived conflict of interest. They must also ensure effective communication and inter personal skills with diverse group of advocates/litigants and active listening skills while maintaining the dignity and sanctity of the court and judicial process. It was clarified that the objective of restorative justice is to ensure dignity of victim and the offender, restoring offenders to law abiding lives, assistance to the victim/survivors of crime, repairing harm done to interpersonal relationships and the community.

Further, it was submitted that the celebrated right of access to justice guaranteed under Article 21 of the Constitution includes right of the victim to participate in an open and transparent justice system. Perhaps, completely shunning out victim from the prosecution would invite the risk of victims seeking assistance of other avenues like media in carrying out parallel proceedings. On the issue of the extent of victim participation, the recommendations of the **Committee on Reforms of Criminal Justice System, 2003 (Malimath Committee Report)** which enumerated certain roles of the victim, such as (i) assisting the court in discovery of truth; (ii) posing questions to the witnesses; (iii) suggesting the existence of such evidence not already put on record before the court; (iv) participation while hearing of bail matters; (v) assisting the court in determination of quantum of compensation; and (vi) right to be assisted by a lawyer at the cost of the state. Reference was also made to the **Report of the Committee on Draft National Policy on Criminal Justice, 2007 (Madhav Menon Committee Report)** which made important reflections on victim participation and made suggestions which resulted in amendment to the Cr.P.C. in 2008. Following victim-centric approaches were made part of the procedural law: (a) Section 2(wa) was inserted to the Cr.P.C. so as to include not only 'victim' but also their family members as stakeholders in criminal justice system; (b) Proviso to Section 24(8) allows victim to appoint a legal practitioner of choice to assist the public

prosecutor with the permission of the Court; (c) Section 357A provides for Victim Compensation Scheme which obligates the state to prepare a scheme to compensate victims of crime, by collaborating with the Central Government; and (d) Proviso to Section 372 gives victim right to appeal against acquittal or conviction for lesser offence or inadequate compensation.

Further, it was pointed that Section 156(3), Cr.P.C. read with Section 200, Cr.P.C. enables victim to file a private complaint before a magistrate in cases where police refuses to lodge complaint. Under Section 301(2), Cr.P.C. victim is allowed to submit written arguments after the evidence is closed. The victim's right to receive notice of closure report filed IO as also the right to challenge the closure report by way of a protest petition before a magistrate was highlighted. In ***Rekha Murarka v. State of West Bengal***[35] law with respect to extent of right of victim's counsel to assist the prosecution as per the scheme envisaged by Cr.P.C. was clarified and it was emphasized that victim has only been accorded supporting role in prosecution of a case else it would result in parallel proceedings. However, the decision of the Supreme Court in ***Jagjeet Singh v. Ashish Mishra***[36] observed that "*From investigation till culmination of appeal/revision, victim has right to be heard at every step post the occurrence of an offence. The victims' rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the Cr.P.C. The presence of 'State' in the proceedings, therefore, does not tantamount to according a hearing to a 'victim' of the crime. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.*" It was held that the victim has a substantive and vested right to seek cancellation of bail granted to the accused. In ***Delhi Domestic Working Women's Forum v. Union of India & Ors***[37] and ***Lalita Kumari v. State of U.P.***[38] the right of the victim to access justice and the need to provide adequate legal assistance was discussed in detail.

Finally, it was asserted that public prosecutors in the country are overburdened and any assistance to them by formalizing participation of victim in the prosecution must be welcomed. However, it was opined that this might lead to Public Prosecutor losing interest in the case thus reducing the role of the state in trial which would not be an appropriate scenario. Also,

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[35] (2020) 2 SCC 474
[36] (2022) 9 SCC 321
[37] (1995) 1 SCC 14
[38] (2012) 4 SCC 1

unbridled participation of victim in prosecution may draw overzealous and overenthusiastic responses which might result in abuse of law and process. Therefore, a balance needs to be maintained between the interest of the state and that of the victim. Also, it was averred rehabilitation of the victim in terms of emotional and social support must be addressed by the courts in addition to monetary compensation.