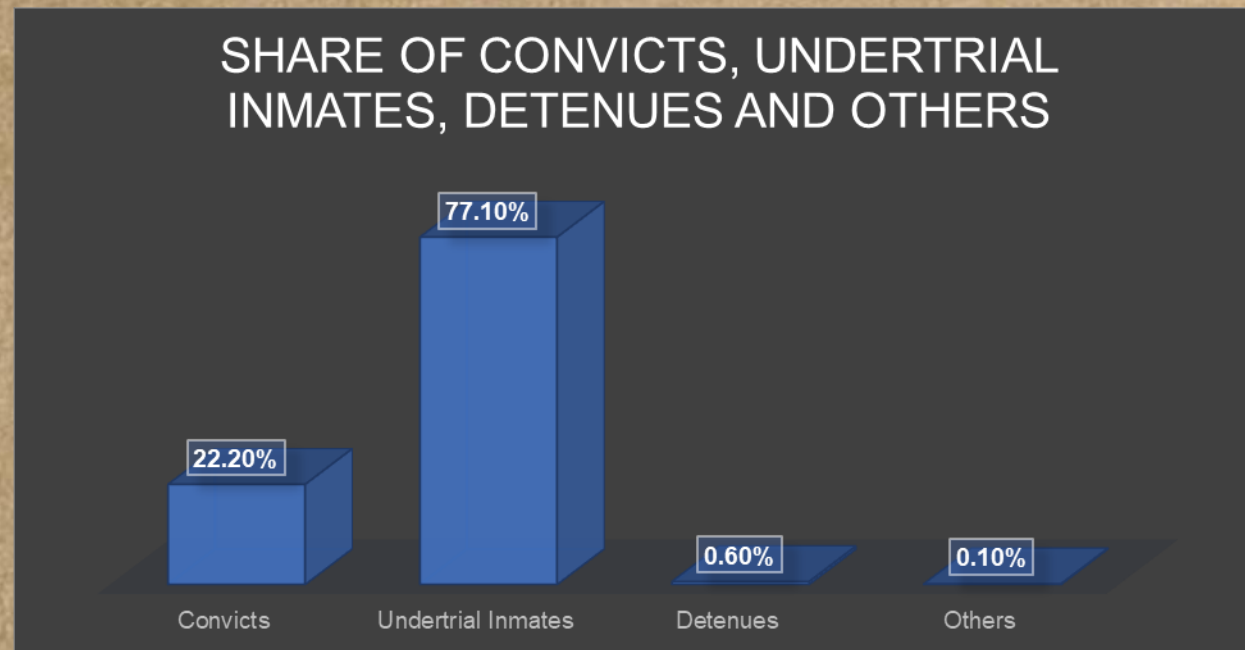


DEVELOPING CONTOURS OF
BAIL JURISPRUDENCE
&
ELECTRONIC EVIDENCE

BAIL NOT JAIL

- The maxim enunciated by Justice V.R. Krishna Iyer seems to exist in theory and not in practice.



NCRB 2021

WHY THIS SITUATION?

- **Arbitrary Arrests** - [*Joginder Kumar Vs State Of U.P* (1994 SCC (4) 260) , *D.K.Basu Vs State of West Bengal* (1997 1 SCC 416) and *Arnesh Kumar Vs State of Bihar* (2014) 8 SCC 273)]
- **Prolonged Trial**
|
- **Strict Bail Provisions**
|
- **Heavy Bail Bonds/Conditions**

SHIFT IN STANCE OF APEX COURT

Supreme Court in 1985: -

This Court does not ordinarily, in the exercise of its discretion under Article 136, entertain petitions for special leave to appeal against orders granting or refusing or cancelling bail or anticipatory bail. These are matters where the High Court should become final and this Court should not entertain petitions for special leave.

Jagdish v. Harendrajit Singh, (1985) 4 SCC 508

Supreme Court in 2021: -

The basic rule of our criminal justice system is “bail, not jail”. The High Courts and the courts in the district judiciary of India must enforce this principle in practice, and not frego that duty, leaving the Supreme Court to intervene at all times.

Arnab Manoranjan Goswami vs State of Maharashtra, (2021)2 SCC 427

Do We Need a Standalone Bail Act?

- Chapter XXXIII of Cr.PC. deals with bail and bonds.

- Is it Adequate?

- Let's peep into other jurisdictions

United Kingdom- Bail Act,1976

- Bail is a right unless case falls under enumerated exceptions (Section 4)
- Reasons must be given for refusal of bail (Section 5)
- Exceptions/Probable reasons for refusal enumerated in the Act

CANADA

Bail shall be granted unless prosecutor satisfies the Court regarding grounds for detention: -

1. Primary- Ensuring presence in Court
2. Secondary- Preventing reoffending
3. Tertiary- Impact of crime in society/victim

Conditions of Bail-Ladder System

- From bond to house arrest

Bail Plan to be submitted by Defence

Bail Program-Release under supervision of case workers

Australia (New South Wales Bail Act)

Court may grant bail taking into consideration: -

1. Appearance in Court
2. Accused's interests
3. Community/Victim's interest

New Zealand Bail Act,2000

Section 8 enumerates the factors to be taken into consideration

Satender Kumar Antil vs CBI(Recommendations)

- (1) Separate Bail Act be introduced;
- (2) Strict compliance of section 41/4A Cr.P.C.; as per Arnesh Kumar
- (3) Standing orders be issued;
- (4) Courts must satisfy itself in this regard while considering bail;

5) Accused need not be arrested and forwarded to court under section 170 CrP.C. if he was available and cooperated during investigation. Court may permit such accused to remain on his own bond [See ***Siddharth (2022)1 SCC 676***]

(6) Special Courts be filled up;

(7) Bail - two weeks; A/Bail-six weeks;

(8) Conditions must be reasonable- High Courts to monitor compliance

BAIL HEARING- BEST PRACTICES

1. Presumption of Innocence- Onus on prosecutor to justify continued detention
1. Prompt hearing of bail applications
1. Reasons to be given- No final opinion on merits but must advert to relevant parameters which prompt the court to grant/deny bail
1. Conditions of bail- Reasonable and not giving an impression of pre-judging issues/disrespectful to accused or victim

OTHER INTERESTING DEVELOPMENTS

HOUSE ARREST-

Courts can in exceptional cases direct house arrest keeping in mind parameters like nature of crime, age and health condition of the accused, criminal antecedents etc.

[Gautam Navlakha vs CBI, 2021 SCC OnLine SC 382]

BAIL IN WRIT JURISDICTION- *Arnab Manoranjan Goswami*

- Cannot be resorted to for “Forum Shopping”, held in *State of Maharashtra vs Pankaj Jagshi Gangar, (2022)2 SCC 66*

- **RE-ARREST UPON ADDITION OF GRAVER OFFENCES-**

[Pradeep Ram vs State of Jharkhand,(2019)17 SCC 326]

- **LANGUAGE/ REASONING USED IN BAIL ORDERS-**

Use of reasoning/language which diminishes the offence and tends to trivialize the survivor(specially in gender related crimes) and pre-judging of guilt is especially to be avoided under all circumstances-

[Aparna Bhat & ors vs State of Madhya Pradesh and anr, 2021 SCC OnLine SC 230]

VICTIM PARTICIPATION

Statutory Changes: -

Section 439(1-A) Cr.PC.- rape of minors

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

Judicial Pronouncement: -

- In *Jagjeet Singh vs Ashish Mishra*, (2022)9 SCC 321, the victim's right to hearing was upheld.

ANTICIPATORY BAIL

In ***Gurbaksh Singh Sibbia and ors vs State of Punjab,(1980) 2 SCC 565***, the Apex Court held :-

No straight Jacket formula can be laid down for the grant of anticipatory bail. Discretionary powers to be exercised by the High Courts and Sessions Court according to the facts of each case while granting anticipatory bail.

Principles to grant Anticipatory bail are stricter than that of regular bail. The court must consider the nature and gravity of the offence and role attributed to the accused when considering prayer for anticipatory bail. It shall ordinarily continue till the end of trial [***Sushila Aggarwal and ors vs State(NCT of Delhi) and anr, (2020)5 SCC 1***]

BAR ON ANTICIPATORY BAIL

- Section 18/18A of the SC/ST Act is not unconstitutional. But Courts may entertain application for anticipatory bail if no prima facie case is made out under the Special Act. ***[Union of India vs State of Maharashtra, (2020)4 SCC 761]***
- In absence of Section 438 CrPC (as in UP) an accused may approach the High Court seeking relief from arrest in appropriate cases. ***[Hima Mishra vs State of UP, (2014)4 SCC 453 (para 21)]***
- Interim order, e.g. “no coercive action against accused” u/s 482 CrPC shall not be ordinarily passed and accused should be relegated to apply for anticipatory bail ***[Siddharth Mukesh Bhandari vs State of Gujarat, (2022) 10 SCC 530]***

BAIL IN OFFENCES UNDER SPECIAL ACTS

ADDITIONAL RESTRICTIONS ON BAIL

Section 37 NDPS Act (19, 24, 27-A)	(1) Notice to PP (2) “Reasonable grounds” – “not guilty” (3) Not likely to commit any offence
Section 43-D UAPA	(1) Notice to PP (2) “Reasonable ground” – “prima facie true” (3) Not to a foreigner who was illegally entered India except under exceptional circumstances
Section 45 of PMLA	(1) Notice to PP (2) “Reasonable ground” – “not guilty”. Except where accused in 16 years, woman, sick, infirm or amount laundered is below Rs. 1 crore (prior 2018 – applicable to predicate offence punishable with imprisonment more than 3 years in Part A of Schedule

SECTION 37 NDPS ACT- “NOT REASONABLE GROUND”-NOT GUILTY

Section 37

Narcotics Control Bureau vs. Mohit Aggarwal, 2022 SCC OnLine SC 891

Reasonable ground – something more than prima facie grounds - “substantial probable cause” that accused is not guilty. That is existence of facts and circumstances which by itself show accused is not guilty. (para 13 and 14)

Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra And Another, (2005) 5 SCC 294

Findings tentative – based on broad probabilities

“shall not commit any offence” – offence under relevant statute – conclusion based on antecedent/conduct

DELAY IN TRIAL- BAR DOES NOT OPERATE

UAPA

Inordinate delay – bail may be granted for breach of right to speedy trial under Article 21 of Constitution of India – section 43-D(5) no bar. (para 11 and 17) - ***Union of India vs. K.A. Najeer, (2021) 3 SCC 713***

NDPS

Speedy trial – one time measure – undertrials in detention for five years – granted bail – ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India And Another, (1995) 4 SCC 695; Thana Singh vs. Central Bureau of Narcotics, (2013) 2 SCC 590***

UAPA

Section 436A Cr.P.C. – as statutory bail – ***Vijay Madanlal Choudhury vs. Uoi, 2022 (10) Scale 577 (para 147-149)***

STATUTORY BAIL

- Right to Statutory Bail is a facet of Article 21.
- Hyper technical approach to be avoided- ***Rakesh Kumar Paul vs State of Assam, (2017) 15 SCC 67***

Default Bail Application may be oral- ***Bikramjit Singh vs State of Punjab, (2020) 10 SCC 616***

- Extension application to be filed prior to application of default bail.
- If filed earlier must be disposed of before default bail can be availed-***M. Ravindran vs Directorate of Revenue Intelligence, (2021) 2 SCC 485***

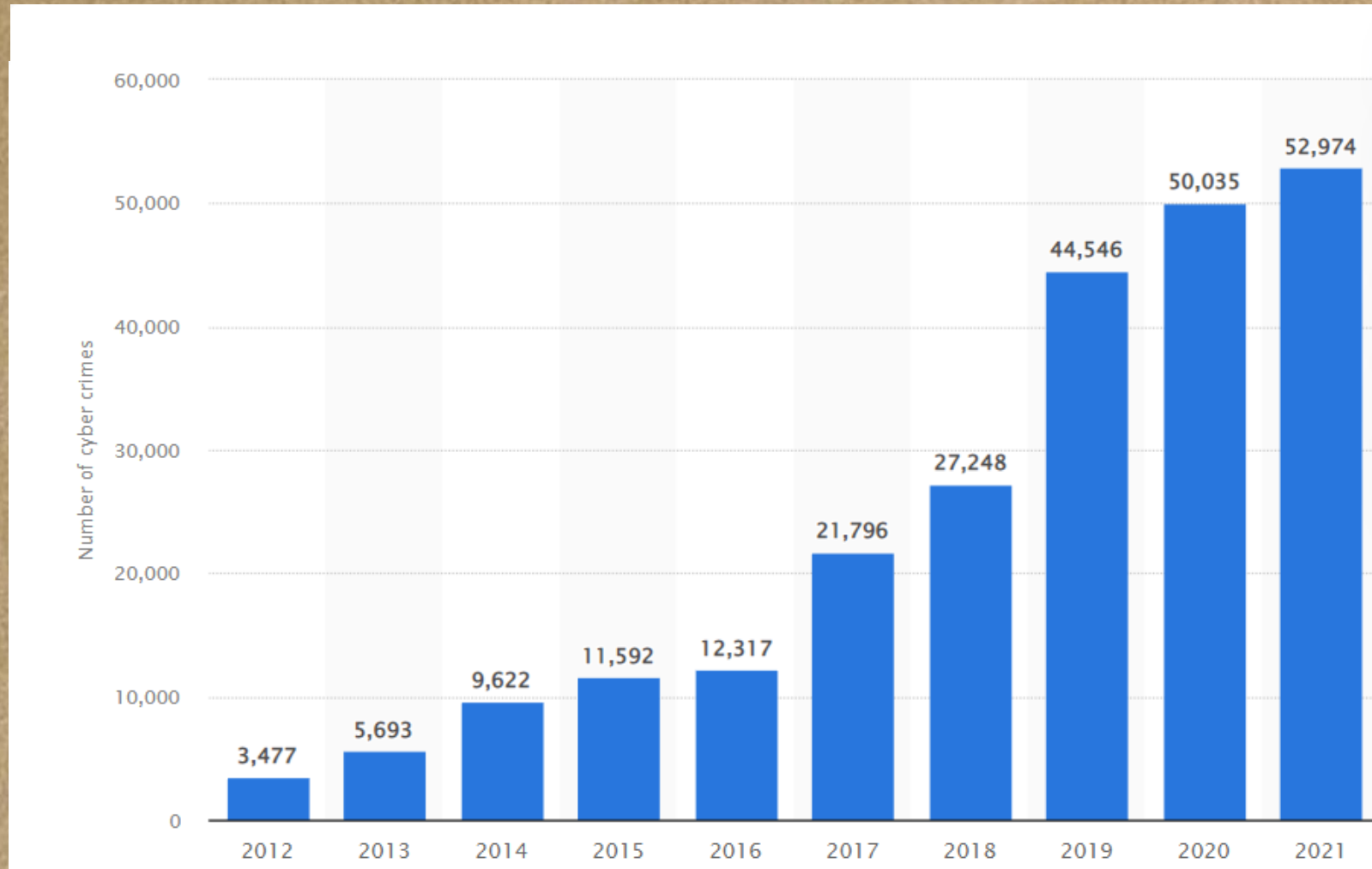
- Notice of extension application need not be given but it must be considered in presence of accused/ his counsel- ***[Jigar alias Jimmy Pravinchandra Aditya vs State of Gujarat, 2022 SCC OnLine SC 1290].***

- Statutory Bail may be cancelled on merits for strong/special reasons upon charge-sheet being filed .

[State through CBI v. T. Gangi Reddy @ Yerra Gnagi Reddy 2023 SCC OnLine SC 25]

ELECTRONIC EVIDENCE-ADMISSIBILITY VS AUTHENTICITY

Number of Cyber Crimes reported across India from 2012 to 2021



Admissibility of Electronic Record: 65-A/ 65-B: Arjun Panditrao Khotkar: An Analysis

- Reference to a larger Bench was necessitated as : -
- In ***Anvar P.V. vs PK Basheer*, (2014)10 SCC 473**, the Apex Court held Section 65-B of Evidence Act is a complete Code relating to admissibility of electronic evidence.
- A written and signed certificate under Section 65-B(4) is mandatory and no oral evidence can be adduced in support thereof.
- But in ***Shafhi Mohammad vs State of Himachal Pradesh*, (2018)2 SCC 801**, a two Judge Bench of the Supreme Court relying on ***Tomaso Bruno***, held, that production of certificate under section 65-B(4) is a procedural requirement and not always mandatory.
- Could be relaxed in the interest of justice particularly when a party is not in a position to secure the certificate

RATIO

- Reiterates Anwar
- Held Tomaso Bruno (per incuriam- as it did not refer to Section 65-B) and overrules ***Shafhi Mohammad***
- Where party is not in possession of the certificate, he must issue notice upon the person/authority who is able to issue the certificate and if it refuses then he shall approach the Court.

Certificate must satisfy the following :-

- a) Identify the electronic record
- b) describe the manner in which the electronic record was produced
- c) furnish the particulars of the device involved in the production of that record

d) Certify :-

- i. Computer system was in working order and if not, it has not affected the electronic record.
- ii. The Output is the exact reproduction of the records stored in the system

Who Can Issue Certificate?

A person in “responsible official position” or in charge of management of relevant activities.

- He shall state the certificate is to the ‘best of his knowledge and/or belief’

IS CERTIFICATION- AN ANACHRONISM?

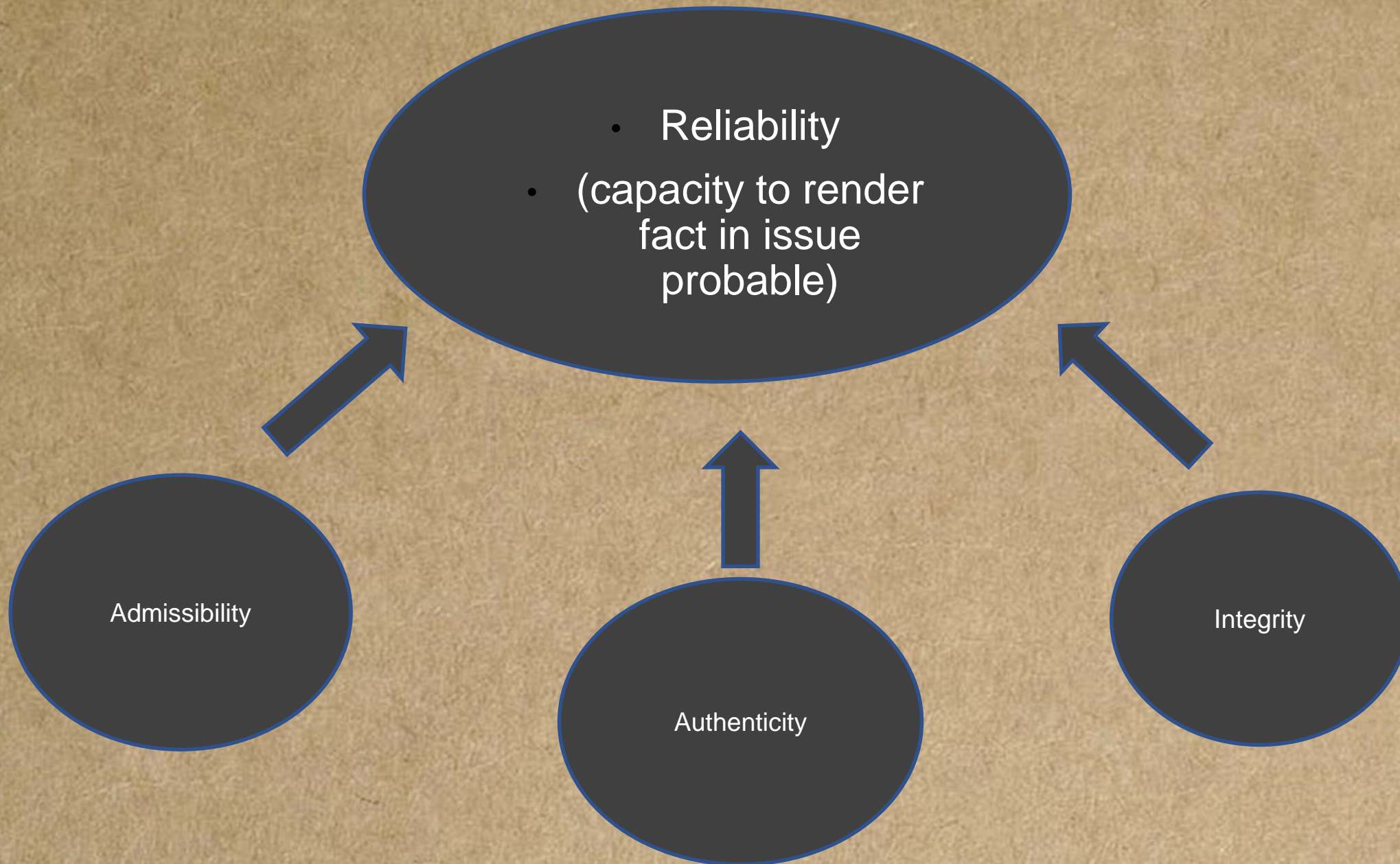
- POSITION IN UK
- Section 65-B of Evidence Act incorporated in 2000 is a reproduction of Section 5 of UK Civil Evidence Act, 1968 (with minor changes) {repealed in 1995}
- Similar procedure for admissibility in Section 69 of Police and Criminal Evidence Act, 1984: -
- UK Law Commission, 1993- held the aforesaid provisions are illogical and impractical
- Civil Evidence Act, 1995 repealed Section 5 of UK Civil Evidence Act
- Section 60 of Youth Justice and Criminal Evidence Act, 1999 repealed Section 69 of PACE

Position in Canada

- Section 31.1-31.6 of Canada Evidence Act, 1985 deals with admissibility of electronic evidence.
- Section 31.1 puts burden on the person who produces the record to prove
- Section 31.6 requires filing of affidavit to prove integrity, i.e., computer system was working properly or if not, such defect has not affected the records; or
- Records were recorded/ stored by adverse party or third party in ordinary course of business
- Section 31.5 permits evidence to be adduced with regard to standard procedure of recording/ storage of records

POSITION IN USA

- **PRE 2017**
- Prior to 2017 electronically stored information (ESI) were admissible as per ordinary rules, i.e., Rules 901 and 902 via self authentication in rare cases.
- Rule 901(B)(9) deals with authentication of computer generated/stored documents and provides for authentication through '*evidence describing a process or system used to produce a result and showing that the process or system processes an accurate result*'
- **POST 2017**
- Post 2017 sub rule 13 and 14 were incorporated in Rule 902 permitting self authentication of ESI generated by a process or system or copied from a device, storage medium or file.



RELIABILITY OF ELECTRONIC EVIDENCE

Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke & Ors. (2015) 3 SCC 123:
Source and authenticity are the two key factors for relying on electronic evidence.

ENSURING AUTHENTICITY/INTEGRITY

- Identification of source of data.
- Data including meta data produced in Court is unaltered – audit trails of all modifications since its creation.
- Verification of the techniques used to obtain, process and store the data.
- Technical and organizational evidence to demonstrate the integrity of the data.

OTHER ISSUES

- Electronic Record is a document. Cloned copy of the memory card/ pen-drive appended to Police report has to be supplied to the accused u/s 207 CrPC. However, the privacy of the complainant/witness needs to be protected.***[P. Gopalkrishnan @ Dileep vs State of Kerala and anr,(2020)9 SCC 161]***

SEIZURE OF ELECTRONIC RECORDS- PRIVACY ISSUES

- Right to Privacy is a fundamental right.***[K.S. Puttuswamy and anr vs Union of India and ors,(2017)10 SCC 1]*** but the right is not an absolute one. It can be restricted by law which caters to a legitimate public interest and is reasonable and proportionate. ***[K.S. Puttuswamy (Retired) and anr vs Union of India (Aadhaar case),(2019) 1 SCC 1]***
- Is the existing legal framework just, reasonable and proportionate with regard to powers of investigator to seize and retrieve data from electronic devices?
- The issue is pending before the Apex Court in ***The Foundation for Media Professionals vs Union of India.***

U.S. SCENARIO

- The Question before the US Supreme Court was whether police's power to search the contents of the cell phone would amount to breach of privacy ? Chief Justice Roberts opined –
- “Cell phones are not like wallets, which hold a limited amount of information; instead, they are mini computers” ***[Riley vs California, 573 U.S. 373 (2014)]***
- The Court held the search of contents of cell phone cannot be an incidental search upon arrest. Search warrant is necessary.

- In ***Carpenter vs US, 138 S. Ct 2206(2018)***, the Court held obtaining Cell Site Location Information (CSLI) which effectively tracks movement of a cell phone without a search warrant amounts to violation of Right to Privacy.
- Chief Justice Roberts observed a cell phone is *“almost a feature of human anatomy”*..... *“Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.”*

THANK YOU