THE STATE OF KERALA
v.
K. AJITH & ORS.

(Criminal Appeal No. 697 of 2021)

JULY 28, 2021

[DR. DHANANJAYA Y CHANDRACHUD* AND M. R. SHAH, JJ.]

Code of Criminal Procedure, 1973:

s. 321 – Withdrawal of prosecution – Respondents-MLAs allegedly disrupted the presentation of the budget by climbing on to the dais of the Speaker and damaging furniture and articles causing huge loss – Registration of criminal case at the behest of the Legislative Secretary u/ss. 447 and 427 r/w s. 34 IPC and s. 3(1) of the Prevention of Damage to Public Property Act, 1984 – Cognizance taken by Chief Judicial Magistrate-CJM upon submission of the final report u/s 173 CrPC – Application u/s 321 by the public prosecutor seeking sanction to withdraw the case against the respondents – CJM declined to grant permission to the public prosecutor to withdraw the prosecution of the respondents u/s. 321 – High Court upheld the order – On appeal, held: Privileges and immunities are not gateways to claim exemptions from the general law of the land, particularly, the criminal law which governs the action of every citizen – To claim an exemption from the application of criminal law would be to betray the trust which is impressed on the elected representatives as the makers and enactors of the law – Withdrawal application is based on a fundamental misconception of the constitutional provisions contained in Art. 194 – Alleged act of destruction of public property within the House by the members to lodge their protest against the presentation of the budget cannot be regarded as essential for exercising their legislative functions, nor can be equated with the freedom of speech in the legislature, thus, not covered by the privileges guaranteed under the Constitution – Allowing the prosecution to be withdrawn would only show that the elected representatives are exempt from the mandate of criminal law – Thus, the orders passed by the CJM and the High Court are upheld – Prevention of Damage to Public Property Act, 1984.

* Author

s. 321 – Withdrawal of prosecution – Exercise of power by the Public Prosecutor u/s. 321 – Exercise of jurisdiction by the Chief Judicial Magistrate – General principles – Formulation of.

s. 321 – Matter pertaining to declining of application for withdrawal made by the public prosecutor u/s. 321 CrPC by Chief Judicial Magistrate and the High Court – Plea that the video recording of the incident was procured from the Electronic Record Room of Assembly without the permission of the Speaker; and that the video recording lacks the certification required for admissibility of evidence – Held: Questions of admissibility of evidence, absent certifications etc., are to be adjudged by the trial court during the stage of trial – It is not the duty of this Court, in an application u/s. 321 to adjudicate upon evidentiary issues and examine the admissibility or sufficiency of evidence – Evidence Act, 1872 – s. 65B.

s. 197(1) – Sanction of speaker for prosecution against accused-MLAs – Requirement of – Held: No provisions warranting the sanction of the speaker to initiate criminal prosecution either specific to offence or specific to class – Thus, on facts, prosecution against accused not vitiated for want of sanction.

Constitution of India:

Arts. 105 and 194 – Privileges and immunities of Members of Parliament and MLAs – Interpretation – Scope of – Explained.

Art. 194 – Powers, privileges, etc, of the House of Legislatures and of the members and committees thereof – Parliamentary proceedings – Immunity from publication of proceedings of the House – Held: Parliamentary proceedings does not include all activities inside the house – It is only limited to essential functions of members in their official capacity for participation and deliberation in the house – Act of destruction and vandalism not manifestation of freedom of speech and cannot be termed as proceedings of the assembly – Thus, video recording of the incident was not a "proceeding" of the Assembly, which would be protected from legal proceedings u/Art.194(2).

Art. 136 – Jurisdiction under – Exercise of – Matter pertaining to declining of application for withdrawal made by the public prosecutor u/s. 321 CrPC by Chief Judicial Magistrate and the High Court – Interference with – Held: Court not to embark upon

a roving enquiry into the facts and evidence of case like this – Interference warranted when findings suffer from a palpable error or perversity.

Parliamentary privileges: Nature of the privileges and immunities enjoyed by members of the House of Commons in the United Kingdom – Evolution of, through various phases – Jurisprudential development – Discussed.

Dismissing the appeals, the Court Held:

1. The principles which emerge on the withdrawal of a prosecution under Section 321 of the Code of Criminal Procedure, 1973 are:

(i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;

(ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;

(iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;

(iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;

(v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:

(a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;

(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;

(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;

(vi) While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and

(vii) In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent. [Para 23]

Sheonandan Paswan vs State of Bihar & Ors. **(1987) 1 SCC 288 : [1987] 1 SCR 702 – followed.**

State of Bihar vs Ram Naresh Pandey & Anr. **AIR 1957 SC 389 : [1957] 1 SCR 279; *M.N Sankarayaraynan Nair vs P.V Balakrishnan* (1972) 1 SCC 318 : [1972] 2 SCR 599; *Rajender Kumar Jain vs State through Special Police Establishment and Ors.* (1980) 3 SCC 435 : [1980] 3 SCR 982; *Yerneni Raja Ramchandar vs State of Andhra Pradesh & Ors.* (2009) 15 SCC 604 : [2009] 12 SCR 494; *Bairam Muralidhar vs State of Andhra Pradesh* (2014) 10 SCC 380 : [2014] 8 SCR 328 – referred to.**

2.1 Articles 105 and 194 of the Constitution provide in similar terms for the privileges and immunities of Members of Parliament and MLAs respectively. [Para 24]

2.2 Clause 1 of Article 194 recognizes the freedom of speech in the legislature of every State. However, the freedom recognized by clause 1 is subject to the provisions of the Constitution and standing orders regulating the procedure of the State Legislatures. Clause 2 enunciates a rule of immunity which protects a member of the legislature from a proceeding in any court "in respect of anything said or a vote given" in the legislature or in any committee of the legislature. Moreover it provides a shield against any liability for a publication of a report, paper, votes or proceedings by or under the authority of the House. Further, clause 3 of Article 194 provides that in other respects the privileges and immunities are such as defined by law. Until defined by law-there being presently no law on the subject-the privileges and immunities of the members of the House and its committees shall be such as were in existence before Section 26 of the Forty-Fourth Amendment to the Constitution came into force. According to clause 4, the privileges and immunities also attach to those who have a right to speak in and participate in the proceedings of the House or its committees. [Para 25]

2.3 At the time of the adoption of the Constitution, clause 3 of Article 194 provided that the privileges, immunities and powers of a House of the Legislature of a State (and of its members and committees) shall be such as may from time to time be defined by the legislature by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom at the commencement of the Constitution. By Section 34 of the Forty-Second Amendment to the Constitution, clause (3) of Article 194 was amended and embodied a transitory provision under which until the powers, privileges and immunities of a House of the legislature of a State (and of the members and its committees) were defined by a law made by the legislature, they shall be those of the British House of Commons and the privileges of each House "shall be such as may from time to time be evolved by such House". However, Section 34 was not brought into force by issuing a notification under Section 1(2) of the Constitution

(Forty-Second) Amendment Act 1976. Eventually, clause (3) in its present form was substituted by Section 26 of the Constitution (Forty-Fourth) Amendment Act 1978 with effect from 20 June 1979. The present position of clause (3) is that: the ultimate source of the powers, privileges and immunities of a House of a State Legislature and of the members and committees would be determined by way of a legislation; until such legislation is enacted, the position as it stood immediately before the coming into force of Section 26 of the Forty-Fourth Amendment Act 1978 would govern; and the amendment to the Constitution introducing the concept of evolution of privileges and immunities by the House of the legislature never came into force and now stands deleted. Since the Parliament is yet to enact a law on the subject of parliamentary privileges, according to Article 194(3) of the Constitution, the MLAs shall possess privileges that the members of the House of Commons possessed at the time of enactment of the Constitution. [Para 26, 29]

2.4 It is evident that a person committing a criminal offence within the precincts of the House does not hold an absolute privilege. Instead, he would possess a qualified privilege, and would receive the immunity only if the action bears nexus to the effective participation of the member in the House. [Para 32]

R vs Eliot, Holles and Valentine **(1629) 3 St Tr 292-336;** *Raja Ram Pal vs Hon'ble Speaker, Lok Sabha* **(2007) 3 SCC 184:[2007] 1 SCR 317;** *Bradlaugh vs Gossett* **[1884] EWHC 1 (QB);** *R vs Chaytor and others* **[2010] UKSC 52 – referred to.**

Erskine May, Parliamentary Practice, Chapter 17, Page 281 (24th Ed., Lexis Nexis, 2011); Sir Edward Coke, Fourth Part Of The Institutes of the Laws of England 14 (1797) – referred to.

3. Whenever a claim of privilege or immunity is raised in the context of Article 105(3) or Article 194 (3), the Court is entrusted with the authority and the jurisdiction to determine whether the claim is sustainable on the anvil of the constitutional provision. Neither Parliament nor the State legislatures in India can assert the power of "self-composition or in other words the power to regulate their own constitution in the

manner claimed by the House of Commons or in the UK". The decision therefore emphasizes the doctrine of constitutional supremacy in India as distinct from parliamentary supremacy in the UK. [Para 42]

Raja Ram Pal vs Hon'ble Speaker, Lok Sabha **(2007) 3 SCC 184 : [2007] 1 SCR 317 – followed.**

P.V. Narasimha Rao vs State (CBI/SPE) etc **AIR 1998 SC 2120 : [1998] 2 SCR 870;** *Lokayukta, Justice Ripusudan Dayal (Retired) and Ors. vs State of Madhya Pradesh & Ors.* **(2014) 4 SCC 473 : [2014] 3 SCR 242 – referred to.**

4. In approaching the task in the exercise of its jurisdiction under Article 136 of the Constitution, the Court must do well to bear in mind the caution which has been expressed in the decision of the majority in the Constitution Bench decision in *Sheonandan Paswan's* case. The Court noted that it had been "the declared policy of this Court not to embark upon a roving enquiry into the facts and evidence of case like this", particularly because any observation on merits or facts and evidence will cause serious prejudice to parties at trial. Hence, in approaching the submissions of the counsel, it is necessary to begin with a caution and caveat that in evaluating them the Court must not transcend the limits of its jurisdiction under Article 136. Both the CJM and the High Court have come to the conclusion that the application for withdrawal made by the public prosecutor under Section 321 should not be allowed. The issue is whether these findings suffer from a palpable error or perversity which would warrant interference by this Court. [Para 45]

Sheonandan Paswan vs State of Bihar & Ors. **(1987) 1 SCC 288 : [1987] 1 SCR 702 – followed.**

5.1 The conclusion of the High Court to affirm the decision of the CJM must be analysed from prism of the law as it has been enunciated consistently in several decisions before and after the judgment of the Constitution Bench and of course, in the decision in *Sheonandan Paswan's* case. The second aspect which must be borne in mind is that the High Court has accepted the fact that no *mala fides* can be attributed to

the application for withdrawal. It is to be considered whether this is a circumstance which in and of itself should have resulted in allowing the application for the grant of permission for withdrawal of the prosecution under Section 321. The issue on this aspect of the case is whether a finding that there is no absence of good faith must inexorably result in allowing an application under Section 321 bereft of the other considerations which must underlie such a decision. [Para 46]

Sheonandan Paswan vs State of Bihar & Ors. **(1987) 1 SCC 288 : [1987] 1 SCR 702 – followed.**

5.2 The persons who have been named as the accused in the FIR in the instant case held a responsible elected office as MLAs in the Legislative Assembly. In the same manner as any other citizen, they are subject to the boundaries of lawful behaviour set by criminal law. No member of an elected legislature can claim either a privilege or an immunity to stand above the sanctions of the criminal law, which applies equally to all citizens. The purpose and object of the Prevention of Damage to Public Property Act 1984 was to curb acts of vandalism and damage to public property including (but not limited to) destruction and damage caused during riots and public protests. [Para 52]

Re: Destruction of Public and Private Properties **2009 5 SCC 212 : [2009] 6 SCR 439;** *Kodungallur Film Society and Another vs Union of India* **2018 10 SCC 713 : [2018] 12 SCR 695 – referred to.**

5.3 A member of the legislature, the opposition included, has a right to protest on the floor of the legislature. The right to do so is implicit in Article 105(1) in its application to Parliament and Article 194(1) in its application to the State Legislatures. The first clauses of both these Articles contain a mandate that "there shall be freedom of speech" in Parliament and in the legislature of every State. Nonetheless, the freedom of speech which is protected by the first clause is subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of the legislature. The second clause provides immunity against liability "to any proceedings in any court" in respect of "anything said or any vote given" in the legislature or any committee. Moreover, no person is to

be liable in respect of the publication by or under the authority of Parliament or of the House of the State Legislature of any report, paper, votes or proceedings. The history of Clause (3) of Article 194 as it originally stood under which the powers, privileges and immunities of the members of Parliament and of the State Legislatures were those which were recognised for Members of the House of Commons immediately before the enforcement of the Constitution. This provision was sought to be amended by the Forty Second Amendment and was ultimately amended by the Forty Fourth Amendment, from which it derives its present form. It recognises the powers, privilege and immunities as they stood immediately before the enforcement of Section 26 of the Forty Fourth Amendment. [Para 53]

5.4 Tracing the history of the privileges and immunities enjoyed by members of the House of Commons, Erskine May makes a doctrinal division of the position in the UK into various phases. However, the stand out feature which emerges from the privileges and immunities of the members of the House of Commons is the absence of an immunity from the application of criminal law. [Para 54]

5.5 There is a valid rationale for this position. The purpose of bestowing privileges and immunities to elected members of the legislature is to enable them to perform their functions without hindrance, fear or favour. The oath of office which members of Parliament and of the State Legislature have to subscribe requires them to (i) bear true faith and allegiance to the Constitution of India as by law established; (ii) uphold the sovereignty and integrity of India; and (iii) faithfully discharge the duty upon which they are about to enter. It is to create an environment in which they can perform their functions and discharge their duties freely that the Constitution recognizes privileges and immunities. These privileges bear a functional relationship to the discharge of the functions of a legislator. They are not a mark of status which makes legislators stand on an unequal pedestal. It is of significance that though Article 19(1)(a) expressly recognises the right to freedom of speech and expression as inhering in every citizen, both Articles 105(1) and 194(1) emphasise that "there shall be freedom of speech" in Parliament and in the Legislature of a State. In

essence, Article 19(1)(a) recognizes an individual right to the freedom of speech and expression as vested in all citizens. Articles 105(1) and 194(1) speak about the freedom of speech in the Parliament and State Legislatures and in that context must necessarily encompass the creation of an environment in which free speech can be exercised within their precincts. The recognition that there shall be freedom of speech in Parliament and the State Legislatures underlines the need to ensure the existence of conditions in which elected representatives can perform their duties and functions effectively. Those duties and functions are as much a matter of duty and trust as they are of a right inhering in the representatives who are chosen by the people. [Para 55]

R vs Eliot, Holles and Valentine **(1629) 3 St Tr 292-336;** *Bradlaugh vs Gossett* [1884] EWHC 1 (QB); *R vs Chaytor and others* **[2010] UKSC 52 – referred to.**

5.6 Privileges and immunities are not gateways to claim exemptions from the general law of the land, particularly as in this case, the criminal law which governs the action of every citizen. To claim an exemption from the application of criminal law would be to betray the trust which is impressed on the character of elected representatives as the makers and enactors of the law. The entire foundation upon which the application for withdrawal under Section 321 was moved by the Public Prosecutor is based on a fundamental misconception of the constitutional provisions contained in Article 194. The Public Prosecutor seems to have been impressed by the existence of privileges and immunities which would stand in the way of the prosecution. Such an understanding betrays the constitutional provision and proceeds on a misconception that elected members of the legislature stand above the general application of criminal law. [Para 56]

5.7 The reliance on *P.V Narasimha Rao's* case to argue that the action of the respondent-accused inside the House was a form of 'protest' which bears a close nexus to the freedom of speech, and thus, is covered by Article 194(2) is unsatisfactory. The majority in *P.V Narasimha Rao's* case dealt with the interpretation of the phrase 'in respect of' and gave it a wide import. At the same time, the majority observed that there must be a nexus between the act or incident (which in that

case was the act of bribery in the context of the votes cast on a motion of no-confidence) and the freedom of speech or to vote, which bore a close nexus to the freedom protected under Article 105(2). The case however, did not deal with the ambit of the privilege of 'freedom of speech' provided to the members of the House. It was in *Lokayukta, Justice Ripusudan Dayal (Retired)'s case* that a three judge Bench of this Court laid down the law for the identification of the content of the privileges. It was held that the members shall only possess such privileges that are essential for undertaking their legislative functions. An alleged act of destruction of public property within the House by the members to lodge their protest against the presentation of the budget cannot be regarded as essential for exercising their legislative functions. The actions of the members have trodden past the line of constitutional means, and is thus not covered by the privileges guaranteed under the Constitution. [Para 57]

P.V. Narasimha Rao vs State (CBI/SPE) etc **AIR 1998 SC 2120 : [1998] 2 SCR 870;** *Lokayukta, Justice Ripusudan Dayal (Retired) and Ors. vs State of Madhya Pradesh & Ors.* **(2014) 4 SCC 473 : [2014] 3 SCR 242 – referred to.**

5.8 The true function of the court when an application under Section 321 is filed is to ensure that the executive function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. The court will grant its consent if it is satisfied that it sub-serves the administration of justice and the purpose of seeking it is not extraneous to the vindication of the law. It is the broad ends of public justice that must guide the decision. The public prosecutor is duty bound to act independently and ensure that they have applied their minds to the essential purpose which governs the exercise of the powers. Whether the public prosecutor has acted in good faith is not in itself dispositive of the issue as to whether consent should be given. The court must scrutinize "whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law". Good faith is one and not the only consideration. The court must

also scrutinize whether an application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. [Para 58]

Sheonandan Paswan vs State of Bihar & Ors. **(1987) 1 SCC 288 : [1987] 1 SCR 702 – followed.**

State of Bihar vs Ram Naresh Pandey & Anr. **AIR 1957 SC 389 : [1957] 1 SCR 279 – relied on.**

5.9 On the touchstone of these principles, there can be no manner of doubt that the CJM was justified in declining consent for the withdrawal of the prosecution under Section 321. The acts complained of which are alleged to constitute offences punishable under Sections 425, 427 and 447 of the IPC and under Section 3(1) of the Prevention of Damage of Public Property Act 1984 are stated to have been committed in the instant case on the floor of the State Legislature. Committing acts of destruction of public property cannot be equated with either the freedom of speech in the legislature or with forms of protest legitimately available to the members of the opposition. To allow the prosecution to be withdrawn in the face of these allegations, in respect of which upon investigation a final report has been submitted under Section 173 of the CrPC and cognizance has been taken, would amount to an interference with the normal course of justice for illegitimate reasons. Such an action is clearly extraneous to the vindication of the law to which all organs of the executive are bound. Hence, the mere finding of the High Court that there is no absence of good faith would not result in allowing the application as a necessary consequence, by ignoring the cause of public justice and the need to observe probity in public life. The members of the State Legislature have in their character as elected representatives a public trust impressed upon the discharge of their duties. Allowing the prosecution to be withdrawn would only result in a singular result, which is that the elected representatives are exempt from the mandate of criminal law. This cannot be countenanced as being in aid of the broad ends of public justice. [Para 59]

6. Section 197(1) of the CrPC states that cognizance cannot be taken for an offence allegedly committed by a public servant, who is removable with the sanction of the Government,

unless the sanction of the Government is received.A plain reading of Section 197 of the CrPC clarifies that it applies only if the public servant can be removed from office by or with the sanction of the government. However, MLAs cannot be removed by the sanction of the government, as they are elected representatives of the people of India. They can be removed from office, for instance when disqualified under the Xth Schedule of the Constitution for which the sanction of the government is not required. Further, sanction under Section 197 is only required before cognizance is taken by a court, and not for the initiation of the prosecution.The submission that the prosecution against the respondent-accused is vitiated for want of sanction of the Speaker is rejected. [Para 63-65]

P.V. Narasimha Rao vs State (CBI/SPE) etc **AIR 1998 SC 2120 : [1998] 2 SCR 870 ;** *K. Veeraswami vs Union of India* **(1991) 3 SCC 655 : [1991] 3 SCR 189 ;** *Satish Chandra vs Speaker, Lok Sabha* **(2014) 2 SCC 178;** *Ramdas Athawale (5) vs Union of India* **(2010) 4 SCC 1 : [2010] 3 SCR 1059;** *Attorney General of Ceylon vs de Livera* **[1963] AC 103 – referred to.**

7.1 Article 194(2) is divided into two limbs. The first limb of Article 194(2) which provides the members absolute immunity with respect of anything said or any vote given in the House is a manifestation of the freedom of speech provided under Article 194(1). The second limb of Article 194(2) gives the members immunity in respect of the publication of 'any report, paper, votes, or proceedings' by or under the authority of the house. The legal immunity to 'anything said or any vote given' in the first limb and the 'publication of a report, paper, votes, or proceedings' in the second limb of Article 194(2), flow from the freedom of speech that is provided under Article 194(1). The exercise of these manifestations of the freedom of speech – as provided in Article 194(2) – has been provided with express immunity. However, the only difference between the two limbs of Article 194(2) is that the first limb protects the exercise of the freedom, and the second limb protects the member against the publication of the said exercise of the freedom. The legal proceedings against the exercise of the freedom can only be initiated by those aware of the exercise of freedom, which would mean either those who are present in

the House or those who become aware of it when the speech, vote or the like, is published. While the freedoms protected by both the limbs are substantively the same, the second limb is clarificatory in the sense that it prevents 'any person' from initiating proceedings against the exercise of freedom of speech inside the House when they obtain knowledge of the exercise of the said freedom through a publication. Thus, the immunity provided for the exercise of the manifestations of the freedom of speech in the second limb of under Article 194(2) cannot exceed the freedom of speech provided in the first limb of Article 194(2). That acts of destruction of public property are not privileged under the first limb of Article 194(2). Consequently, acts of vandalism cannot be said to be manifestations of the freedom of speech and be termed as "proceedings" of the Assembly. It was not the intention of the drafters of the Constitution to extend the interpretation of 'freedom of speech' to include criminal acts by placing them under a veil of protest. Hence, the Constitution only grants the members the freedom of speech that is necessary for their active participation in meaningful deliberation without any fear of prosecution. [Para 80]

7.2 Moreover, the word 'proceedings' in Article 194(2) follows the words 'any report, paper, votes'. Reports, papers and votes are actions that are undertaken by the members of the Assembly in their official capacity for participation and deliberation in the House. These are essential functions that a member has to perform in order to discharge her duty to the public as their elected representative. On application of the interpretative principle of *noscitur* a *sociis*, the phrase 'proceedings' takes colour from the words surrounding it. Since the words associated with the phrase 'proceedings' refer to actions that are exercised by the members in their official capacity, in furtherance of their official functions, the meaning of the word 'proceedings' must also be restricted to only include such actions.The submissions of the appellant are rejected and it is held that the video recording of the incident was not a "proceeding" of the Assembly, which would be protected from legal proceedings under Article 194(2). [Paras 81, 82]

P.V. Narasimha Rao vs State (CBI/SPE) etc **AIR 1998 SC 2120 : [1998] 2 SCR 870 – referred to.**

R vs Chaytor and others **[2010] UKSC 52**;*Attorney General of Ceylon vs de Livera* **[1963] AC 103 – referred to.**

7.3 The submission that the video recording was not obtained by the investigating authorities with the sanction of the Speaker; that the video recording belongs to the Electronic Record Room of Assembly and as the custodian of the House, the permission of the Speaker is necessary to access this video recording; and that the video recording lacks the certification required for admissibility of evidence is not relevant and does not merit consideration by this Court in an application for withdrawal of prosecution under Section 321 of the CrPC. The High Court has correctly observed that questions of insufficiency of evidence, admissibility of evidence absent certifications etc., are to be adjudged by the trial court during the stage of trial. It is not the duty of this Court, in an application under Section 321 of the CrPC, to adjudicate upon evidentiary issues and examine the admissibility or sufficiency of evidence. [Paras 83, 84]

Sheonandan Paswan vs State of Bihar & Ors. **(1987) 1 SCC 288 : [1987] 1 SCR 702 – followed.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 697 of 2021

From the Judgment and Order dated 12.03.2021 of the High Court of Kerala at Ernakulam in Crl. Revision Petition No.641 of 2020.

With

Criminal Appeal No.698 of 2021

K. Gopalakrishna Kurup, Adv. Gen, Ranjit Kumar, Jaideep Gupta, Sr. Advs., P. Narayanan, Manu V., Jishnu M. L., G. Prakash, Rajagopalan Nair, P. S. Sudheer, Ms. Anne Mathew, Bharat Sood, Ms. Shruti Jose, Advs. for the petitioner.

Mahesh Jethmalani, V. Chitambares, Sr. Advs., Ravi Sharma, Shoumendu Mukherji, Nachiketa Joshi, Ms. Bharti Tyagi, Mukul Singh, Praneet Pranav, Amit Sharma, Bhaskar Gowtham, Ms. Gunjan Mangla, Ms. Megha Sharma, R. V. Sreejith, Suvin R. Menon, Sayuj Mohandas, Ramesh Babu M. R., T. Asaf Ali, Advs. for the Respondent.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

This judgment has been divided into the following sections to facilitate analysis:

A. Factual Background

1. Leave granted.

2. The appeals arise out of a judgment of a Single Judge of the High Court of Kerala dated 12 March 2021. The High Court in the exercise of its revisional jurisdiction under Section 397 of the Code of Criminal Procedure, 1973[1] upheld the order of the Chief Judicial Magistrate[2], Thiruvananthapuram declining to grant permission to the Public Prosecutor to withdraw the prosecution of the first to sixth respondents under Section 321 of the CrPC.

1 "CrPC"
2 "CJM"

3. On 13 March 2015, the then Finance Minister was presenting the budget for the financial year 2015-2016 in the Kerala Legislative Assembly. The respondent-accused[3], who at the time were Members of the Legislative Assembly[4] belonging to the party in opposition, disrupted the presentation of the budget, climbed over to the Speaker's dais and damaged furniture and articles including the Speaker's chair, computer, mike, emergency lamp and electronic panel, causing a loss of Rs. 2,20,093/-. The incident was reported to the Museum Police Station by the Legislative Secretary. Crime No. 236 of 2015 was registered under Sections 447 and 427 read with Section 34 of the Indian Penal Code 1860[5] and Section 3(1) of the Prevention of Damage to Public Property Act 1984. On the completion of the investigation, the final report under Section 173 of the CrPC was submitted and cognizance was taken by the Additional CJM, Ernakulam of the said offences[6].

4. On 21 July 2018, an application[7] was filed by the Assistant Public Prosecutor under Section 321 of the CrPC seeking sanction to withdraw the case against all the respondent-accused. The Prosecutor gave the following reasons for withdrawing the prosecution:

   (i) Immunities and privileges: The events transpired during a session of the Legislative Assembly when certain MLAs protested against the budget presentation. The 'protest' by the MLAs is protected by the immunities and privileges under Article 194(3) of the Constitution of India;

   (ii) Breach of privilege: A violation of the rights and immunities granted to MLAs is a breach of privilege and the Legislative Assembly is empowered to punish such actions which are offences against its authority and of disobedience of its legitimate commands. A breach of privilege is a contempt of the House, which falls under the exclusive jurisdiction of the Speaker of the Assembly;

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3 The term "respondent-accused" refers to Respondent Nos 1 to 6 in SLP (Crl) No 4009 of 2021 and the petitioners in SLP (Crl) No 4481 of 2021.

4 "MLA"

5 "IPC"

6 C.C No. 151 of 2018.

7 Crl. MP 2577 of 2019.

(iii) Sanction of the Speaker: An offence which is committed in the Assembly, during a session or in its vicinity by MLAs, cannot be registered by the police without the permission of the Speaker. Police officers require authorization from the 'competent authority' to investigate a breach of law if it occurs in the precincts of the Legislative Assembly;

(iv) Public Interest: The freedoms granted to MLAs are necessary for the functioning of democracy and are subject to the powers of the Speaker or the criminal courts with the sanction of the Speaker. The continuance of the trial of the MLAs absent the sanction of the Speaker lowers the dignity of the Assembly amongst citizens, thereby affecting public interest;

(v) Absence of *mens rea*: According to the charge sheet, the incident occurred during a protest by the party in opposition against the presentation of the budget. Thus, it is difficult to assess the 'reus' of the offence;

(vi) Lack of evidence: The statements of witnesses under Section 161 of the CrPC are vague and there is an absence of proper identification of the persons involved and their participation in the commission of the alleged offence. The Investigating Officer has failed to record the statement of natural eye witnesses, that is, the MLAs who were present in the Assembly Hall, despite the permission of the Speaker. Although this casts a doubt on the nature of the investigation conducted, it nonetheless indicates that the prosecution has a remote chance to prove its case;

(vii) A copy of the video recording of the incident was procured from the Electronic Control Room of the Legislative Assembly, without the sanction of the Speaker. The video footage lacks certification under Section 65B of the Indian Evidence Act 1872 and the admissibility of this evidence would be under challenge in the trial; and

(viii) The Government of Kerala, which owned the property that was destroyed, had by an order dated 9 February 2018 consented to the withdrawal of the prosecution and hence, the 'larger public interest' would be served if the case is withdrawn early.

5. The case was transferred to the court of the CJM, Thiruvananthapuram[8]. By an order dated 22 September 2020, the CJM declined to give consent to the application of the Prosecutor for the following reasons:

   (i) Immunity can be claimed by MLAs only in exercise of free speech and voting as held by this Court in **P.V. Narasimha Rao vs State (CBI/SPE) etc**[9]. The alleged offence committed by the respondent-accused did not have any nexus with their speech or vote;

   (ii) The case against the MLAs was registered at the instance of the Secretary of the Legislative Assembly and thus, it can be assumed that this was within the knowledge of the Speaker of the Assembly. Accordingly, the argument that the case was registered without the permission of the Speaker does not hold ground;

   (iii) Although the Government of Kerala had consented to the withdrawal of the prosecution, it is erroneous to suggest that the loss of public property is a loss accruing to the Government. Damage to public property causes a loss to the public exchequer. The alleged offences are of a serious nature; and

   (iv) The role of the court under Section 321 is to assess whether the application is made in good faith, in the interests of justice and public policy, and not to stifle the process of law. The application of the Prosecutor fails to inform the court how the withdrawal of prosecution in this case would achieve these objectives. Thus, it is presumed that the application is filed without good faith and is based on external influence.

6. The State of Kerala filed a criminal revision petition[10] before the High Court. The High Court, by its order dated 12 March 2021 dismissed the petition and affirmed the order of the CJM. In doing so, the High Court rejected the argument of the State that prosecuting the MLAs will lower the prestige of the Assembly, and thereby impact public interest. The High Court observed that:

8 C.C No. 73 of 2019.
9 AIR 1998 SC 2120.
10 Crl. Rev. Pet. No. 641 of 2020.

(i) The conduct of the MLAs cannot be deemed to be in furtherance of the functioning of a free democracy, and does not warrant the invocation of the immunities and privileges granted to MLAs;

(ii) There is no provision, either in the Constitution, or in the Rules of Procedure and Conduct of Business in the Kerala Assembly, made pursuant to Article 208(1) of the Constitution, that mandated the police to seek permission or sanction of the Speaker before registering a crime against the MLAs; and

(iii) Insofar as the prosecution raised arguments regarding inadequacy of evidence for successful conviction of the respondent-accused, the judgment of this Court in **Sheonandan Paswan vs State of Bihar & Ors.**[11] indicates that such arguments must be raised by the respondent- accused while seeking a discharge before the Magistrate.

7. While dismissing the petition, the High Court observed that the application under Section 321 of the CrPC had been rejected by the CJM for valid reasons. However, the High Court did not find any "*justification for the presumption in the order that the petition was filed without good faith and on extraneous influence*"

8. The State of Kerala and the respondent-accused have filed independent SLPs against the order of the High Court before this Court.

B. Submissions of Parties

9. Mr Ranjit Kumar, Senior counsel appearing on behalf of the State of Kerala made the following submissions in support of the appeals:

(i) The power of the Public Prosecutor to withdraw from the prosecution for one or more offences of which the accused is tried can be exercised in furtherance of public justice – social, economic, and political as held in **Rajendra Kuman Jain vs State through Special Police Establishment & Ors.**[12]. The offence that the respondents are accused of committing occurred during the presentation of the State budget, in the premises of the Legislative Assembly. Their actions are manifestations

11 (1987) 1 SCC 288.
12 (1980) 3 SCC 435.

of effective political participation, and are in furtherance of a political purpose which is a valid ground for withdrawal of the prosecution in view of the above decision;

(ii) The court granting permission for withdrawal from prosecution performs a supervisory and not an adjudicatory function. It must not take it upon itself the burden to review the reasons advanced by the Public Prosecutor but must only determine if the Public Prosecutor has applied the mind as a "free agent, uninfluenced by irrelevant and extraneous considerations";

(iii) The High Court while deciding the revision against the order of the CJM has erroneously relied on the dissent of Chief Justice Bhagwati in **Sheonandan Paswan (supra)**. The majority opinion in **Sheonandan Paswan (supra)** was authored by Justice Khalid for himself and Justice Natarajan, while Justice Venkataramiah authored a separate but concurring judgment;

(iv) The incident in relation to which the complaint was filed, took place on the floor of the Kerala Legislative Assembly during the presentation of the budget by the Finance Minister. Since the incident happened *inside* the House, prosecution cannot be initiated without the sanction of the Speaker, who is the presiding officer of the Legislative Assembly. The dictum in **P.V. Narasimha (supra)** that the sanction of the Speaker of the House is required for the registration of an offence against any MLA is not restricted to offences under the Prevention of Corruption Act, 1988;

(v) The genesis of the incident lies in a political protest inside the House. Certain women MLAs had been physically assaulted leading to an FIR being registered. There was a protest against the Finance Minister during the presentation of the budget and the incident was a manifestation of that protest. In this backdrop a decision was taken to bring a quietus to the incident, and the Government considered it appropriate to advise the Public Prosecutor to withdraw the prosecution;

(vi) The actions of the respondent-accused are a manifestation of their right to protest which is a facet of the freedom of speech and expression. Article 194 of the Constitution provides that no proceedings shall be initiated in the court for the exercise of the

freedom of speech by MLAs inside the precincts of the Legislative Assembly. Moreover, these actions took place during the course of the budget presentation and bear a close nexus to the right to vote which is protected under Article 194. Further, the video of the incident of 13 March 2015 that was procured from the Electronic Control Room is a publication of the proceedings of the House. Under Article 194(2), no member shall be held liable in respect of publication of any proceedings inside the House; and

(vii) The High Court despite finding that no *mala fides* can be attributed to the petition for withdrawal initiated by the Public Prosecutor, upheld the order of the CJM declining consent for the withdrawal. By doing so, the High Court has exercised an adjudicatory function, reviewing the grounds provided by the Public Prosecutor as opposed to the established principles laid down in **Rajendra Kumar Jain (supra)** and **Sheonandan Paswan (supra)** where it has been held that the court can only exercise a supervisory jurisdiction.

10. Mr Jaideep Gupta, learned Senior counsel appearing on behalf of the respondent-accused and in support of the appeal in the companion case, urged that:

(i) There is a clear difference in the approach of the majority and the minority judgments in **Sheonandan Paswan (supra)**. The judgments of the majority require the court to determine whether the Public Prosecutor has improperly exercised their powers, interfered with the normal course of justice or exercised powers for illegitimate purposes. The minority cuts down the scope of Section 321 by imposing conditions which are not accepted by the majority opinions. While the majority focusses on the function of the Public Prosecutor, the minority dwelt on the purity of the administration of justice;

(ii) Since the CJM did not apply the correct principles, the High Court in the exercise of its revisional jurisdiction under Section 397 of the CrPC ought to have intervened to correct the decision; and

(iii) The real test is whether the decision of the Public prosecutor will destroy the administration of justice. This has to be answered in the negative and hence the application for withdrawal ought to be allowed.

11. On the other hand, Mr Mahesh Jethmalani and Mr V. Chitambaresh, Senior counsel, and Mr Ramesh Babu, Advocate-On-Record, appearing on behalf of Respondent Nos 7 and 8[13], opposed the stand of the appellants and the respondent-accused, urging that:

(i) The exercise of the freedom of speech by the MLAs inside the House does not embrace within it the right to destroy property. The privileges under Article 194 cannot be used as a cover for violent actions of members in the precincts of the legislative assembly;

(ii) The decision of this court in **Lokayukta, Justice Ripusudan Dayal (Retired) and Ors. vs State of Madhya Pradesh & Ors.**[14] holds that a privilege can only be provided to the extent required so as to allow the members to perform their functions without hindrance. A claim of privilege cannot be used as a shield to circumvent the application of criminal law since no person enjoys a privilege against criminal prosecution;

(iii) The observation in **P.V Narasimha Rao** **(supra)** on the mandatory prior sanction of the Speaker was only made with specific reference to Section 19 of Prevention of Corruption Act, 1988.[15]Section 19 provides that for the prosecution of a public servant for offences under the Act, the sanction of the authority competent to remove the said person is required. Since no such authority is specified for MPs, three judges in **P.V Narasimha Rao** **(supra)** held that until Parliament so specifies, the Speaker would be competent to grant a sanction to prosecute under Section 19. The observation cannot be construed to have a general application to mean that the previous sanction of the Speaker is required to prosecute the members of the House for any offence, other than under the Prevention of Corruption Act, 1988;

13 Respondent Nos 7 and 8 were impleaded as parties before the High Court of Kerala by order dated 12 March 2021 in Crl. M. Appl. 3 of 2021 and Crl. M. Appl. 4 of 2021, respectively.

14 (2014) 4 SCC 473.

15 "19. Previous sanction necessary for prosecution.- (1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,—
(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
(c) in the case of any other person, of the authority competent to remove him from his office. […]".

(iv) Section 197 of CrPC[16] is not applicable to MLAs since they cannot be removed from office by or with the sanction of the Government, which is a pre-requisite for the application of the provision. Even otherwise, the sanction under Section 197 of the CrPC is not required at the initial stage of commencing prosecution but only at a later stage after cognizance is taken;

(v) The High Court has incorrectly relied on the minority opinion authored by Justice Bhagwati in **Sheonandan Paswan (supra).** However, both Justice Khalid in his majority opinion, and Justice Venkataramiah in his concurring opinion held that this Court must restrain itself from interfering with the concurrent findings of the lower courts, either accepting or rejecting the withdrawal petition filed by the Public Prosecutor. Since the CJM dismissed the withdrawal petition in the present case and the High Court dismissed the revision petition against the order of the CJM, this Court must refrain from interfering with the concurrent findings of the courts below under Article 136 of the Constitution; and

(vi) In the present case this court must be guided by: (a) the concurrent findings on the illegality of the application for withdrawal; (b) the overriding aspect of public interest; and (c) the object of the law. The provisions of the legislation enacted by Parliament for prosecuting damage to public property make its intent clear. Section 3 of the Prevention of Damage to Public Property Act 1984 provides a minimum sentence of six months and Section 5 has adopted a special provision on bail, whereby it is necessary to give prosecution an opportunity to oppose the application for bail. These provisions are similar to provisions for bail in the Narcotics Drugs and Psychotropic Substance Act, 1951, which indicate the intention of the Parliament to consider damage to public property as a grave offence.

16 "197. Prosecution of Judges and public servants: (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction […]".

C. Issues and Analysis

12. Having adverted to the submissions of the parties, we shall now turn to the issues raised before this Court. The question before this Court is centred on the exercise of power by the Public Prosecutor under Section 321 and the exercise of jurisdiction by the CJM. Before assessing the submissions of the parties, we find it necessary to discuss the position of the law on this point.

C.1 Withdrawal of prosecution

13. Section 321 of the CrPC reads as follows:

"321. Withdrawal from prosecution. The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court

shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

14. The powers under Section 321 of the CrPC have been interpreted by this Court on a number of occasions. In **State of Bihar vs Ram Naresh Pandey & Anr.**[17], a three-judge Bench of this Court analysed Section 494 of the earlier Code of Criminal Procedure 1898 (similar to Section 321 of the CrPC). Justice B. Jagannadhadas observed that in granting consent to withdraw a prosecution, the court exercises a judicial function. However, in doing so, the court need not determine the matter judicially. The court only needs to be satisfied that "*the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes*". This Court also observed that the Magistrate's power under Section 494 was to prevent abuse of power of the executive. Addressing the question of whether insufficiency of evidence is a ground for withdrawal of prosecution, the Court held that :

"9. […] **we find it difficult to appreciate why the opinion arrived at by both the trial court and the Sessions Court that the view taken of that material by the Public Prosecutor viz. that it was meagre evidence on which no conviction could be asked for, should be said to be so improper that the consent of the Court under Section 494 of the Code of Criminal Procedure has to be withheld.** Even the private complainant who was allowed to participate in these proceedings in all its stages, does not, in his objection petition, or revision petitions, indicate the availability of any other material or better material. Nor, could the complainant's counsel, in the course of arguments before us inform us that there was any additional material available. In the situation, therefore, excepting for the view that no order to withdraw should be passed in such cases either as a matter of law or as a matter of propriety but that the matter should [b]e disposed of only after the evidence is judicially taken, we apprehend that the learned Chief Justice himself would not have felt called upon to interfere with the order of the Magistrate in the exercise of his revisional jurisdiction."

(**emphasis supplied**)

17 7 AIR 1957 SC 389.

15. In **M.N Sankarayaraynan Nair vs P.V Balakrishnan**[18], this Court held that the powers conferred on the Prosecutor under Section 494 of the Code of Criminal Procedure 1898 are to be exercised in "furtherance of the object of law". On the power of the court to grant consent, Justice P. Jaganmohan Reddy observed that

> "8. […] The Court also while considering the request to grant permission under the said section should not do so as a necessary formality — the grant of it for the mere asking. **It may do so only if it is satisfied on the materials placed before it that the grant of it subserves the administration of justice and that permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain**."
>
> **(emphasis supplied)**

16. In **Rajender Kumar Jain vs State through Special Police Establishment and Ors.**[19], there was an application for the withdrawal of the prosecution against Mr George Fernandes, Chairperson of the Socialist Party of India. Mr Fernandes had been accused of rousing resistance against the Emergency imposed in 1975 and of participating in a conspiracy to do acts which may have resulted in the destruction of property. After the Emergency was revoked, the Special Public Prosecutor filed an application under Section 321 of the CrPC 'in view of the changed circumstances and public interest'. Given the political background of the dispute, a two judge bench of this Court, speaking through Justice O. Chinnappa Reddy highlighted the importance of the independence of the Public Prosecutor in exercising the power under Section 321 of the CrPC. In the context of a withdrawal of prosecution where matters of public policy are involved, the Court held that:

> "16. In the past, we have often known how expedient and necessary it is in the public interest for the public prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest etc. **Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from**

18 (1972) 1 SCC 318.
19 (1980) 3 SCC 435.

prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter-productive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecution already launched. In such matters who but the Government can and should decide, in the first instance, whether it should be baneful or beneficial to launch or continue prosecutions. If the Government decides that it would be in the public interest to withdraw from prosecutions, how is the Government to go about this task?

17. Under the Code of Criminal Procedure it is the Public Prosecutor that has to withdraw from the prosecution and it is the court that has to give its consent to such withdrawal. […] it is he that is entrusted with the task of initiating the proceeding for withdrawal from the prosecution. **But, where such large and sensitive issues of public policy are involved, he must, if he is right-minded, seek advice and guidance from the policy- makers**. His sources of information and resources are of a very limited nature unlike those of the policy-makers. **If the policy- makers themselves move in the matter in the first instance, as indeed it is proper that they should where matters of momentous public policy are involved, and if they advise the Public Prosecutor to withdraw from the prosecution, it is not for the court to say that the initiative comes from the Government and therefore the Public Prosecutor cannot be said to have exercised a free mind.** Nor can there be any quibbling over words. If ill informed but well meaning bureaucrats choose to use expressions like "the Public Prosecutor is directed" or "the Public Prosecutor is instructed", the court will not on that ground alone stultify the larger issue of public policy by refusing its consent on the ground that the Public Prosecutor did not act as a free agent when he sought withdrawal from the prosecution. What is at stake is not the language of the letter or the prestige of the Public Prosecutor but a wider question of policy. **The court, in such a situation is to make an effort to elicit the reasons for**

withdrawal and satisfy itself, that the Public Prosecutor too was satisfied that he should withdraw from the prosecution for good and relevant reasons."

Thus the fact that the withdrawal was initiated by the government was held not to vitiate the application, so long as the Public Prosecutor had independently applied his mind. Elaborating on the scope of withdrawal on the ground of public justice, and in particular the ambit of the expression 'political offence', the Court held:

"19.[…] For our present purpose it is really unnecessary for us to enter into a discussion as to what are political offences except in a sketchy way. **It is sufficient to say that politics are about Government and therefore, a political offence is one committed with the object of changing the Government of a State or inducing it to change its policy.** Mahatma Gandhi, the father of the Nation, was convicted and jailed for offences against the municipal laws; so was his spiritual son and the first Prime Minister of our country.

[…]

21. To say that an offence is of a political character is not to absolve the offender of the offence. But the question is, is it a valid ground for the Government to advise the Public Prosecutor to withdraw from the prosecution? **We mentioned earlier that the Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice and that such broad ends of public justice may well include appropriate social, economic and political purposes**. It is now a matter of history that the motivating force of the party which was formed to fight the elections in 1977 was the same as the motivating force of the criminal conspiracy as alleged in the order sanctioning the prosecution; only the means were different. The party which came to power as a result of 1977 elections chose to interpret the result of the elections as a mandate of the people against the politics and the policy of the party led by Shrimati Gandhi. Subsequent events leading up to the 1980 elections which reversed the result of the 1977 elections may cast a doubt whether such interpretation was correct; only history can tell. But, if the Government of the day interpreted the result of the 1977 elections as a mandate of the people and on the basis of that interpretation the Government advised the Public Pr[o]secutor to withdraw from the prosecution, one cannot say that the Public Prosecutor was activated

by any improper motive in withdrawing from the prosecution nor can one say that the Magistrate failed to exercise the supervisory function vested in him in giving his consent."

(emphasis supplied)

17. The locus classicus on the interpretation of the powers conferred by Section 321 of the CrPC is the decision of the Constitution Bench in **Sheonandan Paswan (supra)**. In this case, the Board of Directors of the Patna Urban Cooperative Bank was charged with misdemeanours such as misappropriation of the funds of the bank by giving multiple loans to the same person under different names and approving loans for fictitious persons. The Registrar of Cooperative Societies at the instance of the Reserve Bank of India directed legal action to be initiated against the stakeholders. On investigation, statements were made against Dr Jagannath Mishra, the ex-Chief Minister of Bihar, and it was alleged that he misused his office and made illegal personal gains for himself while holding office of the Chief Minister. A charge sheet was filed and the CJM took cognizance of the matter. However, before the case could progress further, Dr Mishra once again took oath as the Chief Minister of Bihar and a communication was issued by the Government that it had decided to withdraw the case. A withdrawal application was filed by the Public Prosecutor on grounds of lack of evidence, implication due to political vendetta, and that the prosecution would be against public policy and public interest. The CJM gave consent for the withdrawal, and the High Court affirmed the order of the CJM.

18. When the matter came up before this Court, the appeal was dismissed by a 2:1 majority. A review petition was allowed, and the scope of Section 321 of the CrPC was addressed by a Constitution Bench. Chief Justice Bhagwati in his minority opinion held that in a case where a withdrawal petition has been filed on the ground of paucity of evidence, after the charge sheet has been filed but before the charge has been framed in a warrant case, the exercise of power by the court granting consent is similar to the power of the court to discharge the accused under Section 239 of the CrPC[20]. Hence,

20 "Section 239: When accused shall be discharged: If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

in such cases, it would not be competent for the public prosecutor to file a withdrawal petition unless there is material change in the evidence. The Chief Justice was of the opinion that the court must take up the exercise of discharge in such cases since it would carry greater conviction with the people. He observed:

"30. The second qualification[..] What the court, therefore, does while exercising its function under Section 239 is to consider the police report and the document sent along with it as also any statement made by the accused if the court chooses to examine him. And if the court finds that there is no prima facie case against the accused the court discharges him. But that is precisely what the court is called upon to do when an application for withdrawal from the prosecution is made by the Public Prosecutor on the ground that there is insufficient or no evidence to support the prosecution. There also the court would have to consider the material placed before it on behalf of the prosecution for the purpose of deciding whether the ground urged by the Public Prosecutor for withdrawal of the prosecution is justified or not and this material would be the same as the material before the court while discharging its function under Section 239. **If the court while considering an application for withdrawal on the ground of insufficiency or absence of evidence to support the prosecution has to scrutinise the material for the purpose of deciding whether there is in fact insufficient evidence or no evidence at all in support of the prosecution, the court might as well engage itself in this exercise while considering under Section 239 whether the accused shall be discharged or a charge shall be framed against him. It is an identical exercise which the court will be performing whether the court acts under Section 239 or under Section 321. If that be so, we do not think that in a warrant case instituted on a police report the Public Prosecutor should be entitled to make an application for withdrawal from the prosecution on the ground that there is insufficient or no evidence in support of the prosecution. "**

(emphasis supplied)

19. Justice Khalid (speaking for himself and Justice Natarajan) rendered the majority opinion holding that the power of the court to grant consent for a withdrawal petition is similar to the power under Section 320 of the CrPC to compound offences. The court in both

the cases will not have to enquire into the issue of conviction or acquittal of the accused person, and will only need to restrict itself to providing consent through the exercise of jurisdiction in a supervisory manner. It was held that though Section 321 does not provide any grounds for seeking withdrawal, "public policy, interest of administration, inexpediency to proceed with the prosecution for reasons of State, and paucity of evidence" are considered valid grounds for seeking withdrawal. Further, it was held that the court in deciding to grant consent to the withdrawal petition must restrict itself to only determining if the Prosecutor has exercised the power for the above legitimate reasons:

"73 […]When an application under Section 321 CrPC is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under Section 321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to rewrite Section 321 CrPC and would be to concede to the court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. **All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given.** In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321 CrPC.

[…]

78. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the court is to grant its consent. The initiative is that of the Public Prosecutor and what the court has to do is only to give

its consent and not to determine any matter judicially. **The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes."**

(emphasis supplied)

The Court also held that while granting or denying consent to a withdrawal petition, the court is not to review the purported grounds warranting withdrawal that the public prosecutor has provided, but must only make sure that it is for a legitimate purpose, initiated without *mala fides.*

20. Both, Justice Khalid in his majority opinion and Justice Venkataramiah (as the learned Chief Justice then was) in his concurring opinion, held that this Court must be circumspect in interfering with the concurrent findings of the courts below, allowing or dismissing the withdrawal petition. Highlighting that this Court is not a court of facts and evidence it was observed:

"89. An order passed under Section 321 comes to this Court by special leave, under Article 136 of the Constitution of India. The appeal before us came thus. It has been the declared policy of this Court not to embark upon a roving enquiry into the facts and evidence of cases like this or even an order against discharge. **This Court will not allow itself to be converted into a court of facts and evidence. This Court seldom goes into evidence and facts. That is as it should be. Any departure from this salutary self-imposed restraint is not a healthy practice and does not commend itself to me. It is necessary for this Court to remember that as an apex court, any observation on merits or on facts and evidence of a case which has to go back to the courts below will seriously prejudice the party affected and it should be the policy of this Court not to tread upon this prohibited ground and invite unsavoury but justifiable criticism.** Is this Court to assess the evidence to find out whether there is a case for acquittal or conviction and convert itself into a trial court? Or is this Court to order a retrial and examination of hundred witnesses to find

out whether the case would end in acquittal or conviction? Either of these conclusions in the case is outside the scope of Section 321. This can be done only if we rewrite Section 321."

(emphasis supplied)

21. The decision in **Sheonandan Paswan (supra)** has held the ground since then. An instance of its application was when this Court dealt with the withdrawal of prosecution of an MLA for offences involving misappropriation of public money. In **Yerneni Raja Ramchandar vs State of Andhra Pradesh & Ors.**[21], the appellant, an MLA, was accused of fabricating hospital records to repeatedly claim medical reimbursement for a sum of Rs. 2,89,489, Rs. 1,33,939, and Rs. 1,22,825 from the Government. Amounts of Rs. 289,489, Rs. 60,000 and Rs. 60,000 were sanctioned by the Government time and again in response to these requests. Charges of misappropriation were levelled against him. Since the appellant was an MLA, the matter was referred to the Ethics Committee of the Legislative Assembly, where the appellant tendered an apology and refunded Rs. 60,000 to the Government. Pursuant to this, the Ethics Committee recommended a withdrawal of the prosecution against the appellant. The State Government also issued an order requiring the District Collector to direct the Prosecutor to withdraw the case. Multiple applications for withdrawal of prosecution were made, which were dismissed by the Magistrate. These, however, were ultimately allowed by the High Court. In refusing to allow the withdrawal of the prosecution against the appellant, this Court opined that in view of decision in **Sheonandan Paswan (supra)**, the power of judicial review of the High Court was limited. It could have only interfered if there was an error of law committed by the Magistrate. Further, the Court also considered the implication of the disciplinary action taken by the Ethics Committee of the Legislative Assembly on the withdrawal of prosecution under Section 321 of the CrPC. Justice SB Sinha, speaking for the two-judge Bench, held that

"15. The Ethics Committee of the legislature of the State of Andhra Pradesh was empowered to deal with the disciplinary action or otherwise which may be taken against the Members of the

21 (2009) 15 SCC 604.

Legislative Assembly. A criminal case against a Member of the Legislative Assembly, ordinarily, should be allowed to be continued on its own merit, particularly, in the light of the facts of the present matter wherein the High Court had refused to interfere at the earlier stages of the proceedings. We have also noticed hereinbefore that the High Court, in fact, had not only been monitoring the investigation, but also directed the learned trial Judge to complete the trial within a period of three months. The action on the part of the State to issue the said government order despite the earlier orders of the High Court must be considered keeping in view the said factual matrix.

[…]

18. The government order was issued even according to the State in terms of the recommendations made by the Ethics Committee alone. […] **The Ethics Committee had no jurisdiction to make such recommendations. If the State had acted on the basis of recommendations made by a body who had no role to play, its action would be vitiated in law, recommendations of the Ethics Committee being unauthorised, the action of the State would attract the doctrine of malice in law**.

19. Even otherwise, the action on the part of the State, in our opinion, suffers from malice on fact as well. The State is the protector of law. When it deals with a public fund, it must act in terms of the procedure established by law. **In respect of public fund, the doctrine of public trust would also be applicable so far as the State and its officers are concerned. It could not, save and except for very strong and cogent reasons, have issued the said government order despite the orders of the High Court**."

(**emphasis supplied**)

22. In offences involving the violation of public trust by executive or legislative authorities, this Court has evaluated the gravity of the offence and the impact of the withdrawal of prosecution on public life. In **Bairam Muralidhar vs State of Andhra Pradesh**[22], the Prosecutor was seeking a withdrawal of the prosecution against

22 (2014) 10 SCC 380.

a police officer who had been accused of demanding a bribe in exchange of not implicating a particular individual for an offence of kidnapping and for reducing the charges against the individual's son. The police officer was accused of offences under Sections 7 and 13(1) of the Prevention of Corruption Act 1988. An application under Section 321 of the CrPC was filed by the Prosecutor based on the fact that the Government had issued an order for withdrawal of prosecution against the officer given his meritorious service and directed that his case be placed before the Administrative Tribunal for disciplinary proceedings. This Court affirmed the concurrent findings of the High Court and the Trial Court and rejected the application for withdrawal. Justice Dipak Misra (as he then was), speaking on behalf of the two judge Bench, held that

"19. In the case at hand, as the application filed by the Public Prosecutor would show that he had mechanically stated about the conditions precedent, it cannot be construed that he has really perused the materials and applied his independent mind solely because he has so stated. **The application must indicate perusal of the materials by stating what are the materials he has perused, may be in brief, and whether such withdrawal of the prosecution would serve public interest and how he has formed his independent opinion. As we perceive, the learned Public Prosecutor has been totally guided by the order of the Government and really not applied his mind to the facts of the case.** The learned trial Judge as well as the High Court has observed that it is a case under the Prevention of Corruption Act. They have taken note of the fact that the State Government had already granted sanction. It is also noticeable that the Anti- Corruption Bureau has found there was no justification of withdrawal of the prosecution.

[…]

22. **We have referred to these authorities only to show that in the case at hand, regard being had to the gravity of the offence and the impact on public life apart from the nature of application filed by the Public Prosecutor, we are of the considered opinion that view expressed by the learned trial Judge as well as the High Court cannot be found fault with**. We say so as we are inclined to think that there is no ground to show that such withdrawal would

advance the cause of justice and serve the public interest. That apart, there was no independent application of mind on the part of the learned Public Prosecutor, possibly thinking that the court would pass an order on a mere asking."

(**emphasis supplied**)

23. The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated:

(i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;

(ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;

(iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;

(iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;

(v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:

(a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;

(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;

(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;

(vi) While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and

(vii) In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent.

C.2 Immunities and Privileges of MLAs

24. Articles 105 and 194 of the Constitution provide in similar terms for the privileges and immunities of Members of Parliament[23] and MLAs respectively. Article 194 of the Constitution is extracted below:

"194. Powers, privileges, etc, of the House of Legislatures and of the members and committees thereof

(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

23 (2014) 10 SCC 380.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution forty fourth Amendment Act, 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."

(**emphasis supplied**)

25. Clause 1 of Article 194 recognizes the freedom of speech in the legislature of every State. However, the freedom recognized by clause 1 is subject to the provisions of the Constitution and standing orders regulating the procedure of the State Legislatures. Clause 2 enunciates a rule of immunity which protects a member of the legislature from a proceeding in any court "in respect of anything said or a vote given" in the legislature or in any committee of the legislature. Moreover it provides a shield against any liability for a publication of a report, paper, votes or proceedings by or under the authority of the House. Further, clause 3 of Article 194 provides that in other respects the privileges and immunities are such as defined by law. Until defined by law – there being presently no law on the subject – the privileges and immunities of the members of the House and its committees shall be such as were in existence before Section 26 of the Forty-Fourth Amendment to the Constitution came

into force. According to clause 4, the privileges and immunities also attach to those who have a right to speak in and participate in the proceedings of the House or its committees.

26. At the time of the adoption of the Constitution, clause 3 of Article 194 provided that the privileges, immunities and powers of a House of the Legislature of a State (and of its members and committees) shall be such as may from time to time be defined by the legislature by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom at the commencement of the Constitution. By Section 34 of the Forty- Second Amendment to the Constitution, clause (3) of Article 194 was amended and embodied a transitory provision under which until the powers, privileges and immunities of a House of the legislature of a State (and of the members and its committees) were defined by a law made by the legislature, they shall be those of the British House of Commons and the privileges of each House "shall be such as may from time to time be evolved by such House". However, Section 34 was not brought into force by issuing a notification under Section 1(2) of the Constitution (Forty-Second) Amendment Act 1976. Eventually, clause (3) in its present form was substituted by Section 26 of the Constitution (Forty-Fourth) Amendment Act 1978 with effect from 20 June 1979[24]. The present position of clause (3) is that:

(i) The ultimate source of the powers, privileges and immunities of a House of a State Legislature and of the members and committees would be determined by way of a legislation;

(ii) Until such legislation is enacted, the position as it stood immediately before the coming into force of Section 26 of the Forty-Fourth Amendment Act 1978 would govern; and

(iii) The amendment to the Constitution introducing the concept of evolution of privileges and immunities by the House of the legislature never came into force and now stands deleted.

24 Section 26 of the Constitution (Forty-fourth Amendment) Act 1978, w.e.f. 20 June 1979, read as follows: "26. In article 194 of the Constitution, in clause (3), for the words "shall be those of the House of commons of the Parliament of the United Kingdom and of its members and committees, at the commencement of this Constitution", the words, figures and brackets "shall be those of that House and of its members and committees immediately before the coming into force of section 26 of the Constitution (Forty fourth Amendment) Act 1978" shall be substituted."

C.2.1 Position in the United Kingdom

27. Now, in this backdrop, it would be necessary to assess at the outset the nature of the privileges and immunities referable to the House of Commons in the United Kingdom. Erskine May's *Parliamentary Practice*[25], provides a comprehensive statement of law, indicating the phases through which Parliamentary privilege evolved in the UK.

First phase

The first phase of the conflict between Parliament and the courts was "about the relationship between the *lex parliament* and the common law of England". In this view, the House of Parliament postulated that "they alone were the judges of the extent and application of their own privileges, not examinable by any court or subject to any appeal". The first phase of the conflict, has been described thus:

"The earlier views of the proper spheres of court and Commons were much influenced by political events and the constitutional changes to which they gave rise. Coke in the early seventeenth century regarded the law of Parliament as a particular law, distinct from the common law. For that reason "judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliament*[26]."

However, even during this period, "elements of the opposing view that – decision of Parliament on matters of privilege can be called in question in other courts, that the *lex parliament* is part of the common law and known to the courts, and that resolutions at either House declaratory of privilege will not bind the courts- are found at almost as early a date, and they gained impetus as time went by".

Second phase

Erskine May tells us that in the second phase of the nineteenth century:

"…some of the earlier claims to jurisdiction made in the name of privilege by the House of Commons were untenable in a court of law: that the law of Parliament was part of the general law, that its

25 ERSKINE MAY, PARLIAMENTARY PRACTICE, Chapter 17, page 281 (24th Ed., Lexis Nexis, 2011).
26 SIR EDWARD COKE, FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 14 (1797).

principles were not beyond the judicial knowledge of the judges, and that the duty of the common law to define its limits could no longer be disputed. At the same time, it was established that there was a sphere in which the jurisdiction of the House of Commons was absolute and exclusive."

Third phase

In the early and mid-twentieth century:

"**In general, the judges have taken the view that when a matter is a proceeding of the House, beginning and terminating within its own walls, it is obviously outside the jurisdiction of the courts, unless criminal acts are involved.** Equally clearly, if a proceeding of the House results in action affecting the rights of persons exercisable outside the House, the person who published the proceedings or the servant who executed the order (for example) will be within the jurisdiction of the courts, who may inquire whether the act complained of is duly covered by the order, and whether the privilege claimed by the House does, as pleaded, justify the act of the person who executed the order."

(emphasis supplied)

In the later twentieth century, the House of Commons came to a significant conclusion about the limits of the phrase and the protection afforded to proceedings in Parliament.

28. The privileges of the British House of Commons at the commencement of the Constitution as embodied in clause (3) of Article 194 as it then stood has significant consequences. First, the nature and extent of the privileges enjoyed by the members was to be decided by the courts and not by the legislature, following the English principle that the courts have the power to determine whether the House possessed a particular privilege. Second, the courts had the power to determine whether any of the privileges of the British House of Commons that existed at the date of the commencement of the Constitution, had become inconsistent with the provisions of the Constitution.

29. As mentioned above, since the Parliament is yet to enact a law on the subject of parliamentary privileges, according to Article 194(3) of the Constitution, the MLAs shall possess privileges that the members of the House of Commons possessed at the time of enactment of the

Constitution. It is thus imperative that we refer to judgments of the United Kingdom on whether criminal offences committed within the precincts of the House of Commons are covered under 'parliamentary privileges', receiving immunity from prosecution.

30. In **R vs Eliot, Holles and Valentine**[27], Sir John Eliot and his fellows in the House of Commons protested against the Armenian movement in the English Church in the House. During the course of the protest, three members of the House used force to hold the Speaker down, preventing him from adjourning the House. They were charged for seditious speech and assault. The court of King's Bench rejected the argument of the members that only the House had the exclusive jurisdiction to examine their conduct, and imposed fined and sentenced them to imprisonment. The House of Lords reversed the judgment of the King's Bench on the writ of error. One of the errors specified was that the charge of seditious speech and assault on the Speaker should not have been disposed of by the same judgment. It was observed that while the former was within the exclusive jurisdiction of the House, the latter could 'perhaps' be tried by the courts. It was not expressly and categorically stated that the assault inside the House could only be tried by the House.

31. In **Bradlaugh vs Gossett**,[28]an elected member of the House of Commons prevented the Speaker from administering oath. Subsequently, the Sergeant-at-Arms exerted physical force to remove the member from the precincts of the House. The elected member initiated action against the Sergeant and the same was dismissed. Justice Stephen in his concurring judgment observed that the House –similar to a private person – has an exercisable right to use force to prevent a trespasser from entering the House, and authorise others to carry out its order. In that context he observed:

"The only force which comes in question in this case is, such force as any private man might employ to prevent a trespass on his own land. **I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice".**

(emphasis supplied)

27 (1629) 3 St Tr 292-336.
28 [1884] EWHC 1 (QB).

Justice Stephen sought to differentiate 'ordinary crimes' from 'crimes'. By the former, he referred to criminal offences that are committed within the precincts of the House, but bear no nexus to the effective participation in essential parliamentary functions.

32. In **R vs Chaytor and others**[29], the UK Supreme Court was dealing with four accused persons who were charged with false accounting in relation to parliamentary expenses and had claimed immunity from legal proceedings as it infringed their parliamentary privilege. Against them, disciplinary proceedings were initiated by the House. Article 9 of the Bill of Rights 1689 provides that the freedom of speech and debates or proceedings in the Parliament must not be questioned by any court or place outside Parliament. The question before the Court was what constituted "proceedings in Parliament". Lord Phillips observed that:

"83. **The House does not assert an exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in committee or in the House. Where it is considered appropriate the police will be invited to intervene with a view to prosecution in the courts.** Furthermore, criminal proceedings are unlikely to be possible without the cooperation of Parliament. Before a prosecution can take place it is necessary to investigate the facts and obtain evidence."

(emphasis supplied)

The Law Lord further held that the submission of claims is *incidental to the administration* of the parliament and not *proceedings of the parliament*:

"90. Where the House becomes aware of the possibility that criminal offences may have been committed by a Member in relation to the administration of the business of Parliament in circumstances that fall outside the absolute privilege conferred by article 9, the considerations of policy to which I have referred at para 61 above require that the House should be able to refer the matter to the police for consideration of criminal proceedings, or to cooperate

29 [2010] UKSC 52 .

with the police in an inquiry into the relevant facts. That is what the House has done in relation to the proceedings brought against the three defendants."

Referring to the distinction made by Justice Stephen in **Bradlaugh (supra)**, Lord Lodger observed:

"118. That remains the position to this day. I have therefore no doubt that, if the offences with which the appellants are charged are to be regarded as "ordinary crimes", then – even assuming that they are alleged to have been committed entirely within the precincts of the House – the appellants can be prosecuted in the Crown Court. **The only question, therefore, is whether there is any aspect of the offences which takes them out of the category of "ordinary crime" and into the narrower category of conduct in respect of which the House would claim a privilege of exclusive cognizance."**

(emphasis supplied)

From the above cases it is evident that a person committing a criminal offence within the precincts of the House does not hold an absolute privilege. Instead, he would possess a qualified privilege, and would receive the immunity *only if the action bears nexus to the effective participation of the member in the House.*

C.2.2 Position in India

33. The immunity available to the MPs under Article 105(2) of the Constitution from liability to "any proceedings in any court in respect of anything said or any vote given by him in Parliament" (similar to Article 194(2) of the Constitution in case of MLAs) became the subject matter of the decision of the Constitution Bench in **P. V. Narasimha Rao (supra)**. The judgment of the Constitution Bench, which consisted of Justice SC Agrawal, Justice GN Ray, Justice AS Anand, Justice SP Bharucha and Justice S Rajendra Babu, comprised of three opinions. The first opinion was by Justice SC Agrawal (on behalf of himself and Dr Justice AS Anand), the second by Justice SP Bharucha (on behalf of himself and Justice S Rajendra Babu) and the third, by Justice GN Ray.

34. In understanding the judgment of the Constitution Bench, it becomes necessary at the outset to dwell on the decision of Justice GN Ray. In the course of his judgment, Justice GN Ray agreed with the reasoning of Justice SC Agrawal that

(i) An MP is a public servant under Section 2(c) of the Prevention of Corruption Act 1988; and

(ii) Since there is no authority to grant sanction for the prosecution of an MP under Section 19(1) of the Prevention of Corruption Act 1988[30], the Court can take cognizance of the offences mentioned in Section 19(1) in the absence of sanction. However, before filing a charge sheet in respect of an offence punishable under Sections 7, 10, 11, 12 and 15 against an MP in a criminal court, the prosecuting agency must obtain the sanction of the Chairman of the Rajya Sabha or the Speaker of the Lok Sabha as the case may be.

35. Therefore, on the first aspect, while understanding the context and text of the decision, it is important to bear in mind that Section 19(1) of the PC Act specifically mandates sanction for prosecution of a public servant, a description which is fulfilled by an MP. However, there being no authority competent to grant sanction for the prosecution of a Member of Parliament, Justice SC Agrawal, speaking for himself and Dr Justice AS Anand, held that:

"3. Since there is no authority competent to remove a Member of Parliament and to grant sanction for his prosecution under Section 19(1) of the Prevention of Corruption Act, 1988, the court can take cognizance of the offences mentioned in Section 19(1) in the absence of sanction but till provision is made by Parliament in that regard by suitable amendment in the law, the prosecuting agency, before filing a charge-sheet in respect of an offence punishable under Sections 7, 10, 11, 13 and 15 of the 1988 Act against a Member of Parliament in a criminal court, shall obtain the permission of the Chairman of the Rajya Sabha/Speaker of the Lok Sabha, as the case may be."

Justice GN Ray as noted earlier agreed with the above formulation.

36. However, it is necessary to appreciate the factual context of the case before dealing with the interpretation of Article 105(3) of the Indian Constitution. On 26 July 1993, a Motion of No Confidence was moved in the Lok Sabha against the minority government of Shri P V Narasimha Rao. The support of fourteen members was needed

30 "PC Act"

to defeat the No Confidence Motion. The Motion was sought on 28 July 1993. 251 members voted in support, while 265 voted against the Motion. It was alleged that certain MPs agreed to and did receive bribes from certain other MPs. A prosecution was launched against the bribe givers and the bribe takers and cognizance was taken by the Special Judge, Delhi.

37. Before the Constitution Bench, a question was raised as to whether the legal proceedings against the said MPs would be protected under the privileges and immunities granted under Article 105(3) of the Constitution "in respect of anything said or any vote given" by an MP. On the interpretation of Article 105(3), the judgment of Justice SP Bharucha, speaking for himself and Justice Rajendra Babu, received the concurrence of Justice GN Ray. The charge against the bribe givers, who were MPs, was in regard to the commission of offences punishable under the PC Act or the abetment of those offences. Justice SP Bharucha in the course of his judgment held that Article 105(2) protects an MP against proceedings in court "that relate to, or concern, or have a connection or nexus with anything said or a vote given, by him in Parliament". The judgment of the majority on this aspect held:

"136. It is difficult to agree with the learned Attorney General that though the words "in respect of" must receive a broad meaning, the protection under Article 105(2) is limited to court proceedings that impugn the speech that is given or the vote that is cast or arises thereout or that the object of the protection would be fully satisfied thereby. The object of the protection is to enable Members to speak their mind in Parliament and vote in the same way, freed of the fear of being made answerable on that account in a court of law. It is not enough that Members should be protected against civil action and criminal proceedings, the cause of action of which is their speech or their vote. **To enable Members to participate fearlessly in parliamentary debates, Members need the wider protection of immunity against all civil and criminal proceedings that bear a nexus to their speech or vote.** It is for that reason that a Member is not "liable to any proceedings in any court in respect of anything said or any vote given by him". Article 105(2) does not say, which it would have if the learned Attorney General were right, that a Member is not liable for what he has said or how he has voted. While imputing no

such motive to the present prosecution, it is not difficult to envisage a Member who has made a speech or cast a vote that is not to the liking of the powers that be being troubled by a prosecution alleging that he had been party to an agreement and conspiracy to achieve a certain result in Parliament and had been paid a bribe."

(emphasis supplied)

38. Justice SC Agrawal and Dr Justice AS Anand reached a contrary conclusion on the subject:

"98. On the basis of the aforesaid discussion we arrive at the following conclusion:

1. A Member of Parliament does not enjoy immunity under Article 105(2) or under Article 105(3) of the Constitution from being prosecuted before a criminal court for an offence involving offer or acceptance of bribe for the purpose of speaking or by giving his vote in Parliament or in any committees thereof.

2. A Member of Parliament is a public servant under Section 2(c) of the Prevention of Corruption Act, 1988.

3. Since there is no authority competent to remove a Member of Parliament and to grant sanction for his prosecution under Section 19(1) of the Prevention of Corruption Act, 1988, the court can take cognizance of the offences mentioned in Section 19(1) in the absence of sanction but till provision is made by Parliament in that regard by suitable amendment in the law, the prosecuting agency, before filing a charge-sheet in respect of an offence punishable under Sections 7, 10, 11, 13 and 15 of the 1988 Act against a Member of Parliament in a criminal court, shall obtain the permission of the Chairman of the Rajya Sabha/Speaker of the Lok Sabha, as the case may be."

39. The view of Justice SC Agrawal and Dr Justice AS Anand on the construction of Article 105 (2) and Article 105(3) was however the minority view since Justice GN Ray had concurred with the view of Justice SP Bharucha and Justice Rajendra Babu on this aspect. Analyzing the decision of the majority led by the judgment of Justice SP Bharucha, the stand out feature is this: the charge against the alleged bribe takers was that they were party to a criminal conspiracy in pursuance of which they had agreed to accept bribes to defeat

the No Confidence Motion on the floor of the House. In pursuance of the conspiracy, it was alleged that the bribe-givers had passed on bribes to the alleged bribe takers. It was in this context that the judgment noted:

"134…The nexus between the alleged conspiracy and bribe and the no-confidence motion is explicit. The charge is that the alleged bribe-takers received the bribes to secure the defeat of the no-confidence motion."

40. Thus, the Court observed that the connection between the alleged conspiracy, the bribe and the No Confidence Motion was explicit, and came to the conclusion that the alleged bribe takers received the bribe to manipulate their votes to secure the defeat of the No Confidence Motion. It was in this context that the Court observed that the expression "in respect of" under Article 105(2) must receive a broad meaning and the alleged conspiracy and bribe had a nexus to and were in respect of those votes and that the proposed inquiry in the criminal proceedings was in regard to their votes in the motion of no-confidence.

41. The next judgment which is of significance in the evolution of this body of law is the decision of the Constitution Bench in **Raja Ram Pal vs Hon'ble Speaker, Lok Sabha**[31]. The case has become known in popular lore as the "cash for query case", where a sting operation on a private channel depicted certain MPs accepting money either directly or through middlemen as consideration for raising questions in the House. Similarly, another channel carried a telecast alleging improper conduct of an MP in relation to the implementation of the MPLADS Scheme. Following an enquiry by the committees of the House, these MPs were expelled. This led to the institution of writ petitions challenging the expulsion. In that context, the issues which were for determination were:

"1. Does this Court, within the constitutional scheme, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the legislatures and its Members?

31 (2007) 3 SCC 184.

2. If the first question is answered in the affirmative, can it be found that the powers and privileges of the legislatures in India, in particular with reference to Article 105, include the power of expulsion of their Members?

3. In the event of such power of expulsion being found, does this Court have the jurisdiction to interfere in the exercise of the said power or privilege conferred on Parliament and its Members or committees and, if so, is this jurisdiction circumscribed by certain limits?"

Chief Justice Y K Sabharwal speaking for the majority (Justice C K Thaker concurring) held that:

"62. In view of the above clear enunciation of law by Constitution Benches of this Court in case after case, there ought not be any doubt left that whenever Parliament, or for that matter any State Legislature, claims any power or privilege in terms of the provisions contained in Article 105(3), or Article 194(3), as the case may be, **it is the Court which has the authority and the jurisdiction to examine, on grievance being brought before it, to find out if the particular power or privilege that has been claimed or asserted by the legislature is one that was contemplated by the said constitutional provisions or, to put it simply, if it was such a power or privilege as can be said to have been vested in the House of Commons of the Parliament of the United Kingdom as on the date of commencement of the Constitution of India so as to become available to the Indian Legislatures."**

(emphasis supplied)

42. The principle which emphatically emerges from this judgment is that whenever a claim of privilege or immunity is raised in the context of Article 105(3) or Article 194 (3), the Court is entrusted with the authority and the jurisdiction to determine whether the claim is sustainable on the anvil of the constitutional provision. The Constitution Bench held that neither Parliament nor the State legislatures in India can assert the power of "self-composition or in other words the power to regulate their own constitution in the manner claimed by the House of Commons or in the UK". The decision therefore emphasizes the doctrine of constitutional supremacy in India as distinct from parliamentary supremacy in the UK.

43. A three judge Bench of this Court has made a distinction between legislative functions and non-legislative functions of the members of the House for determination of the scope of the privileges. In **Lokayukta, Justice Ripusudan Dayal (Retired) (supra)**, the petitioner initiated action against certain officers of the State Legislative Assembly for indulging in corruption relating to construction work and initiated criminal proceedings against the officials. In turn, the Speaker of the House issued a letter to the petitioner alleging breach of privilege, against which the petitioner filed a writ petition before this Court. Allowing the petition, Chief Justice P. Sathasivam speaking for a three-Judge Bench observed that privileges are available only as far as they are essential for the members to carry out their legislative functions. He held that the scope of the privileges must be determined based on the need for them. The Court observed:

> **"51. The scope of the privileges enjoyed depends upon the need for privileges i.e. why they have been provided for. The basic premise for the privileges enjoyed by the Members is to allow them to perform their functions as Members and no hindrance is caused to the functioning of the House.** The Committee of Privileges of the Tenth Lok Sabha, noted the main arguments that have been advanced in favour of codification, some of which are as follows:..[…]
>
> **52. It is clear that the basic concept is that the privileges are those rights without which the House cannot perform its legislative functions. They do not exempt the Members from their obligations under any statute which continues to apply to them like any other law applicable to ordinary citizens.** Thus, enquiry or investigation into an allegation of corruption against some officers of the Legislative Assembly cannot be said to interfere with the legislative functions of the Assembly. No one enjoys any privilege against criminal prosecution."
>
> **(emphasis supplied)**

44. Having detailed the position of law above, the next section would discuss the validity of the argument invoking the immunities and privileges under Article 194 as a hypothesis for barring legal proceedings for acts of destruction of public property in the present case.

C.3 Privilege to commit acts of public destruction – an incongruous proposition

45. The essence of this case is whether the application made by the Public Prosecutor under Section 321 of the CrPC falls within the interpretative understanding of Section 321 of the CrPC as elucidated by the decisions of this Court. The CJM held that the application could not be allowed and the High Court in the exercise of its revisional jurisdiction affirmed the finding of the CJM. In approaching this task in the exercise of its jurisdiction under Article 136 of the Constitution, the Court must do well to bear in mind the caution which has been expressed in the decision of the majority in the Constitution Bench decision in **Sheonandan Paswan (supra)**. The Court noted that it had been "the declared policy of this Court not to embark upon a roving enquiry into the facts and evidence of case like this", particularly because any observation on merits or facts and evidence will cause serious prejudice to parties at trial. Hence, in approaching the submissions of the counsel, it is necessary to begin with a caution and caveat that in evaluating them the Court must not transcend the limits of its jurisdiction under Article 136. Both the CJM and the High Court have come to the conclusion that the application for withdrawal made by the public prosecutor under Section 321 should not be allowed. The issue is whether these findings suffer from a palpable error or perversity which would warrant interference by this Court.

46. We must at the outset clear two grounds raised by the appellants. First, the High Court in the course of its decision has cited the observations in the minority opinion of Chief Justice Bhagwati in **Sheonandan Paswan (supra)** treating them to be the view of the court. Undoubtedly, the judgment of the learned Chief Justice expresses a minority opinion. The majority view is reflected in the judgement of Justice V Khalid (speaking for himself and Justice S Natarajan) and in the concurring opinion of Justice E S Venkataramiah. However, before we accede to the submission of the appellants to displace the judgment of the High Court on this count we must advert to whether it is consistent with the decision of the majority in **Sheonandan Paswan (supra)**. The conclusion of the High Court to affirm the decision of the CJM must, therefore, be analysed from prism of the law as it has been enunciated consistently in several decisions

before and after the judgment of the Constitution Bench and of course, in the decision in **Sheonandan Paswan (supra)**. The second aspect which must be borne in mind is that the High Court has accepted the fact that no *mala fides* can be attributed to the application for withdrawal. We will consider whether this is a circumstance which in and of itself should have resulted in allowing the application for the grant of permission for withdrawal of the prosecution under Section 321. The issue on this aspect of the case is whether a finding that there is no absence of good faith must inexorably result in allowing an application under Section 321 bereft of the other considerations which must underlie such a decision.

47. Shorn of detail, the allegations against the accused need to be recapitulated. At the material time in March 2015, the respondent-accused were elected members of the State Legislative Assembly belonging to the party in opposition. On 13 March 2015, when the Finance Minister was presenting the annual budget, the MLAs in question are alleged to have disrupted the presentation of the budget. To them is attributed the acts of climbing on to the dais of the Speaker and damaging furniture and articles including the Speaker's chair, computer, mic, emergency lamp and an electric panel amounting to a loss of Rs.2,20,093. Following this incident, Crime No. 236 of 2015 was registered at the behest of the Legislative Secretary of the State Assembly for offences punishable under Sections 427[32] and 447[33] read with Section 34 of the IPC and Section 3(1) of the Prevention of Damage to Public Property Act 1984. A final report under Section 173 of the CrPC was submitted by the police and cognizance was taken by the CJM.

48. The Prevention of Damage to Public Property Act 1984 was enacted by Parliament "to provide for prevention of damage to public property and for matters connected therewith". Section 2(b) defines the expression 'public property' thus:

32 "427. Mischief causing damage to the amount of fifty rupees.—Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

33 "447. Punishment for criminal trespass.—Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both".

"(b) "public property" means any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under the control of—

(i) the Central Government; or

(ii) any State Government; or

(iii) any local authority; or (iv) any corporation established by, or under, a Central, Provincial or State Act; or

(v) any company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

(vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government shall not specify any institution, concern or undertaking under this sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments."

The Statement of Objects and Reasons contains the rationale for the Ordinance which was promulgated by the President on the subject, which was enacted as a statute:

"With a view to curb acts of vandalism and damage to public property including destruction and damage caused during riots and public commotion, a need was felt to strengthen the law to enable the authorities to deal effectively with cases of damage to public property. Accordingly, the President promulgated on 28th January, 1984, the Prevention of Damage to Public Property Ordinance, 1984 (No. 3 of 1984)."

Section 3 which has been invoked in the present case is in the following terms:

"3. Mischief causing damage to public property.—

(1) Whoever commits mischief by doing any act in respect of any public property, other than public property of the nature referred to in sub-section (2), shall be punished with imprisonment for a term which may extend to five years and with fine.

(2) Whoever commits mischief by doing any act in respect of any public property being—

(a) any building, installation or other property used in connection with the production, distribution or supply of water, light, power or energy;

(b) any oil installations;

(c) any sewage works;

(d) any mine or factory;

(e) any means of public transportation or of tele-communications, or any building, installation or other property used in connection therewith, shall be punished with rigorous imprisonment for a term which shall not be less than six months, but which may extend to five years and with fine:

Provided that the court may, for reasons to be recorded in its judgment, award a sentence of imprisonment for a term of less than six months."

The expression "mischief" is defined in Section 2(a) to have the meaning which is ascribed to it in Section 425[34] of the IPC:

34 "425. Mischief.—Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief"".
Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.
Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.
(a) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.
(b) A introduces water in to an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.
(c) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.
(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.
(e) A having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.
(f) A causes a ship to be cast away, intending thereby to cause damage to Z who has lent money on bottomry on the ship. A has committed mischief.
(g) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.
(h) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

"(a) "mischief" shall have the same meaning as in section 425 of the Indian Penal Code (45 of 1860);"

The ingredients of Section 425 are:

(i) causing destruction of any property (a) with an intent to cause; or (b) knowing of the likelihood to cause wrongful loss or damage to the public or to any person; or

(ii) any change in the property or its situation which destroys or diminishes its value or utility or affects it injuriously.

49. The Prevention of Damage to Public Property Act 1984 seeks to penalise *inter alia* the commission of mischief (as defined in Section 425 of the IPC) by doing any act in respect of public property. Sub-Section (1) of Section 3 makes the offence punishable with imprisonment for a term which may extend to five years and with fine. Sub-Section (2) covers certain specific installations in the case of which an act of mischief carries a minimum term of imprisonment of six months but which may extend to five years and a fine. Section 5[35] embodies a special provision for bail. Section 6[36] makes it clear that the law is in addition to and not in derogation of any other law for the time being in force.

50. The gravity of the offence involving a destruction of public property was considered by this Court in **Re: Destruction of Public and Private Properties**[37], where it took *suo motu* cognizance to remedy the large-scale destruction of public and private properties in agitations, bandhs, hartals and other forms of 'protest'. The Court formed two committees chaired by Justice KT Thomas (former judge of this Court) and Mr Fali S Nariman, Senior counsel and adopted the recommendations of both the committees in laying down specific guidelines for investigation and prosecution of offences involving destruction of public property, assessment of damages and determination of compensation in cases involving destruction of property. In the more recent decision

35 "5. Special provisions regarding bail.—No person accused or convicted of an offence punishable under section 3 or section 4 shall, if in custody, be released on bail or on his own bond unless the prosecution has been given an opportunity to oppose the application for such release."

36 "6. Saving.—The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force, and nothing contained in this Act shall exempt any person from any proceeding (whether by way of investigation or otherwise) which might apart from this Act, be instituted or taken against him."

37 2009 5 SCC 212.

Kodungallur Film Society and Another vs Union of India[38], this Court noted that the guidelines in Re: Destruction of Public and Private Properties **(supra)** have been considered by the Union of India and a draft Bill for initiating legislative changes along the lines of the recommendations is under consideration. The Court also issued guidelines on preventive measures to curb mob violence, determining compensation and fixing liability for offences, and in regard to the responsibility of police officials for investigation of such crimes.

51. Based on the above, it is evident that there has been a growing recognition and consensus both in this Court and Parliament that acts of destruction of public and private property in the name of protests should not be tolerated. Incidentally, the Kerala Legislative Assembly also enacted the Kerala Prevention of Damage to Private Property and Payment of Compensation Act 2019 (Act No. 09 of 2019) to complement the central legislation, Prevention of Damage to Public Property Act 1984, with a special focus on private property.

52. The persons who have been named as the accused in the FIR in the present case held a responsible elected office as MLAs in the Legislative Assembly. In the same manner as any other citizen, they are subject to the boundaries of lawful behaviour set by criminal law. No member of an elected legislature can claim either a privilege or an immunity to stand above the sanctions of the criminal law, which applies equally to all citizens. The purpose and object of the Act of 1984 was to curb acts of vandalism and damage to public property including (but not limited to) destruction and damage caused during riots and public protests.

53. A member of the legislature, the opposition included, has a right to protest on the floor of the legislature. The right to do so is implicit in Article 105(1) in its application to Parliament and Article 194(1) in its application to the State Legislatures. The first clauses of both these Articles contain a mandate that "there shall be freedom of speech" in Parliament and in the legislature of every State. Nonetheless, the freedom of speech which is protected by the first clause is subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of the legislature. The second clause

38 2018 10 SCC 713.

provides immunity against liability "to any proceedings in any court" in respect of "anything said or any vote given" in the legislature or any committee. Moreover, no person is to be liable in respect of the publication by or under the authority of Parliament or of the House of the State Legislature of any report, paper, votes or proceedings. We have earlier traced the history of Clause (3) of Article 194 as it originally stood under which the powers, privileges and immunities of the members of Parliament and of the State Legislatures were those which were recognised for Members of the House of Commons immediately before the enforcement of the Constitution. This provision, as we have seen, was sought to be amended by the Forty Second Amendment and was ultimately amended by the Forty Fourth Amendment, from which it derives its present form. It recognises the powers, privilege and immunities as they stood immediately before the enforcement of Section 26 of the Forty Fourth Amendment.

54. Tracing the history of the privileges and immunities enjoyed by members of the House of Commons, Erskine May makes a doctrinal division of the position in the UK into various phases. However, the stand out feature which emerges from the privileges and immunities of the members of the House of Commons is the absence of an immunity from the application of criminal law. This jurisprudential development began in **Sir John Elliot (supra),** was developed by Justice Stephen in **Bradlaugh (supra)**, and cemented by the UK Supreme Court in Chaytor (supra)**.**

55. There is a valid rationale for this position. The purpose of bestowing privileges and immunities to elected members of the legislature is to enable them to perform their functions without hindrance, fear or favour. This has been emphasized by the three judge Bench in **Lokayukta, Justice Ripusudan Dayal (supra)**. The oath of office which members of Parliament and of the State Legislature have to subscribe requires them to (i) bear true faith and allegiance to the Constitution of India as by law established; (ii) uphold the sovereignty and integrity of India; and (iii) faithfully discharge the duty upon which they are about to enter. It is to create an environment in which they can perform their functions and discharge their duties freely that the Constitution recognizes privileges and immunities. These privileges bear a functional relationship to the discharge of the functions of a legislator. They are not a mark of status which makes legislators

stand on an unequal pedestal. It is of significance that though Article 19(1)(a) expressly recognises the right to freedom of speech and expression as inhering in every citizen, both Articles 105(1) and 194(1) emphasise that "there shall be freedom of speech" in Parliament and in the Legislature of a State. In essence, Article 19(1)(a) recognizes an individual right to the freedom of speech and expression as vested in all citizens. Articles 105(1) and 194(1) speak about the freedom of speech in the Parliament and State Legislatures and in that context must necessarily encompass the creation of an environment in which free speech can be exercised within their precincts. The recognition that there shall be freedom of speech in Parliament and the State Legislatures underlines the need to ensure the existence of conditions in which elected representatives can perform their duties and functions effectively. Those duties and functions are as much a matter of duty and trust as they are of a right inhering in the representatives who are chosen by the people. We miss the wood for the trees if we focus on rights without the corresponding duties cast upon elected public representatives.

56. Privileges and immunities are not gateways to claim exemptions from the general law of the land, particularly as in this case, the criminal law which governs the action of every citizen. To claim an exemption from the application of criminal law would be to betray the trust which is impressed on the character of elected representatives as the makers and enactors of the law. The entire foundation upon which the application for withdrawal under Section 321 was moved by the Public Prosecutor is based on a fundamental misconception of the constitutional provisions contained in Article 194. The Public Prosecutor seems to have been impressed by the existence of privileges and immunities which would stand in the way of the prosecution. Such an understanding betrays the constitutional provision and proceeds on a misconception that elected members of the legislature stand above the general application of criminal law.

57. The reliance placed by the appellants on **P.V Narasimha Rao** **(supra)** to argue that the action of the respondent-accused inside the House was a form of 'protest' which bears a close nexus to the freedom of speech, and thus is covered by Article 194(2) is unsatisfactory. The majority in **P.V Narasimha Rao** **(supra)** dealt with the interpretation

of the phrase 'in respect of' and gave it a wide import. At the same time, the majority observed that there must be a nexus between the act or incident (which in that case was the act of bribery in the context of the votes cast on a motion of no-confidence) and the freedom of speech or to vote. It was emphasised that the bribe was given to manipulate the votes of the MPs and thus, it bore a close nexus to the freedom protected under Article 105(2). The case however, did not deal with the ambit of the privilege of 'freedom of speech' provided to the members of the House. It was in **Lokayukta, Justice Ripusudan Dayal (Retired) (supra)** that a three judge Bench of this Court laid down the law for the identification of the content of the privileges. It was held that the members shall only possess such privileges that are *essential* for undertaking their *legislative functions*. An alleged act of destruction of public property within the House by the members to lodge their protest against the presentation of the budget cannot be regarded as essential for exercising their legislative functions. The actions of the members have trodden past the line of constitutional means, and is thus not covered by the privileges guaranteed under the Constitution.

58. The test which has been laid down in the decisions of this Court commencing with **Ram Naresh Pandey (supra)** in 1957, spanning decisions over the last 65 years is consistent. The true function of the court when an application under Section 321 is filed is to ensure that the executive function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. The court will grant its consent if it is satisfied that it sub-serves the administration of justice and the purpose of seeking it is not extraneous to the vindication of the law. It is the broad ends of public justice that must guide the decision. The public prosecutor is duty bound to act independently and ensure that they have applied their minds to the essential purpose which governs the exercise of the powers. Whether the public prosecutor has acted in good faith is not in itself dispositive of the issue as to whether consent should be given. This is clear from the judgment in **Sheonandan Paswan (supra)**. In paragraph 73 of the judgment, Justice V Khalid has specifically observed that the court must scrutinize "whether the application is made in good faith, in the interest of public policy and

justice and not to thwart or stifle the process of law". Good faith is one and not the only consideration. The court must also scrutinize whether an application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given.

59. On the touchstone of these principles, there can be no manner of doubt that the CJM was justified in declining consent for the withdrawal of the prosecution under Section 321. The acts complained of which are alleged to constitute offences punishable under Sections 425, 427 and 447 of the IPC and under Section 3(1) of the Prevention of Damage of Public Property Act 1984 are stated to have been committed in the present case on the floor of the State Legislature. Committing acts of destruction of public property cannot be equated with either the freedom of speech in the legislature or with forms of protest legitimately available to the members of the opposition. To allow the prosecution to be withdrawn in the face of these allegations, in respect of which upon investigation a final report has been submitted under Section 173 of the CrPC and cognizance has been taken, would amount to an interference with the normal course of justice for illegitimate reasons. Such an action is clearly extraneous to the vindication of the law to which all organs of the executive are bound. Hence, the mere finding of the High Court that there is no absence of good faith would not result in allowing the application as a necessary consequence, by ignoring the cause of public justice and the need to observe probity in public life. The members of the State Legislature have in their character as elected representatives a public trust impressed upon the discharge of their duties. Allowing the prosecution to be withdrawn would only result in a singular result, which is that the elected representatives are exempt from the mandate of criminal law. This cannot be countenanced as being in aid of the broad ends of public justice.

60. We shall now deal with two other arguments raised by the appellants and the respondent-accused : First, whether the sanction of the Speaker of the House is required for prosecuting MLAs for occurrences within the precincts of the Assembly and second, whether the members are protected by privilege under Article 194(2) which is available in case of publication of proceedings that take place inside the House.

C.4 Sanction of Speaker

61. The Speaker of the legislative assembly is appointed under Article 178 of the Constitution. The Speaker is the presiding officer of the House, and has complete autonomy to make decisions on the functioning of the house and maintenance of decorum of the House. Chapter IV of the Rules of Procedure and Conduct of Business in the Kerala Legislative Assembly[39] states that the Speaker presides over the House, decides on the sittings and adjournments of the House, and makes arrangements for carrying out the smooth conduct of the business of the House.

62. The appellants have relied on **P.V. Narasimha Rao (supra)** to argue that the prior sanction of the Speaker, as the presiding officer of the House, is necessary to initiate a prosecution against the members of the House for the commission of an offence inside the House. We are unable to accept this submission. The decision of this Court in **P.V. Narasimha Rao (supra)** and the factual background within which it arose has been discussed earlier. In that case MPs were accused of committing offences under the PC Act. Section 19 of the PC Act specifically provides that cognisance of offences committed by a public servant under Sections 7, 10, 11, 13 and 15 can only be taken with the prior sanction of the authority competent to remove a public servant from office[40]. In light of this section, the majority in **P.V. Narasimha Rao (supra)** (Justice S C Agarwal speaking for himself and Dr Justice A S Anand with Justice G N Ray concurring on this point) held that since MPs are public servants, prior sanction is required to initiate a prosecution against them. The Court also held that since there is no authority competent to remove an MP, the power to grant a sanction to prosecute an MP would reside in the Speaker of the House. The observations of the Constitution Bench regarding prior sanction were made with specific reference to Section 19 of the PC Act and cannot be construed to imply a broader proposition of

39 "Kerala Assembly Rules".

40 "19. (1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)]— (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government; (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government; (c) in the case of any other person, of the authority competent to remove him from his office."

law that sanction is a pre-requisite for initiating a prosecution against the members of the House, in this case of the Kerala Legislative Assembly for any offences committed within the House. In fact, this contention was raised before the Constitution Bench in **P.V. Narasimha Rao (supra)** but was rejected. It was argued, relying on the decision in **K. Veeraswami vs Union of India,**[41] that the no criminal proceedings can be launched against an MLA without receiving the sanction of the Speaker. In **Veeraswami (supra)**, the appellant was the Chief Justice of the Madras High Court when he was charged with criminal misconduct under the Prevention of Corruption Act, 1947. It was laid down that a criminal case cannot be registered against a judge of the High Court or the Supreme Court unless the Chief Justice of India is consulted. Justice Shetty (for himself and Justice Venkatachalliah) observed thus:

"60….Secondly, the Chief Justice being the head of the judiciary is primarily concerned with the integrity and impartiality of the judiciary. Hence it is necessary that the Chief Justice of India is not kept out of the picture of any criminal case contemplated against a Judge. He would be in a better position to give his opinion in the case and consultation with the Chief Justice of India would be of immense assistance to the government in coming to the right conclusion. **We therefore, direct that no criminal case shall be registered under Section 154, CrPC against a Judge of the High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter**. Due regard must be given by the government to the opinion expressed by the Chief Justice**. If the Chief Justice is of opinion that it is not a fit case for proceeding under the Act, the case shall not be registered.** If the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received the government shall consult any other Judge or Judges of the Supreme Court. **There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India.** Accordingly the directions shall go to

41 (1991) 3 SCC 655.

the government. These directions, in our opinion, would allay the apprehension of all concerned that the Act is likely to be misused by the executive for collateral purpose."

(emphasis supplied)

The Court in **PV Narasimha Rao (supra)** distinguished the instance of a criminal charge instituted against an MP from that instituted against a member of the judiciary. It held that it is important that the sanction of the Chief Justice of India is required before the initiation of a complaint against a judge to safeguard the independence of the judiciary, and that the position of an MP is not akin to the position of a judge:

"176. It is convenient now to notice a submission made by Mr Sibal based upon *Veeraswami case* [(1991) 3 SCC 655 : 1991 SCC (Cri) 734 : (1991) 3 SCR 189] . He urged that just as this Court had there directed that no criminal prosecution should be launched against a Judge of a High Court or the Supreme Court without first consulting the Chief Justice of India, so we should direct that no criminal prosecution should be launched against a Member of Parliament without first consulting the Speaker. As the majority judgment makes clear, **this direction was considered necessary to secure the independence of the judiciary and in the light of the "apprehension that the executive being the largest litigant is likely to abuse the power to prosecute the Judges". Members of Parliament do not stand in a comparable position. They do not have to decide day after day disputes between the citizen and the executive. They do not need the additional protection that the Judges require to perform their constitutional duty of decision-making without fear or favour."**

(emphasis supplied)

63. It is clear from the above discussion that the decision of this Court in **P.V. Narasimha Rao (supra)** does not lend support to the argument of the appellants that the sanction of the Speaker ought to have been obtained. The appellants have further relied on Section 197(1) of the CrPC in support of their submission for requiring a prior sanction of the Speaker for prosecuting MLAs/MPs for offences committed within the House. Section 197(1) of the CrPC states that cognizance cannot be taken for an offence allegedly committed by a public

servant, who is removable with the sanction of the Government, unless the sanction of the Government is received. The provision reads as under:

"197. Prosecution of Judges and public servants:

(1) When any person who is or was a Judge or Magistrate or a public servant **not removable from his office save by or with the sanction of the Government** is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, **no Court shall take cognizance of such offence except with the previous sanction**-…"

(emphasis supplied)

64. A plain reading of Section 197 of the CrPC clarifies that it applies only if the public servant can be removed from office by or with the sanction of the government. However, MLAs cannot be removed by the sanction of the government, as they are elected representatives of the people of India. They can be removed from office, for instance when disqualified under the Xth Schedule of the Constitution for which the sanction of the government is not required. Further, sanction under Section 197 is only required before cognizance is taken by a court, and not for the initiation of the prosecution.

65. The appellants have relied on **Satish Chandra vs Speaker, Lok Sabha**[42] to urge that the powers of the Speaker to control and regulate the House encompasses the power of sanction for initiation of proceedings against members of the Assembly. We find that the dictum in **Satish Chandra (supra)** also does not come to the aid of the appellants. In **Satish Chandra (supra)**, a petition was instituted before this Court under Article 32 of the Constitution seeking a direction to the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha to withhold the payment of salary, perquisites and privileges of MPs disrupting the House and to try them under the PC Act if they continue to avail of them. The reliefs sought included their disqualification from membership of the House and debarment from contesting future elections. The prayer was essentially to direct the Speaker of the House on the manner of conduct of the proceedings. It was in this context that the two judge bench of this

42 (2014) 2 SCC 178.

court consisting of Chief Justice P Sathasivam and Justice Ranjana P Desai dismissed the petition relying on **Ramdas Athawale (5) vs Union of India**[43] where it was held:

"He (the speaker) is the interpreter of its rules and procedure, and is invested with the power to control and regulate the course of debate and maintain order."

In **Ramdas Athawale (supra),** the question for consideration was whether the decision of the Speaker directing resumption of the sitting of the House can be subject to judicial review. Therefore, in both **Ramdas Athawale (supra)** and **Satish Chandra (supra)**, the Court was faced with the question of judicial review of the actions of the Speaker of the House. In both the cases the Court limited its power to review so as to not interfere in the ordinary functioning and conduct of the House in pursuance of Article 122(2) which states that the Speaker's power to regulate the proceedings and conduct of business is final and binding. It would be a stretch however, to argue that these observations of the Court grant the Speaker a carte blanche to decide if and when criminal proceedings should be initiated against MLAs. The State of Kerala, unlike the State of Maharashtra has not amended the relevant provisions of the CrPC warranting the sanction of the Speaker for the initiation of criminal proceedings against MLA's. The Code of Criminal Procedure (Maharashtra Amendment) Act, 2015 was enacted amending Sections 156 and 190 of the CrPC. The amended provisions state that no Magistrate can order investigation and take cognizance for an offence alleged to have been committed by any person who is or was a pubic servant, 'while acting or purporting to act in discharge of his official duties' , without the previous sanction of the sanctioning authority. Moreover, even in such a case sanction is necessary when the act was while acting or purporting to act in the discharge of official duties. When no provisions warranting the sanction of the Speaker-either specific to the offence (such as the PC Act) or specific to the class (such as the Maharashtra Amendment Act, 2015) are enacted, the argument of the appellant stands on fragile grounds. For the above mentioned reasons, the contention that the prosecution against the respondent-accused is vitiated for want of sanction of the Speaker is rejected.

43 (2010) 4 SCC 1.

C.5 Claiming privilege and inadmissibility of video recordings as evidence

66. During the course of his submissions, Mr Ranjit Kumar, learned Senior counsel for the appellants, referred to a video recording of the incident that occurred on 13 March 2015. The video was procured by the investigating authorities from the Electronic Control Room of the House. The video recording also finds mention in the withdrawal petition filed by the Public Prosecutor, where the Prosecutor states that the video footage was obtained without the consent of the Speaker of the House and thus lacks certification under Section 65B of the Indian Evidence Act 1872. In this regard, Mr Ranjit Kumar has made two distinct submissions, which require our consideration:

(i) The incident occurred on the floor of the House, and is a 'proceeding' of the House. According to Article 194(2), no legal proceedings can be initiated against any member in respect of the publication, by or under the authority of the House, of any report, paper, votes or proceedings. Based on this, the video which recorded the incident is a publication of the proceedings of the House and no MLA can face legal action for these proceedings; and

(ii) The video recording of the incident belongs to the House and a copy of the video footage could not have been obtained without the sanction of the Speaker, who is the custodian of the House. In addition to this, the video recording also lacks certification under Section 65B of the Indian Evidence Act 1872. Without the video recording, there is insufficient evidence available with the prosecution to succeed in a trial against the respondent- accused. It is urged that in light of this, a withdrawal of prosecution of this case is warranted.

67. We shall deal with each of these submissions in turn.

C.5.1 Immunity from publication of proceedings of the House

68. Article 194(1) of the Constitution provides that there shall be freedom of speech in the Legislature of every State. Clause 2 of Article 194, specifically provides that no member of the State Legislature shall be liable for any legal proceedings in respect of anything said or any vote given by him in the Legislature or any committee thereof,

and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings. Mr Ranjit Kumar has sought to take recourse of the second limb of Article 194(2), to claim that legal proceedings are barred against respondent-accused for the incident, as it allegedly formed part of the 'proceedings' of the House, which were published under the authority of the House.

69. For the second limb of Article 194(2) to be applicable, the following three elements must be present- first, there must be a publication; second, the publication must be by or under the authority of the House; and third, the publication must relate to a report, paper, vote or proceedings.

70. The first question to be addressed in this regard is the meaning of the phrase 'publication' under Article 194(2) of the Constitution. The Oxford Dictionary defines the term 'publication' as the "act of printing a book, a magazine etc. and making it available to the public." Thus, in common parlance, publication refers to print media. At the time of enactment of the Constitution, the members of the Constituent Assembly would not have envisioned the possibility of broadcasting of the proceedings of the House through the aid of technology as it exists at present. The discussions in the Constituent Assembly leading up to the adoption of the Constitution and the debates were recorded in a typed format and published. In line with the Constituent Assembly (Legislative) Rules of Procedure and Conduct of Business, which were in force till the adoption of the Constitution, the Lok Sabha and Rajya Sabha also adopted Rules of Procedure and Conduct of Business. Rule 379 of the Lok Sabha Rules records that the Secretary-General shall prepare a full report of the proceedings of the House and publish it in such form and manner as the Speaker directs. Similar rules have been adopted by various State Legislatures, including the Kerala Legislative Assembly which adopted the Kerala Assembly Rules. Rule 306 of the Kerala Assembly Rules is *pari materia* to Rule 379 of the Lok Sabha Rules. Thus, when the Constitution was enacted, the phrase 'publication' was intended to mean the publication of proceedings in the printed format.

71. With the advent of technology, proceedings of Parliament and the Legislative Assembly are broadcast for public viewership, with an aim to promote accessibility to debates in the legislative

body. Correspondingly, the Union and State Governments enacted legislation and issued instructions to regulate the field of broadcasting of legislative proceedings. In 1977, the Parliamentary Proceedings (Protection of Publication) Act, 1977[44] was enacted. Section 3 of the Act states that no person shall be liable to any civil or criminal proceeding for a substantially true publication in a newspaper of the proceedings in the House, unless the publication is not for public good. Section 4 of the Act extended the protection to broadcasting of these proceedings. Subsequently, the Constitution was amended by the Constitution (Forty fourth) Amendment Act, 1978 to include Article 361A. Article 361A amplifies the protection provided in the 1977 Act. Article 361A reads as follows:

"361-A . Protection of publication of proceedings of Parliament and State Legislatures.—(1) No person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature, of a State, unless the publication is proved to have been made with malice: Provided that nothing in this clause shall apply to the publication of any report of the proceedings of a secret sitting of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature, of a State.

(2) Clause (1) **shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station as it applies in relation to reports or matters published in a newspaper.**

Explanation.—In this article, "newspaper" includes a news agency report containing material for publication in a newspaper."

(emphasis supplied)

In May 2002, the Kerala Legislative Assembly issued Instructions on Broadcasting and Telecasting of Governor's Address and Assembly Proceedings[45] pursuant to Rule 306 of the Kerala Assembly Rules.

44 "1977 Act"
45 "2002 Instructions"

Thus, although broadcasting of proceedings was not initially visualised within the meaning of the word 'publication', the meaning of the term 'publication' has evolved in contemporary parlance. Broadcasting of proceedings is also a form of publication, though not in the form of print, which serves the same purpose of disseminating information to the public as publication in the printed format.

72. We now turn to the second ingredient of Article 194(2), which is whether the alleged proceedings were published by or under the authority of the House. The video recording of the incident was seized from the Electronic Control Room. Various local and national news channels carried telecasts of snippets of the incident of 13 March 2015 on the very same day. The 2002 Instructions permit broadcasting of proceedings after obtaining the prior permission of the Speaker for recording. Therefore, if permission for recording the proceedings has been provided to the news channels, then the broadcast would usually be a publication 'under the authority of the House'. However, Clause 7 of the 2002 Instructions denies permission to record any interruption/disorder during the address. Clause 7 states:

"7. Cameras should not record any interruption/disorder or walk- out during the Address. In case of any such eventuality the cameras shall be focussed only on the dignitary."

Since the 2002 Instructions grant permission for the recording of the proceedings subject to conditions such as that mentioned in clause 7, any recording that contravenes the conditions stipulated is not a recording 'under the authority of the House'. When the recording of such an incident is itself without authority, the publication/broadcasting of it would also have no authority of the House. Thus, though the video recording of the incident that was broadcast in the local and national news channels would fall within the purview of the word 'publication', it did not have the authority of the House to be recorded, and thus the members cannot be granted immunity.

73. In addition to this, it is also worth mentioning that the video recording that was procured from the Electronic Control Room of the Assembly is not a copy of the broadcast of the incident in the local or national television but was a part of the internal records of the Assembly. Thus, the stored video footage of the incident was not broadcast, or in other words, published, for dissemination to

the public. Since it was not a "publication" of the House, it does not enjoy the protection of immunity under Article 194(2) of the Constitution.

74. Though the argument of the appellants can be rejected at this stage, we find it necessary to deal with the third ingredient - that is whether the incident that transpired on 13 March 2015 was a 'proceeding' under Article 194(2), thus bestowing the appellants with absolute immunity.

75. Erskine May defines the phrase 'parliamentary proceedings' as follows:

"The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is **some formal action, usually a decision, taken by the House in its collective capacity.** While business which involves actions and decisions of the House are clearly proceedings, **debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time saving substitutes for speaking"**[46]

(emphasis supplied)

76. In **Attorney General of Ceylon vs de Livera**[47], Section 14 of the Bribery Act of Ceylon (as Sri Lanka was then called) was in question before the Judicial Committee of the Privy Council. Section 14 states that an inducement or reward to a member of the House of Representatives for doing or forbearing to do any act 'in his capacity as such member' is an offence. While interpreting the phrase 'in his capacity as such member', Viscount Radcliffe referred to Article 9 of the Bill of Rights 1689 which provides parliamentary privilege. The judgment notes:

"What has come under inquiry on several occasions is the extent of the privilege of a member of the House and the complementary

46 Supra note 25 at 235.
47 [1963] AC 103.

question, what is a 'proceeding in Parliament'? This is not the same question as that now before the Board, and **there is no doubt that the proper meaning of the words 'proceedings in Parliament' is influenced by the context in which they appear in article 9 of the Bill of Rights**; but the answer given to that somewhat more limited question depends upon a very similar consideration**, in what circumstances and in what situations is a member of the House exercising his 'real' or 'essential' function as a member? For, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function."**

(emphasis supplied)

Thus, the test that was laid down for identification of activities that fall within the meaning of the word 'parliamentary proceedings' was whether the activity/function was a real or essential function of the member.

77. In **Chaytor (supra),** the question before the UK Supreme Court was the interpretation of the phrase "proceedings in Parliament". Elucidating on the meaning of the expression, it was held:

"47. The jurisprudence to which I have referred is sparse and does not bear directly on the facts of these appeals. It supports the proposition, however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. **In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.**

48. If this approach is adopted, the submission of claim forms for allowances and expenses does not qualify for the protection of privilege. **Scrutiny of claims by the courts will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech. Indeed it will not inhibit any**

of the varied activities in which Members of Parliament indulge that bear in one way or another on their parliamentary duties. The only thing that it will inhibit is the making of dishonest claims.

62. Thus precedent, the views of Parliament and policy all point in the same direction. **Submitting claims for allowances and expenses does not form part of, nor is it incidental to, the core or essential business of Parliament, which consists of collective deliberation and decision making.** The submission of claims is an activity which is an incident of the administration of Parliament; it is not part of the proceedings in Parliament. I am satisfied that Saunders J and the Court of Appeal were right to reject the defendants' reliance on article 9."

(emphasis supplied)

According to **Chaytor (supra),** the activities undertaken within the House are classified into two categories - essential functions and non-essential functions. The essential function of the House is collective deliberation and decision making. For an act in the House to be provided immunity from legal proceedings, it must either be an essential function or must affect the exercise of an essential function of the House.

78. This meaning provided to the phrase 'parliamentary proceedings' in **Chaytor (supra)** and **de Livera (supra)** finds support in the text of the Constitution of India. At this stage, we find it imperative to refer to other provisions of the Constitution that mention the phrase 'proceedings' in reference to the legislative assembly. Article 194(4) states that the provisions of Articles 194(1), (2) and (3) shall also apply to anybody who takes part in the 'proceedings' of the House. Article 212(1) states that the validity of the 'proceedings' in the State Assembly shall not be called in question on the ground of irregularity of the procedure. In both Articles 194(4) and 212(1) it is evident that the word 'proceedings' does not include all the activities inside the House within its meaning. If the act of the respondent-accused is considered as a 'proceeding' on the ground that the alleged destruction of public property held a nexus with the budget speech, then it would mean that if a non-member who is called before the Assembly to depose would also be protected by Article 194(4), if they

commit a similar act as that of the respondent-accused. Similarly, the reference to 'proceedings' in Article 212(1) can only mean specific actions such as the passing of a Bill. What is, however, evident from the above discussion is that the word 'proceedings' will take within it the meaning that is contextually appropriate.

79. To understand the meaning of the word 'proceedings' in Article 194(2), it is necessary that we look at the context of the provision. Article 194(1) states that the members of the House shall have freedom of speech in the legislature. The freedom of speech that is provided to the members is subject to the provisions of the Constitution and other standing orders. It was held in **P.V. Narasimha Rao (supra)** that the freedom of speech provided to the members of the House is absolute and independent of Article 19 of the Constitution, and that the freedom of speech of the members *inside* the House cannot be restricted by the reasonable restrictions provided in Article 19(2) of the Constitution. Thus, although the members of the House are restricted from discussing the conduct of a Judge of the Supreme Court or High Court in the discharge of their duties, but they cannot be precluded from undertaking any discussion on the grounds of violation of Article 19(2) of the Constitution.

80. Article 194(2), as mentioned above, is divided into two limbs. The first limb of Article 194(2) which provides the members absolute immunity with respect of anything said or any vote given in the House is a manifestation of the freedom of speech provided under Article 194(1). The second limb of Article 194(2) gives the members immunity in respect of the publication of 'any report, paper, votes, or proceedings' by or under the authority of the house. The legal immunity to 'anything said or any vote given' in the first limb and the 'publication of a report, paper, votes, or proceedings' in the second limb of Article 194(2), flow from the freedom of speech that is provided under Article 194(1). The exercise of these manifestations of the freedom of speech – as provided in Article 194(2) – has been provided with express immunity. However, the only difference between the two limbs of Article 194(2) is that the first limb protects the *exercise* of the freedom, and the second limb protects the member against the *publication* of the said exercise of the freedom. The legal proceedings against the exercise of the freedom can only be initiated by those aware of the exercise

of freedom, which would mean either those who are present in the House or those who become aware of it when the speech, vote or the like, is published. While the freedoms protected by both the limbs are substantively the same, the second limb is clarificatory in the sense that it prevents 'any person' from initiating proceedings against the exercise of freedom of speech inside the House when they obtain knowledge of the exercise of the said freedom through a publication. Thus, the immunity provided for the exercise of the manifestations of the freedom of speech in the second limb of under Article 194(2) cannot exceed the freedom of speech provided in the first limb of Article 194(2). As held above, that acts of destruction of public property are not privileged under the first limb of Article 194(2). Consequently, acts of vandalism cannot be said to be manifestations of the freedom of speech and be termed as "proceedings" of the Assembly. It was not the intention of the drafters of the Constitution to extend the interpretation of 'freedom of speech' to include criminal acts by placing them under a veil of protest. Hence, the Constitution only grants the members the freedom of speech that is necessary for their active participation in meaningful deliberation without any fear of prosecution.

81. Moreover, the word 'proceedings' in Article 194(2) follows the words 'any report, paper, votes'. Reports, papers and votes are actions that are undertaken by the members of the Assembly in their official capacity for participation and deliberation in the House. These are essential functions that a member has to perform in order to discharge her duty to the public as their elected representative. On application of the interpretative principle of *noscitur a sociis,* the phrase 'proceedings' takes colour from the words surrounding it. Since the words associated with the phrase 'proceedings' refer to actions that are exercised by the members in their official capacity, in furtherance of their official functions, the meaning of the word 'proceedings' must also be restricted to only include such actions.

82. Accordingly, we reject the submissions of the appellant and hold that the video recording of the incident was not a "proceeding" of the Assembly, which would be protected from legal proceedings under Article 194(2).

C.5.2 Inadmissibility of the video recording as evidence

83. Mr Ranjit Kumar, learned Senior counsel, has urged before us that the video recording was not obtained by the investigating authorities with the sanction of the Speaker. He has submitted that the video recording belongs to the Electronic Record Room of Assembly and as the custodian of the House, the permission of the Speaker is necessary to access this video recording. It was also submitted that the video recording lacks the certification required for admissibility of evidence.

84. We do not believe that this submission is relevant and merits consideration by this Court in an application for withdrawal of prosecution under Section 321 of the CrPC. In our opinion, the High Court has correctly observed that questions of insufficiency of evidence, admissibility of evidence absent certifications etc., are to be adjudged by the trial court during the stage of trial. As held by the Constitution Bench of this Court in **Sheonandan Paswan** **(supra)**, it is not the duty of this Court, in an application under Section 321 of the CrPC, to adjudicate upon evidentiary issues and examine the admissibility or sufficiency of evidence.

85. For the reasons indicated above, we have arrived at the conclusion that there is no merit in the appeals. The appeals shall accordingly stand dismissed.

86. Pending application(s), if any, stand disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeals dismissed.