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CRIMINAL LAW

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I INTRODUCTION

MACAULAY WAS strongly of the opinion that the penal laws should be made by a democratically elected legislature which should not abdicate such responsibility either directly (by not legislating) or indirectly (by enacting open ended and vague laws that will be dependent on judicial interpretation).[1]The legislature in India is under a constitutional responsibility as per the separation of powers for setting down the parameters of criminal law not only in defining the ingredients of an offence but also the punishment. The role of the courts is then to interpret these laws and apply them to the facts of the particular case. A fair amount of judicial discretion is of course vested in the courts. This paper surveys the trend of the courts in criminal cases of the year 2013.

II UNNATURAL OFFENCES

Suresh Kumar Koushal v. *Naz Foundation* [2] must have posed an ethical and a moral dilemma for the judges. The Delhi High Court judgment against which the present appeal lay was hailed by the lesbian, gay, bisexual, and transgender (LGBT) community and many others as a progressive judgment keeping with the changing perceptions. The high court had allowed the writ petition filed by the NGO NAZ Foundation challenging the constitutional validity of section 377 of the Indian Penal Code (IPC). The Union of India chose not to contest the constitutional validity of the section (given the fact that every statute is presumed to be constitutional) and that speaks for itself that the government was in sync with the Delhi High Court judgment. The issue before the apex court was as regards the constitutional validity of section 377 IPC.

The final judgment was criticised by the LGBT supporters and hailed by many religious groups and many others. Leaving that debate aside what is most

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1 Barry Wright and Stanley Yeo "Revitalizing Macaulay's Indian Penal Code" in Wing Cheong, Chan, Barry Wright and Stanley Yeo (eds.), *Codification, Macaulay and the Indian Penal Code*3-17(2011).

2 (2014) 1 SCC 1.

disturbing in the judgement is the fact that the vast literature available in terms of judicial decisions the world over was ignored by holding that "judgments of other jurisdictions cannot be applied blindfolded for deciding the constitutionality of a law enacted by the Indian legislature."[3] The apex court's earlier judgments[4] have been replete with copious references from other jurisdictions and why was this case singled out remains an enigma to the surveyor. The court further elaborates thus:[5]

> We have had occasion to point out the danger of such statements of law enunciated and propounded for meeting the conditions existing in the countries in which they are applicable from being blindly followed in this country without a critical examination of those principles and their applicability to the conditions, social norms and attitudes existing in this country.

It is submitted that since the case involved rights of a marginalized and vulnerable group whose rights are being intensely debated the world over and a change of attitude and social norms is taking place so it was in the fitness of things for the matter to be deliberated by a larger bench representing both Victorian morality and liberal views to come to a conclusion.[6]Article 145(3) of the Constitution also mandates thus:

> The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five: Provided that, where the Court hearing an appeal under any of the provisions of this chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion

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3 *Id*. at 68.The court discusses the *Jagmohan* case where death penalty was debated

4 See for example *PUCL* v. *Union of India*, (1997) 3 SCC 433; *Jolly George Verghese* v. *Bank of Cochin*, 1980(2) SCC 360; *Javed Abidi* v. *Union of India* (1999) 1 SCC 467; *Dwarka Prasad Agarwala* v. *B.D. Agarwala* (2003) 6 SCC 230; *Visakha* v. *Rajasthan* (1997) 6 SCC 248; *Anuj Garg* v. *Union of India* (2008) 3 SCC 1; *Vineet Narain* v. *Union of India* (1998) 1 SCC 226.

5 *Supra* note 2 at 81.

6 The instant case was decided by a two judge bench of G.S. Singhvi and S.J. MukhopadhayaJJ.

The reviewer is reminded of Cardozo when talking about judges (including himself) he observed "All their lives forces which they do not recognize and cannot name, have been tugging at them – *inherited instincts, traditional beliefs, acquired convictions* …. In this mental background every problem finds its settings. We may try to see things as objectively as we please. None the less we can never see them with any eyes except our own."[7] This dictum on judicial process rings true for the *Naz* judgment and a larger bench would have atleast ensured that the judicial process does not become a reflection of two judges' ideology and prejudice.

III OFFENCES AGAINST WOMEN

Dowry death

In *Panchanand Mandal* v. *State of Jharkhand* [8] there was conviction by the trial court and the high court for dowry death on the basis of the dying declaration and the allegations made by the mother and brother of the deceased. The Supreme Court allowed the appeals as the police officer who had recorded the dying declaration was not examined by the prosecution thereby casting a doubt on its veracity and further, the demand of dowry was not proved "soon before her death". Krishna Iyer J's words come ringing back when he asserts thus:[9]

> Adversarial process is gladiatorial justice, the strong win the bout, the weak lose with punched nose, bleeding face and broken head. The (robed) umpire is uninterested in the justice of the cause but forbids violation of the boxing rules (called law) and there ends his duty.

The expression "soon before her death" needs to be interpreted liberally ignoring the semantics. It does not mean immediately before but must be construed according to its true import.[10]

India continues to have the dubious distinction of a *sui generic* crime that of killing the woman of the house by burning her after pouring kerosene. Such criminals must be given very harsh punishments. But the conditions in India are such that criminals rule the roost. In *Anjanappa* v. *State of Karnataka*[11] a woman

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7 Benjamin N. Cardozo, "Introduction" in *The Nature of Judicial Process* 12-13 (Fifth Indian Reprint 2004). *Emphasis supplied*.

8 (2013) 9 SCC 800. It is submitted that in cases of such deaths there should also be an alternate charge under s. 302 IPC. See also *Manoj* v. *State of Haryana* (2013) 9 SCC 190.

9 Justice VR Krishna Iyer "Adversarial Praxis vis a vis Social Justice", *The Constitution Corruption Pathological Casualties and Radical RemediesReformatories* 40-41(2014).

10 See also *Tummala Venkateswara Rao* v. *State of A.P.* (2014) 2 SCC 240.

11 (2014) 2 SCC 776. See also *Bhupendra* v. *State of M.P.* (2014) 2 SCC 106.

in her dying declaration nailed her husband as the culprit who had killed her over dowry demand. The trial court acquitted the accused on a frivolous contention that the dying declaration was not supported by a certificate by the doctor stating that the declarant was in a fit state of mind. The doctor had deposed that she was not under the spell of sedatives and her dying declaration could be relied upon. It is not clear why the conviction was not under section 304-B and under section 304 Part II IPC. The judgment is not clear on the issue and simply states that the high court has given reasons for the same. The facts of the instant case reveal that just before her death there was a demand for transferring the property to the appellant's name and the dowry harassment has been there from the very beginning and the latest demand was only an extension of it.

In *Kallya* v. *State of M.P.*[12] the dying declaration of the deceased implicating her mother-in-law could not be traced. Reliance was placed on the duplicate copy of the dying declaration and there was conviction under section 302. There is no discussion of intention, knowledge or imminently dangerous act. The court declared that "she had died due to asphyxia, due to burn injuries, her death was homicidal".

In *Gurnaib Singh* v. *State of Punjab*[13] there was death by poison of a young girl in her twenties and there were allegations of cruelty and the appellants were charged under sections 304-B and 498-A IPC. However, the prosecution could not establish a demand for dowry but only for mental cruelty, hence the apex court was of the view that the case attracted section 306 and not section 304-B. However, the accused were not charged under section 306 but the court relying on *K. Prema S. Rao* v. *Yadla Srinivasa Rao*[14] "altered the conviction from 304-B IPC to that under section 306 IPC. The matter fell within the purview of sections 221(1) and (2) Cr PC". The court also was anguished by the way the trial was conducted where repeated adjournments were given at the behest of the counsel. The criminal justice administration of the country is under severe criticism from all quarters for the huge pendency of cases and the court pontificated thus: "it needs no special emphasis to state that dispensation of criminal justice is not only a concern of the Bench but has to be the concern of the Bar."

In *Kulwant Singh* v. *State of Punjab*[15] the post mortem report revealed presence of aluminium phosphide (pesticide) in the stomach of the deceased and phosphine in her liver, spleen, right kidney and right lung and the evidence was clinching enough to prove that it was dowry death and there was conviction under sections 304-B and 498-A IPC.

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12 (2013) 10 SCC 758. For more on dying declaration see also *Kashi Vishwanath* v. *State of Karnataka* (2013) 7 SCC 162; *Hiraman* v. *State of Maharashtra* (2013) 12 SCC 586;*Parbin Ali* v. *State of Assam* (2013) 2 SCC 81 and *Ashabai* v. *State of Maharashtra* (2013) 2 SCC 224.

13 (2013) 7 SCC 108.

14 (2003) 1 SCC 217.

15 (2013) 4 SCC 177.

In cases of death by burning as in *Bakshish Ram* v. *State of Punjab*,[16] where conviction is reversed and the court believes it to be an accidental death, one thing that doesn't fail to amaze the surveyor is that how come only young brides die by burning and never the in-laws?

In *Modinsab Kasimsab Kanchagar* v. *State of Karnataka*,[17] like in many other dowry death cases, a very pedantic interpretation of the term dowry was taken. There was a demand of Rs. 10,000/- for repaying society loan and the young bride was asked to get it from her parents. The courts refused to see it as a dowry demand and hence the charge of dowry death under section 304B could not sustain. The courts must keep in mind the social milieu of India where women still continue to have a subordinate position in the matrimonial houses.

Rape

The court in *Mohd. Iqbal* v. *State of Jharkhand*[18] talked about the crime of rape and its impact on the victim and a need for a nuanced approach to get the victim out of the trauma so as to be able to lead a normal life and stated thus:[19]

> Rape cannot be treated only as a sexual crime but it should be viewed as a crime involving aggression which leads to the domination of the prosecutrix. In case of rape besides the psychological trauma, there is also social stigma to the victim. Majority of rapes are not sudden occurrences but are generally well planned …. Social stigma has a devastating effect on rape victim. It is violation of her right of privacy. Such victims need physical, mental, psychological and social rehabilitation. Physically she must feel safe in the society, mentally she needs help to restore her lost self-esteem, psychologically she needs help to overcome her depression and socially, she needs to be accepted back in the social fold. Rape is blatant violation of women's bodily integrity.

It is true that rape is one of the most heinous crimes known to mankind. And since the victim is the woman it is the man who should be shamed. But in case after case it is the woman who is shamed ultimately. To give an example, the apex court in *Shyam Narain* v. *State (NCT of Delhi)*[20] stated thus while justifying the punishment of life imprisonment to the accused:[21]

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16 (2013) 4 SCC 131.

17 (2013) 4 SCC 551.

18 (2013) 14 SCC 481.

19 *Id*. at 485.

20 (2013) 7 SCC 77.

21 *Id.* at 88.*(Emphasis added)*

> The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. … The young girl, with efflux of time, would grow with a traumatic experience, and unforgettable shame … She may *not be able to assert the honour of a woman* for no fault of hers.

It is submitted that the focus must be on the animal passion and the depravity of the man who committed the crime rather than on shaming the victim!

The facts in *Mohan Lal* v. *State of Punjab*[22] are indeed shocking. A minor girl was raped by her teachers while on a camp. FIR was belatedly registered as the mother sent a telegram to the father who was away and only on his return could they file it. The girl was repeatedly cross-examined for a period of two years and she consistently maintained that she was raped though the accused persons tried all delaying tactics in the case. Unfortunately, during the pendency of the case her father, who was her pillar of support, died and the prosecutrix resiled on the last date of cross-examination. The double disadvantage of being a woman and then poor was too much for her to hold her ground and the appellants succeeded in browbeating her. The Supreme Court rose to the occasion and castigated the trial court for not taking steps to process the witnesses and for giving repeated adjournments and held thus:[23]

> Giving recognition to the principle of speedy trial, sub-section (1) of Section 309 Cr PC, envisages that when the examination of witnesses has once begun, the same shall be continued from day to day, until all the witnesses in attendance have been examined. Speedy and expeditious trial and enquiry were envisaged under Section 309 Cr PC.
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> *The teacher, who has been kept in charge, bears more added higher responsibility and should be more exemplary. His/her character and conduct should be more like Rishi and as loco parentis and such is the duty, responsibility and charge expected of a teacher*. The question arises whether the conduct of the appellant is befitting with such higher responsibilities and as he by his conduct betrayed the trust and forfeited the faith whether he would be entitled to the full-fledged enquiry as demanded by him? The fallen standard of the appellant is the tip of the iceberg in the discipline of teaching, a noble and learned profession; it is for each teacher and collectively their body to stem the rot to sustain the faith of the society reposed in them. Enquiry is not a panacea but a nail in the coffin.

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22 (2013) 12 SCC 519.

23 *Id*. at 525, 27.

The court upheld the sentence of ten years under section 376(2)(b) & (g) IPC though it lamented that the punishment should have been for life but since the state had not appealed the question of enhancement did not arise.

The gruesome rape and then an equally gruesome murder of the woman and her 13 months old daughter by pouring kerosene over them and setting them ablaze is a case fit for the maximum punishment. In *Kumar* v. *State of T.N* [24] the trial court and the high court gave life imprisonment (which is slightly surprising as generally the trial courts give death penalty in such cases). The apex court concurring with the courts below put in a word of caution saying that "in view of the gruesome act of rape followed by double murder, we are of the view that the authorities having the power of remission have to be conscious and cannot pass any such order of remission lightly without adhering to various principles enunciated by this court." The court in this case did not out rightly exclude remission (which now has become the trend), exhorted the authorities to employ caution while considering the same.

There have been concerted efforts to criminalize marital rape since bodily autonomy and integrity are sacrosanct. Dignity rights get attached to a person the moment he or she is born and marriage cannot *ipso facto* take them away. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee in February 2007 had recommended that India should "remove the exception of marital rape from the definition of rape". Subsequently the Verma J Committee *Report of the Committee on Amendments to Criminal Law*[25] had recommended that "the exception for marital rape be removed" and also specifically asked for "two finger test to be immediately stopped." Given such progressive thinking on the bodily autonomy it is indeed shocking that in case after case the court talks of "two finger test" and each time it questions its propriety but still it continues with it. If one goes with the report of this test in *Lillu* v. *State of Haryana*[26] it is repulsive to realize the kind of intrusive society *vis a vis* women that we have. It is a serious violation of right to privacy when it is blatantly discussed whether the woman (and in the instant case a minor 13 years 9 months and 2 days old to be precise) was habituated to sex or not. The Supreme Court does only lip service and nothing more when it observes routinely in a catena of cases that the rape survivors have a right "to privacy, physical and mental integrity and dignity." It is time that clear cut guidelines with stringent penalties are put forth categorically by the apex court so that the victim is not ravished over and over again even in courts.

Consent

The age of consent has been fixed at 18 years so as to protect vulnerable children (who have not attained sufficient maturity to distinguish right form wrong).

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24 (2013) 12 SCC 699.

25 Jan, 23, 2013 at 117.

26 (2013) 14 SCC 643.

In *Mahadeo* v. *State of Maharashtra*[27] facts reveal that the prosecutrix was 15 years old and was fond of singing. The accused convinced the gullible girl that he would take her to Hyderabad and get her *bhajans* recorded. He even asked her to bring ornaments so as to facilitate their travel to Hyderabad. They went to Hyderabad and from there to Kurnool in Andhra Pradesh where the appellant repeatedly had forcible sexual intercourse with the prosecutrix. After that he got her back since a complaint had been lodged against him. The trial court and high court found him guilty under sections 363 and 376 IPC and the Supreme Court dismissed the appeal and upheld the conviction.

In *Rajesh Patel* v. *State of Jharkhand*[28] where the prosecution charge of rape was not trustworthy it was contended that there were strong circumstances to arrive at the conclusion that it was consensual sex. And since both were major there was no question of rape. In rape cases the courts follow the rule that the version of the prosecutrix needs no corroboration but in cases where there are reasons to doubt the same then it is not safe to rely on the uncorroborated version of the alleged victim of rape.[29]

Regarding the true import of consent the prosecution in *Ganga Singh* v. *State of M.P.,*[30] quoting *State of U.P.* v. *Chhotey Lal*[31] clarified that "consent for the purpose of section 375 IPC requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and the moral quality of the act as also after full exercise of choice between resistance and assent".

Consent was again under the scanner in *Karthi* v. *State.*[32] It was a case of forcible sex followed by consensual sex on the false promise of marriage. The Supreme Court in *Uday* v. *State of Karnataka*[33] and *Deelip Singh* v. *State of Bihar*[34] has quite clearly stated that consent obtained on a promise of marriage with the intention of not fulfilling it but just as a bait to elicit the assent for sex is not a true consent and such intercourse needs to be treated as rape. The court in the instant case also held that "obtaining the consent by exercising deceit, cannot be a legitimate defence to exculpate an accused."

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27 (2013) 14 SCC 637. See also *Kashi Vishwanath* v. *State of Karnataka* (2013) 7 SCC 162.

28 (2013) 3 SCC 791.

29 *Kaini Rajan* v. *State of Kerala* (2013) 9 SCC 13.

30 (2013) 7 SCC 228 at 282.

31 (2011) 2 SCC 550.

32 (2013) 12 SCC 710.

33 AIR 2003 SC 1639.

34 (2005) 1 SCC 88

This issue came up for consideration again in *Deepak Gulati* v. *State of Haryana.*[35] In the case of *Karthi,* the issue was that the accused gave a false promise of marriage on the basis of which the girl consented to sexual intercourse. But in the instant case the couple indulged in sexual intercourse (forcible according to the facts) and the appellant convinced the girl to accompany him to Ambala where they would get married. When they reached the bus stop the father of the girl with the police was there as a complaint under sections 365 and 376 IPC was lodged and the appellant was taken into custody. Medical examination of the girl was conducted and her statement was recorded and charges under sections 365 and 376 IPC were framed against the accused by the sessions court. The court tried to make a distinction between a false promise and a breach of promise as in the circumstances of the case it was not clear whether he would have at all married her or not. Since he was apprehended by the police it could not be said that he obtained consent for sexual intercourse on a false promise of marriage rather it is a case of breach of promise due to change in the circumstances. It is submitted that the courts must be very careful as men should not be victimized in cases of consensual sex since a girl above 18 years is supposed to have a mature mind with full comprehension of her acts and when she voluntarily participates she should not be allowed to take the plea of cheating or deception except in cases like *Karthi*. The court in the instant case gave the appellant the benefit of doubt and discharged him.

Female infanticide

Article 21 guarantees the right to life but in India some people are so obsessed with having sons and believing in superstitions, sometimes end up killing the girl child. This background forms the factual matrix in *R. Kuppusamy* v. *State*[36] wherein a girl child of about 10 months was considered unlucky for the family and was thrown in the well by the father. Obviously, the hapless child died of drowning. There was an extrajudicial confession supported by corroborative evidence. The court dismissing the appeal upheld the life imprisonment on a charge of murder under section 302.

Compoundable offence

P. Ramaswamy v. *State of Andaman & Nicobar Islands*[37] allowed an offence under section 354 IPC to be compounded. As per the law, the offence under this section is compoundable by the woman assaulted or towards whom the criminal force was used. The saving grace in this case was that the high court had dropped the charge under section 3(1) (ix) of the SC/ST Act otherwise the compounding of the offence would not have been allowed.

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35 (2013) 7 SCC 675.

36 (2013) 3 SCC 322.

37 (2013) 14 SCC 577.

IV OFFENCES AGAINST THE BODY

Murder

Mritunjoy Biswas v. *Pranab*[38] stressed on the fact that "the protection given by the criminal process to the accused persons is not to be eroded, at the same time; uniformed legitimisation of trivialities would end up making a mockery of criminal justice administration". In the instant case the high court gave too much credence to non essentials and reversed the conviction verdict of the trial court on a murder charge. The apex court restoring the trial court verdict made the above observations.

In a murder case in a cargo ship,[39] no eyewitnesses were there and there was a botched up investigation wherein the alleged murder weapon was not examined along with the post mortem which was conducted in Hong Kong since the ship was sailing and after the murder came to a halt at Hong Kong. The clothes of the appellant were not seized. The crime scene was washed and cleaned. Hence the circumstantial chain was not complete which should have unerringly pointed towards the guilt of the appellant. Since the circumstances were not conclusive the appellant was acquitted.

Cases become difficult to crack when there are no eyewitnesses. *Sucha Singh* v. *State of Haryana*[40] was a case of homicide wherein the accused was nailed based on the extra judicial confession. On the basis of the confession and the information furnished by the appellant a *Kassi*, one *Khese* and bed sheet were recovered which had large and small blood stains. All these pointed to the guilt of the accused as recoveries were made based on the confession of the accused. The court held that "there is no merit in the contention of the learned counsel for the appellant that the statement of the appellant and the recoveries made pursuant to the statement of the appellant are of no evidentiary value". The appeal was dismissed.

In *Kusti Mallaiah* v. *State of A.P.*[41] the conviction was on the testimony of a single eye witness. There was an allegation that he did not volunteer information till the dead body was identified. Upholding the conviction the court held that there is no legal impediment in convicting a person on the sole testimony of a single witness if his version is reliable and trustworthy. The court acknowledged the fact that people react to situations in different ways. Having witnessed a ghastly crime he may have got scared and so did not immediately come forth with the truth.

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38 (2013) 12 SCC 796.

39 *Majenderan Langeswaran* v. *State (NCT of Delhi)* (2013) 7 SCC 192. See also *State of U.P.* v. *Gobardhan* (2013) 14 SCC 751.

40 (2013) 4 SCC 552.

41 (2013) 12 SCC 680.

In the case of murder the "last seen together" theory shifts the burden of proof onto the accused, requiring him to explain the incident. Failure to explain the events raises a strong presumption of guilt against him. In *Rohtash Kumar* v. *State of Haryana*[42] the factual matrix revealed that a couple had applied for divorce by mutual consent. The appellant went to meet the woman in her hostel and they were last seen together before the dead body of the woman was discovered. In cases of circumstantial evidence "motive" which otherwise is inconsequential may assume importance. The investigation team recovered a suicide note and certain other undelivered letters written to officials by the appellant alleging that the girl's family was harassing him over the divorce and had even extracted money from him. These documents revealed that he felt harassed and provided him a motive to commit the murder. Based on circumstantial evidence and motive for murder the court upheld the conviction.

Contrast these cases with *Sujit Biswas* v. *State of Assam.*[43] A small girl went missing from a place where she was enjoying the festivities of Durga Puja along with her elder sister. Around the same time the appellant who was present there also vanished. The elder sister informed the parents and when confronted, the appellant demanded Rs. 20. On being given that amount he pointed to a place where the girl was found in a gunny bag gasping for breath with injury in her vagina and various other parts the appellant tried to run away but was nabbed. She eventually died. The trial court and the high court affirmed conviction under sections 376(2) (f) and 302. The Supreme Court allowed the appeal against conviction and acquitted the appellant. It held that the only evidence against him was that he was able to show the place where the deceased was lying. Extra judicial confessions have no sanctity in law but they become relevant only when discovery is made pursuant to that. Moreover, the court maintained that the blood stained underwear which matched the blood of the victim was a circumstance which was never put to the appellant when he was being examined under section 313 Cr PC. Thus, the court felt that the case could not be proved beyond reasonable doubt and took a serious note of the lapse under section 313. The fact is, technical irregularities like this both by the prosecution and by the investigation agencies often botch up many cases. How long should the court allow them to continue with this?

However, in *Ram Deo Prasad* v. *State of Bihar*[44] which was again a case of brutal rape and murder of a 4 year old child, the examination under section 313 Cr PC was just an eyewash. He was unrepresented in the trial court and did not file an appeal in the high court against the death penalty awarded to him. The Supreme Court was of the opinion that he did not have the financial resources and the realization to understand the gravity of the situation. On these technical irregularities it commuted his death penalty to imprisonment for 18 years! Thus in one case the accused gets acquittal and in the other remission in sentence!

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42 (2013) 4 SCC 434.

43 (2013) 12 SCC 406. See also *Raj Kumar Singh* v. *State of Rajasthan* (2013) 5 SCC 722.

44 (2013) 7 SCC 725.

In *Karan Singh* v. *State of Haryana*[45] the investigation was botched up by the investigating officer since he was favourably inclined towards the accused. All that was necessary in the circumstances of the case *i.e.* using the services of the dog squad or crime team of the forensic science laboratory, taking photographs of the place of residence of the deceased which had been broken into were not done. Now, these were crucial issues. The trial court and the high court while lamenting on the shoddy investigation nonetheless gave a verdict of guilt. The Supreme Court, taking the administration of State of Haryana to task for not punishing the erring official, rightly upheld the guilty verdict.

Yet another case of shoddy investigation was *Sunil Kundu* v. *State of Jharkhand*.[46] The court acknowledging that "it is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigation agency at the cost of the victims which may lead to encouraging perpetrators of crime,"[47] was still constrained to give the benefit of doubt to the accused on the argument that a suspicion, howsoever strong, cannot take the place of proof. The point is that the courts laments have so far gone unheeded.[48]

In *Soguru Subrahmanyam* v. *State of A.P.*[49] though there was no direct evidence of murder by the husband but the cumulative effect of the circumstances led to the irresistible and inescapable conclusion that the appellant committed the murder. The conviction was upheld.

Culpable homicide not amounting to murder

In *Mohd. Ishaque* v. *State of West Bengal*[50] the conviction was converted from section 302 to culpable homicide not amounting to murder under section 304 Part I, because the murder was not premeditated but was a result of rivalry between political parties.

In *State of Rajasthan* v. *Santosh Savita*[51] there was death by burning of a woman in the matrimonial home. There was some sort of a relationship between the woman and the brother-in-law and two dying declarations stated that the accused brother-in-law poured kerosene on her and set her on fire. However, the details of the incident are quite sketchy. Hence the court set aside the conviction under section

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45 (2013) 12 SCC 592.

46 (2013) 4 SCC 422.

47 *Id.* at 434.

48 See also *Dayal Singh* v. *State of Uttaranchal* (2012) 8SCC 263; *Gajoo* v. *State of Uttarakhand* (2012) 9 SCC 532.

49 (2013) 4 SCC 244.

50 (2013) 14 SCC 581.

51 (2013) 12 SCC 663.

302 IPC as it could not be satisfactorily proved that there was intention to kill, or cause such bodily injury as is likely to cause death or cause such injury as is sufficient in the ordinary course of nature to cause death. The court held that the case did not fall in the 'fourthly' of section 300 IPC because the act was not so imminently dangerous that it must in all probability cause death. It is submitted that no mathematical precision can be employed to distinguish between murder and culpable homicide not amounting to murder. Sometimes, there is a very thin line dividing the two as in the present case. But there has to be some rationale to be employed by the judge and there is nothing in this judgment to show how to distinguish between the two. There is also no discussion as to how the case got covered under section 304 Part II IPC. Is it so much dependent on the subjective satisfaction of the judge? The only way to infer intention is through the physical conduct of the accused and section 300 fourthly reads thus "if the person committing the act knows…." It means that it is a very subjective criteria when interpreted literally. Otherwise section 300 fourthly is so encompassing that it may cover all homicide cases. Leaving that discussion aside, it is little disturbing that the judgment declares that "from the two dying declarations, it is also difficult to come to a finding that the respondent committed the act knowing that it is so imminently dangerous that it must in all probability, cause death of the accused"[52] The court justifying the alteration of the conviction from section 302IPC had placed little faith in the dying declaration when it observed thus: "The two dying declarations are very sketchy".[53] Since it was a sketchy account how did the court garner the accused's state of mind from it with so much conviction. The reasoning in such cases should be very convincing as the range of conviction between the two varies from the extreme of death penalty to a liberal punishment of just fine.

The court in *Swarn Kaur* v. *Gurumukh Singh*[54] was of the opinion that though the injury was on the head of the deceased (a vital organ of the body), the nature of the injury was not such as to infer intention to cause death. The accused were upset by the poor quality of food and assaulted him so there was no intention but knowledge could be imputed and hence they were convicted under section 304 Part II IPC.

In *Babu* v. *State of T.N*,[55] the medical evidence pointed to the fact that head injury was caused to the deceased and she became unconscious. In order to make it appear as a suicide, the appellant administered poison to her and before it could reach the liver and kidney, she succumbed to her injury. The court reasoned that since she had suffered only one head injury the conviction would be under 304 Part I IPC and not for offence punishable under section 302 IPC.

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52 *Id.* at 673.

53 *Id.* at 673.

54 (2013) 12 SCC 732.

55 (2013) 8 SCC 60. *Basdev* v. *State of Pepsu*, 1956 SCR 363 drew a distinction between motive, intention and knowledge and the court opined thus: "In many cases intention and knowledge merge into each other and mean the same thing more or less and

In *Kachar Dipu* v. *State of Gujarat*,[56] the trial court convicted the accused for culpable homicide not amounting to murder under section 304 IPC but the high court altered it to section 302 IPC, categorizing it as murder. Section 300 IPC states that culpable homicide is not murder: (a) if committed without premeditation; (b) if committed in the sudden fight in the heat of passion upon sudden quarrel; (c) without the offender having taken undue advantage; or (d) acted in a cruel or unusual manner. In the instant case the man (since deceased) was going to the field on his bicycle when the appellants hit him with their motorcycle. When he fell his body was tied to the motor vehicle and was dragged. The trial court gave a verdict of culpable homicide not amounting to murder. The high court on reappreciation convicted him under section 300 as the injury was sufficient in the ordinary course of nature to cause death.[57] The same was upheld by the Supreme Court.

In *Som Raj* v. *State of H.P.*[58] the deceased was given a blow on the head by a '*darat*' (an agricultural implement). It was contended by the appellant accused that "even if a singular fatal blow is taken to be inflicted, he could only be punished for an offence under section 304 Part II of the Penal Code, and not for the offence of murder under section 302." The court clarified that there is no justification for the same and "the whole thing depends on the intention to cause death, and the case may be covered by either clause "firstly or clause thirdly. The nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant upon the death." And in the instant case, the blow was so imminently dangerous that it would in all probability cause death and hence conviction under section 302 IPC was upheld.

Fake encounter

Rohtash Kumar v. *State of Haryana*[59] is indeed a disturbing case of fake encounter wherein a policeman killed a young man in cold blood in October 2008. The police subsequently refused to file an FIR. It is due to the relentless effort of the hapless father that the case reached the Supreme Court. It is painful to note that inspite of clear cut guidelines by NHRC and the Supreme Court regarding

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intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things. See also, *Ankush Shivaji Gaikwad* v. *State of Maharashtra* (2013) 6 SCC 770.

56 (2013) 4 SCC 322.

57 See also *Virsa Singh* v. *State of Punjab*, 1958 SCR 1495.

58 (2013) 14 SCC 246.

59 (2013) 14 SCC 290.

investigation in cases of alleged fake encounters the same was blatantly ignored. The court while admitting that it appears to be a fake encounter showed its helplessness thus:[60]

> Once we come to a conclusion that Sunil is killed in an encounter, which appears to be fake, it is necessary to direct an independent investigating agency to conduct the investigation so that those who are found to be involved in the commission of crime can be tried and convicted. But, as rightly pointed out by the learned amicus curiae directing an investigation, at this distant point of time, will be an exercise in futility. We are informed that witnesses would not be available. It would be difficult to trace the record of the case from the two police stations. Handing over investigation to an independent agency and starting a fresh investigation would be of no use at this stage.

And the court granted compensation of Rs.20 lakh. It is submitted that it is little uncomfortable to believe that 2008 record is something which is difficult to procure (as mentioned by the apex court). If this is the line of approach than the right to information which is considered to be a potent weapon in the hands of citizenry would be useless. The Act requires at least 20 years of record to be there. A mere compensation without bringing the guilty to book is like the archaic practice of giving blood money. The courts should have, at the least, ordered an inquiry and should have overseen that officers responsible for the cover-up were departmentally proceeded against and punishment imposed.

Corpus delicti

Lal Bahadur v. *State (NCT of Delhi)*[61] dealt with the anti Sikh riots of 1984 where large scale killings took place; the dead bodies of the victims were put in gunny bags and disposed off. The court reiterated that "[d]iscovery of the dead body of the victim has never been considered as the only mode of proving the corpus delicti in murder". The apex court upheld the conviction of the appellants under sections 147/149/449/436/302,395/396 IPC and sentenced them to rigorous imprisonment and fine.

The court in *Rishipal* v. *State of Uttarakhand*,[62] while admitting that *corpus delicti* is not essential, made it amply clear that there must be clinching evidence which proves that the victim has been done to death. In the instant case, there was no evidence either direct or circumstantial, of a homicidal death.

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60 *Id.* at 298.

61 (2013) 4 SCC 557 at 572.

62 (2013) 12 SCC 551.

Removal of evidence

In *Tejinder Singh* v. *State of Punjab*[63] the court held that for a charge under section 201 to succeed, mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused had caused the evidence to disappear in order to screen the offender, known or unknown.

V GENERAL DEFENCES

Unsoundness of mind

The law gives a defence of insanity as a person is responsible only for the acts which he does with the knowledge that what he is doing is wrong or contrary to law, especially in offences inolving *mens rea*.

In *Mariappan* v. *State of Tamil Nadu*[64] there was a homicidal death of a woman over a property dispute. Evidence was led to prove that there had been a dispute between the appellant and the deceased (who was the appellant's paternal aunt) over a portion of land. The appellant had threatened her a day prior to the murder that if money in lieu of land was not paid, he would kill her and her husband. On the fateful day he went to her house, locked the place from inside and gave her repeated blows on the head and she died. The deceased woman's grand-daughters who were witness to the crime raised cries for help. The neighbours came and saw the appellant running out of the house. The murder weapon was found and the blood stains matched. The appellant took the plea of insanity – that he was suffering from paranoid schizophrenia at the time of doing it and sought benefit of exception under section 84 IPC.

The law is settled on the point that the onus to prove that the case falls under the general exceptions is on the accused claiming the exception. The appellant submitted reports from the doctor certifying that he had paranoid schizophrenia and was under treatment from 11.7.2001 to 8.8.2009 and had also a termination letter from IG Police, Northern Sector, CRPF, New Delhi. However, the incident occurred three months after the treatment period and around the same time he had also requested his department to let him rejoin stating improvement in his health. The language of the section is very clear that the insanity must be at that particular time and in the instant case the accused could not discharge the burden of proving the same and hence his appeal was dismissed and stood convicted under section 302 IPC.

Right to private defence

Gopal v. *State of Rajasthan* [65] was a case of double murder. The facts proved that the complainant party was the aggressor. The accused party pleaded right to

63 (2013) 12 SCC 503.

64 (2013) 12 SCC 270.

65 (2013) 2 SCC 188.

private defence. However it is not clear from the facts if the aggressors were armed unlike the accused party which used axe and lathis to kill. In the judgement there is only a cursory discussion on right of private defence, and no discussion at all on the point whether they exceeded their right. The reason could be that the second murder did not fall under section 96 as that person (who was murdered subsequently) had come to help and was running away from the scene when he was killed. While the appellants could be held guilty under section 302 for the second murder, the right of private defence in the first murder was just granted without a serious thought and without proper appreciation of facts which, it is submitted, is not a healthy practice. The judgement mentions that "where the right of private defence is pleaded the defence must be a reasonable and probable one… the burden stands discharged on showing a preponderance of probability." But the fact remains that the right of private defence "should not exceed" and the courts have been wary of this excess. Moreover, as per section 31(1) Cr PC, consecutive sentences may be awarded and so each murder needs to be separately dealt with all seriousness.

VI INCHOATE OFFENCES

Attempt

The law of attempt defies Mill's harm principle. In cases of attempt no harm may result, but if the person has gone beyond preparation and entered the realm of attempt, he would be guilty of the offence. Therefore, for conviction under section 307 IPC, in a case of gunshot, it is immaterial whether the injury is on a vital part or not. What is important is that if the act was done with intention or knowledge that it might cause death. In *State of U.P.* v. *Mohan*[66] where the gunshot missed the vital portion and resulted in a lacerated wound, conviction under section 307 was upheld. The court reiterated that punishment should be commensurate with the crime and deprecated the high court ruling of reducing the sentence as the injury was not to a vital part.

Abetment

There was again an issue of birth of a girl child which led to suicide by the mother along with the child in *Atmaram* v. *State of Maharashtra.*[67] The court seems to have accepted the fact that bigamy does exist in India. There is no mention of the religion of the parties but the names suggest that they may be Hindus and the woman who died was the second wife. She was specifically married as the first wife could not bear children. Neither cruelty nor abetment could be proved. The court, due to lack of evidence, was constrained to believe that the woman was unhappy that she could not beget a son while the first wife delivered one and that drove her to commit suicide so the guilty verdict under sections 306 and 498 A IPC was reversed.

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66 (2013) 14 SCC 16.

67 (2013) 12 SCC 286.

The factual matrix in *Vajresh Venkatray Anvekar* v. *State of Karnataka*[68] was that a woman died after consuming poison. There were charges under sections 498A, 304B and 306. But since the dowry demand could not be proved the charge of 304-B was dropped. As far as section 306 is concerned section 113A reads thus:

> 113-A. *Presumption as to abetment of suicide by a married woman*.—When the question is whether the commission of suicide by a woman had been abetted by her husband … and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

The evidence proved that the woman was beaten up before her death and since the death occurred in the matrimonial home, it was clear that she was assaulted in there. The trial court did not view the harassment and beating to be of any consequence and the apex court was constrained to reprimand the sessions judge for the insensitivity shown to a serious crime against a hapless woman. The order is replete with such insensitivity like "giving one or two beatings is not cruelty to drive the deceased to commit suicide." The court while upholding the reversal of acquittal by the high court observed thus:[69]

> Our objection is to the tenor of the learned Sessions Judge's observations. We do not suggest that where there is no evidence the court should go out of its way, ferret out evidence and convict the accused in such cases. It is of course the duty of the court to see that an innocent person is not convicted. But it is equally the duty of the court to see that perpetrators of heinous crimes are brought to book. The above quoted extracts add to the reasons why the learned Sessions Judge's judgment can be characterised as perverse. They show a mindset which needs to change. There is a phenomenal rise in crime against women and protection granted to women by the Constitution of India and other laws can be meaningful only if those who are entrusted with the job of doing justice are sensitised towards women's problems.

VII FRAUDULENT REPRESENTATION

The question in *Devendra Kumar* v. *State of Uttaranchal*[70] related to suppression of material information sought by the employer. An FIR had been

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68 (2013) 3 SCC 462.

69 *Id.* at 471.

70 (2013) 9 SCC 363.

lodged against the appellant and subsequently there was a closure report which was accepted by the magistrate. The effect was that no case was made against the appellant. In his form for employment he did not mention (where it was specifically asked) the registration of FIR against him and his services were terminated when the fraud was detected. The court upholding his termination observed thus:[71]

> The case pending against a person might not involve moral turpitude but suppressing of this information itself amounts to moral turpitude.

Cheating

In *Arun Bhandari* v. *State of U.P.*,[72] the court analysing the offence of cheating held that in the definition of cheating there are two separate classes of acts which the persons deceived may be induced to do."In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts the inducing must be intentional but not fraudulent or dishonest." The court stressed that there is a fine distinction between breach of contract and cheating. The factual matrix, in the instant case, as was noted by the sessions judge, revealed that there was intention to deceive right from the beginning so it was not a question of breach of contract but cheating which the high court could not appreciate and quashed the proceeding. The apex court set aside the order of the high court and directed the magistrate to proceed in accordance with law.

VIII OBSCENITY

In *Gita Ram* v. *State of H.P.*,[73] there was a raid on a video parlour and the appellants were caught showing a blue film to about 15 viewers which included young men. The trial court sentenced the appellants to undergo 6 months simple imprisonment under section 292/34 IPC and imposed a fine of Rs. 1000 under section 7 of the Cinematograph Act, 1952. The sessions court upholding the guilt reduced the sentence to one month showing leniency towards these first time offenders. The high court saw no perversity in the judgment and dismissed the revision. The counsel for the appellants argued for the benefit of Probation of Offenders Act and pleaded for the sentence to be modified to fine alone. However a perusal of section 292 IPC makes it clear that it deals with first time offenders with lighter punishment and aggravated in case of repeat offenders. Hence, the court saw no reason to modify the sentence any further.

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71 *Id*. at 368.

72 (2013) 2 SCC 801.

73 (2013) 2 SCC 694.

IX INTENTIONAL INSULT TO PROVOKE BREACH OF PEACE

Religion is a very sensitive issue in India and religious insults have historically been responsible for escalating tensions among groups. Hence, the courts take such matters quite seriously. In *Fiona Shrikhande* v. *State of Maharashtra*[74] the idols of the "Kulu devta" were dislodged and the court held that there was a prima facie case to initiate proceedings under section 504 IPC.

X JOINT LIABILITY

Common intention

The conditions precedent which are essential to attract section 34 of the IPC are that the act must have been done by more than one person and the said persons must have shared a common intention either by omission or commission in effectuating the act. A separate act by each of the accused is not necessary.[75]The court in *Syed Yousuf Hussain* v. *State of A.P.*[76]clarified the same thus:[77]

> Section 34 IPC is intended to cover a situation wherein the accused persons have done something with common intention to constitute a criminal act. To get Section 34 attracted, certain conditions precedent are to be satisfied. The act must have been done by more than one person and they must have shared a common intention either by omission or commission in effectuating the crime. It is always not necessary that every accused must do a separate act to be responsible for the ultimate criminal act. What is required is that an accused person must share the common intention to commit the act.

In *Goudappa* v. *State of Karnataka*[78] the ingredients of section 34 were once again scrutinized and the court held thus:[79]

> [H]ow to gather common intention? The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature of the injury caused by one or some of them. Therefore, for arriving at a

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74 (2013) 14 SCC 24.

75 *Birendra Das* v. *State of Assam* (2013) 12 SCC 236.

76 (2013) 4 SCC 517.

77 *Id.* at 521.

78 (2013) 3 SCC 675.

79 *Id*. at 682.

> conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

So, there must be a common intention for convicting a person under section 34 IPC and most importantly there must be participation by the accused persons in furtherance of the common intention. It may not be necessary that the acts of the several persons charged with the commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must be arising out of the same common intention.[80] No prejudice can be claimed by the accused merely because charge was framed under section 302 IPC simpliciter and not with the help of section 34 IPC.[81]

Unlawful assembly

In *State of Rajasthan* v. *Shiv Charan*[82] the trial court recorded a conviction under section 302 read with section 149 IPC. But the high court noting that the prosecution has not revealed the genesis of the incident abruptly reached the conclusion that as there had been no meeting of minds just prior to the incident, or even at the time of the incident, the respondents were responsible for their individual acts. The Supreme Court reminded the scope of constructive liability stating thus:[83]

> The pivotal question of applicability of Section 149 IPC has its foundation on constructive liability which is the sine qua non for its application. … It is not necessary that for common object there should be a prior concert as the common object may be formed on the spur of the moment. Common object would mean the purpose or design shared by all members of such assembly and it may be formed at any stage. Even if the offence committed is not in direct prosecution of the common object of the unlawful assembly, it may yet fall under the second part of Section 149 IPC if it is established that the offence was such, as the members knew, was likely to be committed. … However, it may be relevant to determine whether the assembly consists of some persons which were merely passive witnesses and had joined the assembly as a matter of ideal curiosity without intending to entertain the common object of the assembly.

The apex court restored the order of the trial court.

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80 *State of Rajasthan* v. *Shobha Ram* (2013) 14 SCC 732. See *Emperor* v. *Barendra Kumar Ghosh*(1925) 27 Bom LR 148. wherein it was held that "Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait.'

81 *Chinnam Kameswara Rao* v. *State of A.P.* (2013) 12 689.

82 (2013)12 SCC 76.

83 *Id.* at 82.

In the case of *Manga* v. *State of Uttarakhand*[84] one of the issues deliberated was the interpretation of section 141 "third" *vis a vis* section 149 IPC. The court after citing authorities on statutory interpretation scrutinized the submission of the senior counsel that "under section 141 'Third', the expression 'other offence' used therein for the purpose of ascertaining the common object of a person in an unlawful assembly, would only be relatable to offences similar to those such as, mischief or criminal trespass, referred to in the said class". The court entered into an examination of sections 141, 147 and 149 and held thus:[85]

> Section 141 "Third", clearly mentions that an assembly of five or more persons is designated as an unlawful assembly if the common object of the persons composing that assembly as among other offences, namely, mischief or criminal trespass or commission of other offence. A literal interpretation, therefore, only means that apart from the offence of mischief and criminal trespass, all other offences would fall within the said clause "Third" mentioned in Section 141. Other related sections falling under the said Chapter VIII are up to Section 160. Reading Section 141 "Third" along with Section 149, if the commission of any other offence apart from mischief or criminal trespass and such commission of offence was by a member of an unlawful assembly, the prescription of common object will automatically get satisfied.

"Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 of the Penal Code."[86] In cases where allegations are against large number of persons the courts have to carefully examine if the offence is committed in direct prosecution of the common object or such as the members knew was likely to be committed. In *Rattiram* the twin test failed and there were doubts as regards the appellant accused person's presence on the spot and so conviction under section 149 was not called for.

The constructive liability should not be stretched to an extent that innocent bystanders get wrongly implicated. This warning becomes all the more relevant while invoking section 149 as large numbers of people may be involved and it may sometimes happen that some people may seem to be a part of the unlawful assembly without actually being a part just by being there out of sheer curiosity. Commission of an overt act by such a person would be one of the tests to prove that he shared the common object, but it is not the sole test, as the mere membership of the assembly has the potential to implicate the person.

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84 (2013) 7 SCC 629.

85 *Id.* at 649.

86 *Rattiram* v. *State of M.P.* (2013) 12 SCC 316 quoting *Baladin* v. *State of U.P.* 1956 CriLJ 345.

In *Subal Ghoral* v. *State of W.B.*[87] there was an altercation involving a goat belonging to the deceased damaging the paddy and being beaten by a juvenile delinquent Gopal and his mother. The deceased detained Gopal for some time. This infuriated the accused persons and they came armed. There was evidence that they assembled on the sounding of a conch shell and proceeded towards the place of commission of crime which resulted in three gruesome murders. The court reiterated that the most important ingredient of an unlawful assembly is the common object. It can be formed at the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. It is irrelevant whether the person did something or not once the case fell within the ingredients of section 149 IPC. So if a large crowd assaults some persons and a few among them do not take part in the assault, and their weapons are not used but that will not absolve them of liability.

Section 149 IPC is a substantive offence and section 34 IPC is only a rule of evidence. Occasions may arise where the court realizes that due to acquittals the strength of the assembly is insufficient to constitute an "unlawful assembly." But once it is established that the other persons who participated in the crime share a common intention with the perpetrators of the crime, the court can invoke section 34 IPC even though they may not have been specifically charged.[88]

XI OFFENCES AGAINST PROPERTY

Dacoity with murder

The question before the court in *Manoj Giri* v. *State of Chhattisgarh*[89] was whether conviction of less than five persons or even one for dacoity can stand. The factual matrix was that the prsoecutrix along with her husband and father-in-law were returning home on bicycles when they were waylaid by a gang of five persons. They were beaten up and she was gang raped. Her father-in- law ultimately succumbed to his injuries in the hospital. The trial court considered the evidence and concluded that the appellant was guilty under section 395, 396, 397, 398 and 376(2) (g) IPC. However, evidence against the others was wanting and they were acquitted. The contention of the appellant was that since the other four had been acquitted it would not be legal to convict him alone for an offence of which the basic ingredient is 5 or more persons. The apex court held that there is no infirmity in the decision since there was no doubt that the murder was committed during the conjoint commission of dacoity. For want of proper evidence the others have been acquitted but conviction of even one can stand.

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87 (2013) 4 SCC 607.

88 See *Babu* v. *State* (2013) 4 SCC 448.

89 (2013) 5 SCC 798.

Robbery with murder

Palwinder Singh v. *State of Punjab*[90] was a case of robbery which ended in murder. The eyewitnesses had fled from the scene of crime which happened at around 10 p.m. at night on a public road and they came to report to the police only at around 8 in the morning. Reliance was placed on their testimony by both the trial court and the high court. The apex court also reasoned thus:[91]

> …[B]ecause he did not make any attempt to go to the rescue of the deceased cannot be put against the witness, inasmuch as when four persons were assaulting the deceased with dangerous weapons that too in the night hour in the present day set-up, one cannot expect an unarmed person to get himself entangled and suffer unnecessary harm to himself. Moreover, the occurrence took place late in the night at around 9 p.m. and, therefore, prudence might have dawned upon him not to fall a cheap prey at the hands of such criminals who were already assaulting a person with a dagger and other weapons. Equally, his conduct in having come back to the place of occurrence in the early morning at around 7.30 a.m. along with PW 4 only shows his earnestness in disclosing what he witnessed on the previous night to the police.

XII SENTENCING

"The most relevant determinative factor of sentencing is proportionality between crime and punishment keeping in mind the social interest and consciousness of the society. It is a mockery of the criminal justice system to take a lenient view showing misplaced sympathy to the accused on any consideration whatsoever including the delay in conclusion of criminal proceedings."[92]

State of M.P. v. *Najab Khan*[93] raises important issues of sentencing and compoundability. The case involved conviction under sections 326/34 IPC for causing grievous injuries to the victim. As per the doctor's opinion the injuries were serious in nature and could have posed a threat to the victim's life. The trial court sentenced the accused persons to three years imprisonment and a fine. On appeal to the high court for reduction of sentence it reduced the punishment to the 14 days imprisonment already undergone! The fact that the parties had amicably resolved the issue is also mentioned in the judgment though it is not clear whether the high court was moved into reducing the sentence because of this factor. However, what is shocking is that the high court blatantly ignored the written law

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90 (2013) 5 SCC 715.

91 *Id*. at 720.

92 *State of M.P.* v. *Babulal* (2013) 12 SCC 308.

93 (2013) 9 SCC 509.

and dealt with such a serious case, which could have resulted in a murder, in a casual manner. The punishment must adhere to the principle of "just deserts" and the apex court was right in restoring the sentence passed by the trial court. It defies logic that the final court of evidence *i.e.,* the high court had no scruples on not following the rule book and giving punishments not commensurate with the gravity of the crime.

State of Haryana v. *Janak Singh*[94] is a rape case and a reading of the judgment reveals that the societal abhorrence of rape and the increase in crime against women and children and its demand for deterrent punishment are of not much concern to some of the high courts. It reduced the sentence of eight years given by the trial court to two years rigorous imprisonment already undergone for "just and expedient" reasons. It reminds us of the *Phul Singh*[95] judgment of Krishna Iyer J. However, there is a discussion as to the probable consent of the prosecutrix but the judgment reflects that the case had been handled in a very shoddy manner. As such, the Supreme Court remanded the case to the high court for disposal.

Sentencing policy has to turn a blind eye to hypothetical situations. The punishment must be commensurate with the crime situation. The courts cannot hypothecate the possible consequences which may follow a conviction. *Hazara Singh* v. *Raj Kumar*[96] was a case of attempted murder which resulted in grievous injuries to the victims. The trial court on a principle of just deserts awarded a punishment of 5 years and 3 years rigorous imprisonment, respectively. The IPC not only specifies the offence but prescribes the punishment to be awarded. The high court reduced the punishment on a frivolous justification of revival of enmity in the village following a harsh punishment. The Supreme Court, deprecating the approach of the high court observed thus:[97]

> [I]n operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix… Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law.

In *Bhaikon* v. *State of Assam*[98] the court asserted that the case did not fall under the "rarest of rare" category and hence gave life imprisonment in a case of rape and murder though the trial court had given the death penalty. The court rightfully did not enter the domain of the executive and the legislature and stuck to

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94 (2013) 9 SCC 413.

95 *Phul Singh* v. *State of Haryana* (1979) 4 SCC 413.Though the reasoning was different in that case.

96 (2013) 9 SCC 516.

97 *Id.* at 523.

98 (2013) 9 SCC 769.

its position of life imprisonment. It also followed the rule book and negatived the contention of the senior counsel that incarceration of 14 years was sufficient.

The year saw a very important judgement as far as sentencing is concerned, *Sangeet* v. *State of Haryana*.[99] The court was sitting in appeal over the death penalty and used the opportunity to deliberate on the sentencing policy *vis a vis* death penalty and discerned three phases of the same. In the first phase the focus was on crime and the court was principally concerned with the aggravating and mitigating circumstances with the "particular crime under inquiry". This was the *Jagmohan*[100] dictum and related to the pre Cr PC 1973 phase. *Bachan Singh*[101] opened the second phase since there was a little legislative change with the coming into force of Cr PC 1973 which under section 354(3) made life imprisonment the rule and death penalty the exception, since special reasons had to be given for imposing death penalty (the earlier position was that death penalty and life imprisonment were alternate punishments). And the focus in this phase shifted from crime to crime and criminal – the dubious "rarest of rare" category. However, *Machhi Singh*[102] "revived the balancing of aggravating and mitigating circumstances through a balance sheet theory". In doing so, it sought to compare aggravating circumstances pertaining to a crime with mitigating circumstance pertaining to the criminal. The *Sangeet* court cautioned that "It hardly needs to be stated that these are completely distinct and different elements and cannot be compared with each other." In *Swamy Shraddananda* v. *State of Karnataka* (2)[103] the rarest of rare category was denounced for not being "followed universally or consistently". And this case started the third phase where remission power of the government came to be circumvented. The court in *Sangeet* case showed concern for "judge-centric sentencing"[104] and suggested that aggravating and mitigating circumstances need a fresh look and "policy needs to be examined." The judgment held that "the tests that have to be applied while awarding the death sentence are 'crime test', 'criminal test' and the 'R-R test' and not the "balancing act".

It has been pointed out by the present author in the earlier surveys also that the sentencing jurisprudence has become very messy. To add to the chaos the Criminal Amendment Act, 2013 under section 376(2) qualifies the term life imprisonment to mean "for the rest of that person's natural life" suggesting thereby that the life imprisonment in other sections of the Code means something other than the convict's natural life !. The confusion arises since the life imprisonment as mentioned in section 53 just says "imprisonment for life". So is it a distinct

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99 (2013) 2 SCC 452. See also *Gurvail Singh* v. *State of Punjab* (2013) 2 SCC 713.

100 *Jagmohan Singh* v. *State of U.P*. (1973) 1 SCC 20.

101 *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684.

102 *Machhi Singh* v. *State of Punjab* (1983) 3 SCC 470.

103 (2008) 13 SCC 767.

104 See Jyoti Dogra Sood, "Criminal Law" XLVII *ASIL* 300 (2011); "Criminal Law" XLVIII *ASIL* 303,306 (2012).

category of life imprisonment for the purposes of section 376A or it just reiterates what section 53 actually means. Some clarity is the need of the hour.

Though the *Sangeet* judgement cautions against the artificial construct of 20 years and 14 years and categorically asserts that life imprisonment is indeterminate and means the natural life of the convict and the court observed: "if the law is applied as we understand it, meaning thereby that life imprisonment is imprisonment for the life span of the convict, with procedural and substantive checks laid down in the Cr PC for his early release we would reach a legally satisfactory result on the issue of remissions."

The much revered "rarest of rare" category which was so vague is finally being given a decent burial or so it seems. Lokur J made a very telling observation in *Shankar Kisanrao Khade* v. *State of Maharashtra*[105] thus:[106]

> It is difficult to practically apply the "rarest of rare principle since there is a lack of empirical data for making the two fold comparison between murder (not attracting death penalty) and murder (attracting death penalty). It is this inability to make a comprehensive evaluation and due to a lack of information and any detailed study that the application of the rarest of rare principle becomes extremely delicate thereby making the awarding of a death sentence subjective.

The court in *Shankar Kisanrao Khade* wanted to give a harsher punishment but not death penalty; so instead of encroaching on the executive domain found a way out by giving sentences for individual offence to run consecutively. The court made very interesting observations which need to be taken seriously:[107]

> It does prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India.

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105 (2013) 5 SCC 546.

106 *Id.* at 584.

107 *Id*. at 614.

Sahib Hussain v. *State of Rajasthan*[108] is a commentary on the sentencing jurisprudence evolved post *Shraddanand* wherein the remission powers of the state have been fettered. The court, taking note of the objections raised in *Sangeet*[109]case wherein it was categorically mentioned that the "appropriate Government cannot be told that it is prohibited from granting remission of a sentencing" held that other judgments have evolved a sentencing policy over a decade in matters of cases where death penalty has been commuted to life imprisonment and it finds no infirmity in fettering the executive power in such cases. It is submitted that the courts commute the death penalty because the particular bench feels that it doesn't fall in the "rarest of rare" category. However, it cannot impose conditions other than what is contemplated in the criminal codes. *Sangeet* is a two judge bench decision and *Sharaddananda* is a three judge bench decision and hence gains legitimacy due to the strength. However, it is submitted that the bench cannot be allowed to adopt such a callous attitude and the matter must be resolved by a constitution bench. Further, without going into the merits of the "rarest of rare" category one thing is clear that the criminal jurisprudence regarding the death penalty post Cr PC 1973 means that it is not an alternate punishment under section 302 but murder has been categorized into two – murder which is harmful to the society and so to be punished with life imprisonment and a heinous murder which shocks the collective conscience of the society with death penalty. Various judgements have given various circumstances wherein such occasions may arise. Hence, to say that the court commuted death penalty to life imprisonment may not be the right thing to do.

In *State of Rajasthan* v. *Jamil Khan*[110] the accused was given life imprisonment for murder and another term of life imprisonment for rape under section 376. Generally the sentences run concurrently but the court, in the instant case, ordered the sentences to run consecutively. This was done to counter the liberal approach adopted by the governments which resorts to commutation and remission of sentences. Since it was a ghastly crime the court was ensuring that the convict remains behind bars for a considerable period of his life.[111]

Joseph Kurien J pontificates in *Sunil Damodar Gaikwad* v. *State of Maharashtra*[112] that "judges should not be blood thirsty. Hanging of murderers has never been too good for them." The judge also observes that the "scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354(3)." A comparison of this view with his own assertions in

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108 (2013) 9 SCC 778.

109 *Supra* note 99.

110 (2013) 10 SCC 721. See also *Deepak Rai* v. *State of Bihar* (2013) 10 SCC 421.

111 The 2013 Criminal Law Amendment does provide non remittable punishment in case of rape and murder (Also see ed. note).

112 (2014) 1 SCC 129.

State of Rajasthan v. *Jamil Khan*[113] would show that he was forced to clarify his stand in *Gaikwad'*s case wherein he qualified his earlier stance and cautioned "poverty shall not be understood and applied as disjunct from the factual position… poverty or socio-economic /psychic or undeserved adversities in life shall be considered as mitigating factors only if those factors have a compelling or advancing role to play in the commission of the crime or otherwise influencing the criminal." The word "influencing the criminal" is not just a play with semantics but could be interpreted in a way to loosen the noose around the neck in many a crime situation. In this ultimate analysis, it is a very subjective opinion of a judge. If the latter judgment had not come, Kurian J seems too much of an abolitionist. It is submitted that there have been problems interpreting 'rarest of rare' concept and one of the safeguards could be that a larger bench be constituted in an appropriate case to discuss the issue threadbare and give an authoritative judgement thereon. Moreover, the Supreme Court was never envisaged to sit in benches of two judges and decide matters as grave as life and death.

In *Ramesh Kumar* v. *State of H.P*[114] the court held thus:[115]

> …[I]t may be pertinent to point out that the High Court had taken an unwarranted lenient view while imposing the punishment less than the minimum sentence provided by the statute for the offence of gang rape which is 10 years' RI, though the appellants had been awarded 7 years' RI. The consideration which prevailed with the High Court for imposing lesser punishment had been as under:

"The children of the respondent convicts are stated to be minor. Convict Ramesh has one leg short and is thus handicapped. The incident in question had taken place in the year 1998. We see these adequate and special reasons to pass a sentence of less than 10 years."

We are of the considered opinion that none of the said grounds are relevant for this purpose and there was no justification for the High Court to impose the punishment of less than 10 years' RI. However, in the facts and circumstances of the case, we do not want to interfere with the said order.

Only the mandatory minimum sentence was awarded in *Ranjit Singh* v. *State of Punjab*[116] in a case of dowry death on the plea that the appellant had got a married second time and from his second wife he has three children, out of which one is handicapped and his mother (who was also implicated) is also paralysed". Is it the case of divine retribution which courts are taking cognizance of? Perhaps

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113 (2013) 10 SCC 721.

114 (2013) 14 SCC 110

115 *Id.* at 116.

116 (2013) 12 SCC 333.

in sentencing, what needs to be taken into account is the circumstances under which the offence was commited and circumstances at the time of commission of the offence and not instances of the convicts' later life.

Sanaullah Khan v. *State of Bihar*[117] is a case of three murders. The guilt was proved and the issue was of sentencing. The trial court awarded death sentence for gruesome murders. The apex court, while unable to decide the case to be of extreme culpability warranting a death sentence, invoked section 31(1) Cr PC which provides thus:[118]

> When a person is convicted at one trial of two or more offences, the court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

The court imposed life imprisonment for each murder and the sentence to run consecutively and not concurrently. In the interest of justice and how sentencing is being treated this pattern of sentencing is perhaps laudable.

The sentence of life imprisonment has been comprehensively debated in *Bangal* v. *B.K. Srivastava*[119] which was a contempt petition filed by one of the convicts alleging that since he had already completed 20 years of imprisonment he as per the remission rules should have been released. The court examined a catena of cases including the Constitution Bench decision in *Gopal Vinayak Godse*[120] wherein it was held that the sentence of imprisonment for life is not for any definite period and the imprisonment for life must, *prima facie*, be treated as imprisonment for the whole of the remaining period of the convicted person's natural life. It categorically stated that section 57 is applicable for the purpose of remission when the matter is considered by the government under the appropriate provisions. Quoting from the Privy Council decision in *Kishori Lal* v. *King Emperor* [121] it held that "the prison rules are made under the Prisons Act and by the Prisons Act by itself does not confer any authority or power to commute or remit sentence. It only provides for the regulation of the prisons and the terms of prisoners confined therein." It is submitted that the legislature should step in to clear the confusion

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117 (2013) 3 SCC 52.

118 See s. 31(1) Cr PC.

119 (2013) 3 SCC 425.

120 AIR 1961 SC 600; (1961) Cri LJ 736.

121 AIR 1945 PC 64.

since post *Shraddhananda*[122] cases after cases, the apex court has been handing down qualified life imprisonments.[123]

Proportionality in sentencing is a hallmark of the rule of law. Hence in *Rajendra Yadav* v. *State of M.P.*[124] where the disciplinary authority imposed a lighter sentence on one accused and harsher punishment on the co-accused the court ordered that harsher punishment on one and not to the other cannot be permitted as it violates article 14 of the Constitution

In *Sunder* v. *State* where there was a murder and kidnapping for ransom, death sentence was confirmed. It is reiterated by the present author that while the retentionist judge gives weightage to aggravating circumstances, the abolitionist judge gives weightage to mitigating circumstances which could even be as frivolous as being married and having a child. The *Sangeet* judgment did point out the loopholes in the sentencing policy. So till the time it is in the statute book it is imperative that a bench of 5 judges must consider the matter so that some balancing is done. It may be noted that this judgement is of February 2013 and in the Supreme Court Rules, 2013 which will be effective from 19.08.14. Order VI (3) and (4) states thus:

> Every cause, appeal or other proceedings arising out of a case in which death sentence has been confirmed or awarded by the High Court shall be heard by a bench consisting of not less than three judges.

If a Bench a less than three judges, hearing a cause, appeal or matter is of the opinion that the accused should be sentenced to death it shall refer the matter to the Chief Justice who shall thereupon Constitute a Bench of not less than three judges for hearing it.

Mohinder Singh v. *State of Punjab*[125] was a case of murder of the wife and a girl child and that also at a time when the appellant was on parole as he was undergoing rigorous imprisonment for 12 years for committing incest on his minor daughters. These diabolic murders resulted in death penalty being given by the trial court which was confirmed by the high court. The apex court mentions two mitigating circumstances *viz*: (a) his age at the time of the commission of crime *i.e.*, 41 years, and (b) that the accused is a poor man, who has no livelihood.

It hastily added that these two circumstances will not suffice for commutation of death sentence. The court then rakes up the entire case law on "rarest of rare"

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122 See *supra* note 103.

123 For example, *State of U.P*. v. *Sanjay Kumar* (2012) 8 SCC 537; *Sandeep* v. *State of U.P.* (2012) 6 SCC 107; *Neel Kumar* v. *State of Haryana* (2012) 5 SCC 766.

124 (2013) 3 SCC 73.

125 (2013) 3 SCC 294.

cases. One gets the feeling that the judges had already made up their mind (were probably abolitionists) not to give death penalty and are building up a weak case. The judgment then clarifies that "life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years or even 30 years, rather it always means the whole natural life". The judgement even mentions the affidavit of the appellant's sister and goes on to advocate that "his family has not totally renounced him. Hence, there is possibility for reformation in the present appellant." And so Sathasivam J did not deem it a fit case for death penalty. The judgement is supplemented by Ibrahim Kalifulla J. where he gives gory details of the crime in paras 38 and 39 and then concurs with his brother judge applying the various principles culled out right from the Constitution Bench decision in *Bachan Singh*[126] to the more recent case of *Mohd. Ajmal Amir Kasab*[127] to hold that it is not a fit case for death penalty but life imprisonment subject, however, to remission (unlike other cases where when death penalty was not given they put fetters on life imprisonment).

The sentencing policy was a subject of lamented discussion in *Maheboobkhan Azamkhan Pathan* v. *State of Maharashtra*[128] which states thus:[129]

> Despite the changes in the criminologist thought and movement and the extent of clemency in penal laws, it has not been possible to put to rest the conflicting views on the sentencing policy. The sentencing policy, as a significant and inseparable facet of criminal jurisprudence, continues to remain a great subject of social and judicial discussion and it is neither possible nor prudent to state a "straitjacket" formula which would be applicable to the cases where capital punishment has been prescribed. The court, therefore, has to consider the factors to the sentencing calculus such as the gravity of the offence, the provocative and aggravating circumstances at the time of the commission of the crime, the possibility of the convict being reformed or rehabilitated, the adequacy of the sentence of life imprisonment and other attendant circumstances.

In *Kulwant Singh* v. *State of Punjab*[130] where there was conviction of the husband, father-in-law and mother-in- law for a dowry death, it was contended that the father- in- law was about 80 years old and his legs have been amputated because of severe diabetes and the mother-in- law was 78 years old and had to look after her husband so a sympathetic view should be taken. Madan Lokur J gave considerable thought to the submission but since the law prescribes a minimum

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126 *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684.

127 (2012) 9 SCC 1.

128 (2013) 14 SCC 214.

129 *Id.* at 217.

130 (2013) 4 SCC 177.

of seven years imprisonment for an offence under section 304-B IPC and only the minimum was given and so could not accept the plea. It is submitted that this is the right approach as each one must get his or her 'just deserts' without distinction as to sex, age, health and the like. And most importantly, as the judge said, "sympathising with an accused person or a convict does not entitle us to ignore the feelings of the victim or the immediate family of the victim."[131]

Execution of death sentence

When a death penalty attains finality by being upheld by the highest court of the land, it does not immediately get executed. The convict has a chance to seek mercy from the President. If the mercy plea is rejected, he has to face the gallows and if accepted he is spared the noose. No time limit is prescribed within which the President is expected to decide the same. In *Mahendra Nath Dass* v. *Union of India*[132] the question before the court was that there had been a long gap of 12 years between the submission under article 22 of the Constitution and rejection thereof. Hence, the special leave to appeal where the appellant contended that inordinate delay must result in commutation of death sentence. It may be pertinent to note that the President Abdul Kalam had accepted the mercy petition in 2005. Subsequently, the Ministry of Home Affairs prepared a 6 page note in which the crime details were reiterated along with the observations of the court. The recommendations were approved by the President Mrs. Pratibha Patil in 2011. The court cited *Triveniben*[133] and a catena of other cases. It declared the rejection illegal and quashed the sentence of death and commuted it into life imprisonment. It is submitted that apart from the delay aspect another important issue which is to be noted is that the mercy petition is a plea for forgiveness from the Constitutional head as the guilt and its "rarest of rare" category has already been adjudicated (and reached finality) by the highest court of the land. Hence, a note from the ministry highlighting the depravity in the crime is uncalled for. The President acts on the aid and advice of the ministers but in the case of mercy petition, once having submitted the case files along with their noting, the government must distance itself from its acceptance or rejection as it is an act imploring the President's benevolence and is not a policy issue with which the government needs to engage with.

In *Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*[134] the court was again vexed with the question of commuting death penalty because of delay in disposing of the mercy petition. The court entered into a lengthy debate on the issue of death penalty and judgments upholding the validity of the same. It then dealt with the The Terrorist and Disruptive Activities (Prevention) Act, 1987 TADA 1987 and

131 *Id.* at 185.

132 (2013) 6 SCC 253.

133 *Triveniben* v. *State of Gujarat* 1989 SCR (1) 509.

134 (2013) 6 SCC 195.

its validity. The first 16 paras are devoted to these two aspects. Only after that the factual situation is discussed. It was pleaded before the court that a delay of eight years should be treated as sufficient for commutation of death sentence into life imprisonment. The *amicus curiae* also was of the opinion that the indifference or callousness or other extraneous reasons should always be treated as sufficient for the commutation of the death sentence into life imprisonment and that the "power reposed in the President under Article 72 and the Governor under Article 161 of the Constitution is not a matter of grace or mercy but is a constitutional duty of great significance and has to be exercised with great care and circumspection keeping in view the larger public interest." The court in its final analysis tried to distinguish between IPC Crimes and TADA crimes and held that the "rule enunciated in *Sher Singh* case,[135] *Triveniben* case[136]and some other judgements that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes"! It is submitted that such a distinction was uncalled for given the fact that death penalty cases are heinous cases and terrorist acts fall in the category of heinous and rarest of rare cases and so need not be treated as a *sui generis* crime. At the end of the day the power of mercy and grace that is conferred on the executive by the Constitution is to be exercised for the benefit of the people. Terrorists continue to be human beings and need to be treated so. The only good part of the judgement is that it ends with concern for the delay in mercy petitions and gives a chart at the end which hopefully would serve as a wakeup call to the executive because these are not merely policy decisions which can wait but relate to matters of life and death of human beings!

XIII VICTIMOLOGY

Victim was a forgotten entity ever since the state took upon itself to book the criminal. However, of late there has been a change and victimology is being examined with due seriousness. The Malimath Committee also made important recommendations regarding victims of crime. The court in *Ankush Shivaji Gaekwad* v. *State of Maharashtra*[137]examined the compensation aspect in conviction under section 304 Part II IPC. The court held that it has to be given depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay. The court after spending considerable space tracing to the history of compensation laments the fact that the trial court and the high courts remain oblivious of the provisions of section 357.[138] It feels constrained about the time lag between the offence and the final disposition of the case and ended with an advice to the courts to be careful in future. The lengthy discussion when remedy was not available defies logic.

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135 (1983) 2 SCC 344 *Sher Singh* v. *State of Punjab.*

136 (1989) 1 SCC 678 *Triveniben* v. *State of Gujarat* (1989) 1 SCC 678.

137 (2013) 6 SCC 770.

138 *Id*. at 797.

In *Mohd. Ishaque* v. *State of W.B.*[139] 50% of the money recovered as fine was to be paid to the wife of the deceased. But the fine amount was itself a meagre Rs.5000!

XIV CONCLUSION

Constitutionalism has led to striking down of some provisions like section 303 IPC and perhaps some of us were expecting decriminalisation of homosexuality as well but the apex court maintained the status quo. In India the legislature has been lax in reviewing the IPC though the legislature must, keeping in mind the changed values, contemporary views on criminal responsibility and privacy *etc*., step forward to update it[140] but the Indian legislature has been found wanting and it falls on the courts to decide and sometimes two judges sit and decide the matter involving questions of constitutional morality.

The cases regarding offences against women are on the rise and courts have been dealing with the offenders sternly in most of the cases. However, it is submitted that in rape cases such narrative should not be used which in a way suggests that the girl has lost her dignity and honour which she can never regain as mentioned in *Shyam Narain* case.[141] The dignity and honour of a woman is not a commodity which can be taken away by anyone! The society must change this mindset and the judiciary must refrain from making such sweeping statements as regards honour of a woman.

Culpable homicide not amounting to murder is another tricky area. And it is perhaps imperative that clear cut reasoning be provided as to how the offence gets covered in the first part or the second part of section 304. The reason being that the first part has a mandatory punishment of imprisonment ranging from "imprisonment for life, or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine…" whereas the second part which has the ingredient of knowledge stipulates a punishment of "imprisonment of either description for a term which may extended to ten years *or* fine *or* both." Given the wide difference in the quantum of sentences the courts must clearly state the reasons for bracketing the case in the former part or the latter part. It must always be kept in mind by the courts that on the question of facts the high court is the final court of appeal.

Sentencing continues to be a contentious issue in case of conviction under section 302. *Sangeet* [142] case did try to throw light on the issue surrounding

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139 (2013) 14 SCC 581.

140 The code continues with morality of the bygone era and adultery law is a perfect example.

141 *Supra* note 20.

142 *Supra* note 99.

sentencing but the judgement is by a two judge bench and is being held *per incuriam* in some cases[143]as *Shraddananda*[144]judgement is a three judge bench decision. It is in the fitness of things that the judiciary restrains itself from interfering in the domain of the executive. And given the varied patterns of sentencing the legislature may initiate legislative reforms and revisit sentencing and other sections of the Code which may be in need of some revitalisation.

143 See for example, *Sahib Hussain* v. *State of Rajasthan* (2013) 9 SCC 778; *Gurvail Singh* v. *State of Punjab* (2013) 10 SCC 631.

144 *Supra* note 103.