9

CRIMINAL LAW

*K I Vibhute**

I INTRODUCTION

CONTENTS OF criminal law endeavor to prescribe a code of conduct for the community. It, depending upon social and cultural ethos of the community, attempts to preserve certain values and ideals that are, rightly or wrongly, perceived essential for the community. It prohibits, with penal sanction, the conduct that poses or is likely to put those values in danger.

The Indian Penal Code, 1860 (IPC) has been in operation for about one hundred and fifty years. Critiques of the IPC perceive that the ideals and values it pursues are essentially Victorian and do not have Indian ethos. However, the higher judiciary in India, through its interpretation, has been making it a penal law of contemporary relevance.

The major thrust of this survey is to make analysis of approach of the higher judiciary to certain basic principles of criminal liability and of related matters. It concentrates on the judicial pronouncements delivered by the higher judiciary in the year 2009 in the selected areas of penal law, namely constructive criminal liability, exceptions from criminal liability, inchoate crimes, sexual offences and sentencing. This selection in no way undermines the significance of other specific offences against the human body and property dealt under the IPC.

II EXCEPTIONS FROM CRIMINAL LIABILITY

The circumstances enumerated under chapter IV of the IPC exempt a person from criminal liability for the commission of an offence. Judicial deliberation on two of these extenuating factors during the year under survey, keeping in view their complexity and significance in the administration of criminal justice, has been looked into.

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Insanity

'Unsoundness of mind'- legal requisites

In *Hari Singh Gond* v. *State of Madhya Pradesh*[1] and *Sidhapal Kamala Yadav* v. *State of Maharashtra*,[2] the Supreme Court reiterated that a person is exonerated from criminal liability on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behavior of a psychopath does not *ipso facto* afford protection under section 84, IPC. Similarly, mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past, or that his behavior was queer, is not, by itself, sufficient to bring section 84 into play. The crucial point of time at which the unsoundness of mind needs to be established is the time when the crime was actually committed. Unsoundness of mind prior or subsequent to the commission of crime cannot absolve him of liability.

In *Rajesh Kumar* v. *State of NCT of Delhi*,[3] the appellant-accused was sentenced by the trial court to death for brutal killing of two children of very tender age of 54 months and of 9 months of his wife's brother, who refused to lend him money for starting business. The Delhi High Court, while confirming the death sentence, also ruled that every mental imbalance cannot be equated with 'unsoundness of mind' and it, by itself, does not make the person 'insane.' Insanity contemplated under section 84 is such unsoundness of mind that renders the person incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law. The court added that anger or hatred, though blurs rational thinking, cannot be equated with insanity as every human being is expected to control his emotions and remain in senses.[4]

Burden of proof - obligations of accused and of investigating officer

The burden of proving unsoundness of mind at the relevant time lies on the accused. He needs to establish it by cogent and convincing evidence. But where, during the investigation, previous history of insanity of an accused is revealed, it is the duty of an investigating officer to subject him to a medical examination and to place that evidence before the court. Failure of an investigation officer to do so not only creates a serious infirmity in the prosecution case but also entitles the accused to get a benefit of doubt.

1 AIR 2009 SC 31.
2 AIR 2009 SC 97.
3 MANU/DE/1652/2009.
4 *Id.* at 65.

In *Ramesh @ Ramesh Babu* v. *State of Tamil Nadu Represented by the Police Inspector*,[5] the High Court ruled that section 84, IPC came into play only when an accused was of unsound mind at the time of commission of the offence in question. His abnormality of mind prior or subsequent to the commission of the offence did not allow him to take shelter under section 84. The appellant-accused, a mechanical engineer and former employee of the Tamil Nadu Petrochemicals Ltd, Manali, for 10 years, was convicted by the trial court under section 302, IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs 10,000. One day, he, for no sound reason or without any provocation, stabbed the deceased till he succumbed to death, took blood oozing from injuries of the deceased and put the same on his forehead as '*thilak*' and ran away from the scene. He urged the High Court to exonerate him as he was of unsound of mind. The evidence brought on record revealed that he was suffering from paranoid schizophrenia, a major mental illness, and was afflicted with certain abnormal delusions and hallucination. He firmly believed that he was '*Baghwan Kalki*' and had the power of *God Shiva*. He believed that a man was against his mission and prevented his actions. He also was under delusion that his 'ideas' and 'waves' had been taken out of his brain through electrodes and seen in a computer. His medical history showed that he was treated for these psychological disorders and put on some life-long drugs. A few years after he left the Tamil Nadu Petrochemicals Ltd., he sought job in Paris and stayed there till he abdicated it and returned back to India. He also, against medical advice, discontinued his treatment and refused to take the prescribed drugs by saying that he was '*Baghwan Kalki.*' His medical examination done after the incidence of killing revealed that he was suffering from abnormality of mind and delusions. The High Court, relying on the evidence on record, inferred that the accused suffered mental illness and had delusion only *prior* and *subsequent* to the commission of the crime and not *at* the time of committing it. The High Court, therefore, declined to invoke section 84, IPC in his favour and to set aside his conviction and sentence ordered by the trial court. It ruled that mere abnormality of mind or partial delusion affords no protection under section 84. Abnormal behavior, actuated by religious fanaticism, and the fatal attack triggered therefrom, cannot be read under section 84.[6]

A careful reading of the judgment creates an impression that it overlooked a set of weighty facts that would have justified it to invoke section 84 in favour of the high-educated appellant-accused. They were: (i) for a long period he was suffering from paranoid schizophrenia and was advised to take the medically prescribed drugs for life; (ii) he, on his own, discontinued them; (iii) he took up the second job in France and carried it

5 MANU/TN/2249/2009.
6 *Id.*, para 42.

till he was taking the prescribed drugs; (iv) he left the overseas job only when he 'felt' that he was '*Baghwan Kalki*' and hence not required to take any medicine; (v) the absence of any motive behind murderous attack on the deceased and putting his blood '*thilak*' on his forehead; and (vi) the post-incidence medical examination, though carried out after a lapse of considerable time but when the accused was not on drugs, confirming that he was suffering from schizophrenia and hallucination.

In this context, a reading of *Narsibhai Dahyabhai Kanazariya* v. *State of Gujarat*,[7] decided by the Gujarat High Court, before the decision in *Ramesh @ Ramesh Babu*, becomes interesting. The facts, in a nutshell, were that the appellant-accused was prosecuted and convicted under sections 302 and 307, IPC for killing, without any apparent reason or motive, his own daughter and son, aged 15 and 5 years, respectively, by causing fatal injuries with an axe, and for attempted murder of his wife and another son. The trial court, *inter alia*, sentenced him to life imprisonment. The appellant was sent for medical examination before the trial even though abnormality of his mind had surfaced during the investigation itself. However, medical officers, who examined the appellant prior and subsequent to the killings, opined that he was suffering from psychiatric disorder, deep depression, and schizophrenia. It was also brought on record that he had an attack of schizophrenia about one year before the offence was committed that required 'continuous medical treatment.' The High Court took note of certain medical attributes of schizophrenia mentioned in earlier ruling of the apex court[8] to link them to the facts of the case at hand. The highlighted attributes were: (i) schizophrenia, which requires continuous medical treatment and it gets aggravated if not treated; (ii) if the disease is not fully and properly treated, it becomes chronic after two years and it re-occurs if medical care ceased and necessary medicines are stopped; (iii) patients affected with paranoid schizophrenia suffer from delusions about somebody controlling or persecuting them, and they occasionally commit murder when they suffer from the delusion of persecution; and (iv) during the spells of delusions, patients tend to become violent or commit suicide. The High Court ruled:[9]

> In the facts of the present case, in *absence of any enmity or quarrel or any apparent reason for appellant to kill* his own children, it was clear that the appellant could not be attributed any *mens rea* in the very nature of things and the state of his mind being unsound could be inferred. Thereafter, there was sufficient evidence of his *history of suffering from mental disorder and being*

7 MANU/GJ/0243/2009.
8 *Shrikant Anantrao Bhosale* v. *State of Maharashtra*, AIR 2002 SC 3399.
9 *Supra* note 7, para 12. *Emphasis is supplied.*

> *ultimately diagnosed for schizophrenia*. Therefore, we have *no hesitation* in holding that the appellant was entitled to benefit of the provisions of section 84 of IPC and entitled to be acquitted.

In *Ramdayal Pando* v. *State of Chhattisgarh*,[10] the High Court of Chhattisgarh, relying on the above mentioned *dicta* of the apex court, ruled that the onus of proof lies on the accused, who takes the plea of insanity, to establish that his mental condition, at the crucial point of time, was unsound. However, it is obligatory on the part of an investigating officer to carry out medical examination of an accused if abnormality of his mind figured in the investigation and to place evidence thereof before the trial court. If he fails to meet this requirement, it creates a serious infirmity in the prosecution and the accused is entitled to get the benefit of doubt. However, in the instant case, the investigating officer could not be held violator of the obligation as no reference to unsoundness of mind of the appellant-accused surfaced during the investigation. It was mentioned in a very casual manner.

The High Court of Madras, however, in *Ramesh @ Ramesh* Babu,[11] felt that the requirement of medical examination of the accused by the investigating officer was complied with when the appellant-accused, with the court's permission, was subjected to medical examination by his mother and that evidence was placed before the trial court. The lapse on the part of the investigating officer, the High Court ruled, did not result in any infirmity that affected the prosecution case.[12] In the backdrop of rulings of the apex court mandating medical examination of accused by an investigating officer and of placing evidence thereof before the court when abnormality of his mind surfaces in the investigation and hinting at legal consequences of its non-compliance,[13] the approach of the Madras High Court seems to be lesser convincing.

In *Marimuthu* v. *State of Tamil Nadu Represented by the Police Inspector*,[14] the Madras High Court, relying on the propositions pertaining to abnormality of mind, refused to absolve the appellant of his liability under section 302 (for killing his wife by hitting her head with a wooden block when she addressed him 'mental') and 324 (for causing injury with the same wooden block to his mother-in-law, when she tried to prevent him from attacking her daughter). The evidence brought on record had revealed that the appellant became alcoholic after he lost his only son aged 14 years.

10 2009 Cri LJ 3893 (Chatt).
11 *Supra* note 5.
12 *Ibid*.
13 *Bapu @ Gujraj Singh* v. *State of Rajasthan* (2007) 3 SCC (Cri) 509; *Hari Singh Gond* v. *State of Madhya Pradesh*, *supra* note 1 and *Sidhapal Kamala Yadav* v. *State of Maharashtra*, *supra* note 2.
14 2009 Cri LJ 3633 (Mad).

He attempted on his life by stabbing himself. He complained of hearing some abnormal sounds and of hearing somebody talking to him in his ears. These factors failed to persuade the High Court to hold that the appellant was of unsound mind within the meaning of section 84, when he killed his wife and injured his mother-in-law. However, it, in the backdrop of the facts of the case, ruled that the death caused by the appellant was not intentional. He lost the power of self-control by grave and sudden provocation and acted on the spur of moment. It, therefore, converted the homicide from murder to culpable homicide not amounting to murder and set aside conviction of the appellant under section 302. Instead, it convicted him under section 304, part 1 and sentenced him to undergo rigorous imprisonment for 7 years and to pay a fine of Rs 2,000. It kept his sentence awarded under section 324 unaltered.

Right of private defence

The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the person defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended. It should not exceed its legitimate purpose.

Right of private defence-preventive and not punitive in nature

In a series of judicial pronouncements,[15] the Supreme Court re-emphasized that the right of private defence is essentially a defensive right. It is not a right of aggression or reprisal. It is a right of defense and not of retribution. It, subject to conditions mentioned in the IPC, is available to a person to defend and to repel unlawful aggression. A right to defend, however, does not include a right to launch an offensive, particularly when the need to defend no longer survived. It is available only to one who is suddenly confronted with the necessity of averting an impending non-self-created danger. There is no right of private defence where there is no apprehension of danger. It cannot be availed for vindictive, aggressive or retributive purposes. The apex court has also reiterated that a person in exercise of right of private defence is allowed to use only such force that

15 *Arun* v. *State of Maharashtra*, 2009 Cri LJ 2065 (SC); *Hanumantappa Bhimappa Dalavai* v. *State of Karnataka*, 2009 Cri LJ 3045 (SC); *Raghbir Singh* v. *State of Haryana*, AIR 2009 SC 1223; *Bhanwar Singh* v. *State of Madhya Pradesh*, AIR 2009 SC 768; *Ranveer Singh* v. *State of Madhya Pradesh*, AIR 2009 SC 1658; *Ravishwar Manjhi* v. *State of Jharkhand*, AIR 2009 SC 1262; *Santokh Singh* v. *State of Punjab*, AIR 2009 SC 1923; *State of Punjab* v. *Gulabh Singh*, AIR 2009 SC 2469.

is necessary to repel the reasonably apprehended imminent danger. In more than one ruling mentioned above, the Supreme Court observed:[15a]

> (T)he violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

It, however, in the same breath, further stressed:[15b]

> We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc.
>
> In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self defence and the right of private defence commences as soon as the threat becomes so imminent.[15c]

Right of private defence need not be specifically pleaded

In *Ravishwar Manjhi* v. *State of Jharkhand*[16] and *Pramila Jawahar Lal* v. *State of Chhattisgarh*,[17] the Supreme Court and the High Court of Chhattisgarh, respectively reiterated the hitherto well-established principle that an accused is not required to specifically take the plea of right of private defence and his failure to do so does not disqualify him to avail benefit of the right of private defence. A trial court is required to invoke it in his favor if facts and circumstances of the case at hand and/or evidence brought on record show that he was put under a situation where he could reasonably have an apprehension of danger to the body. Conviction based on such an omission on part of the trial court is liable to be set aside by an appellate court.

15a Bhamwar Singh, *id.* at 781.
15b *Ibid*.
15c Ravishwar Manjhi, *id*. at 1271.
16 AIR 2009 SC 1261; also see *State of Punjab* v. *Gulabh Singh,* AIR 2009 SC 2469.
17 2009 (5) MPHT 4.

Burden of proof

The apex court, as in the past, ruled that burden of proof to establish the plea of self-defence lies on the defence. He is, however, not required to prove it beyond reasonable doubt. It is enough for him to show that the preponderance of probabilities was in favor of his plea. He may discharge this onus by establishing a mere preponderance of probabilities either by relying upon the facts revealed in the cross-examination of the prosecution witnesses or by adducing defence evidence.

The Supreme Court further stressed that injuries sustained by the accused at/about the time of occurrence or in the course of altercation carry significance in probabilising his version of the right of private defence. Mere unexplained injuries on the accused, however, neither establish his right of private defence nor do create presumption that he received those injuries in exercise of his right of private defence. Unexplained injuries may hardly affect the prosecution's story unless the defence establishes that the injuries caused lend support to his asserted version of right of private defence. It is a question of fact to be determined in the light of facts and circumstances of the case at hand. No test in the abstract, the court stressed, for determining such a question can be laid down. In *Gajey Singh* v. *State of Uttar Pradesh*,[18] the Supreme Court, concurring with the decision of the Allahabad High Court, held that non-explanation of injuries that are not minor or superficial on the accused, in the light of facts and circumstances of the case, renders the prosecution version doubtful and makes the defence version more probable that injuries on the deceased were inflicted by the accused in the exercise of his right of private defence. Unexplained injuries leave a scope for the defence to argue that the accused had the right of private defence or the prosecution evidence liable to be rejected. In a similar vein, the apex court in *Ravishwar Manjhi* v. *State of Jharkhand*,[19] expressed its displeasure over the fact that the High Court of Jharkhand overlooked the well established rule that the prosecution is under a duty to explain injuries received by the appellant-accused. It set aside conviction of the appellant under section 302 as they, in its opinion, caused death of the deceased in exercise of the right of private defence.

The Supreme Court stressed that a court needs to ensure that a plea of right of private defence is not based on surmises and speculations, but on situations and circumstances that create reasonable apprehension of danger. It is required to view these situations pragmatically and from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny to detect slight or even marginal

18 (2009) 11 SCC 414.
19 *Supra* note 16.

overstepping. The court has to examine the entire incident with care and to view it in its proper setting for finding out as to whether the right of private defence is or is not available to an accused. It is not relevant for the court to pay attention to the opportunity or chance available to the accused to inflict severe and mortal injury on the aggressor but to the situations that required him to inflict injuries on his aggressor for dispelling the apprehension.[20]

III CONSTRUCTIVE CRIMINAL LIABILITY

Sections 34 and 149, IPC lay down certain principles of criminal liability of persons who commit crime in group. Joint liability created under section 34 is premised on the idea of sharing by 'several persons' of 'common intention' and doing of a 'criminal act' by any one of the 'several persons' in 'furtherance of common intention of all'. Section 149 deals with liability of a 'member' of 'an unlawful assembly' for committing an 'offence' by another member(s) of the assembly in 'prosecution of the common object' of the assembly. Section 34 is a rule of evidence. Section 149 is in itself a substantive offence besides being a provision providing for vicarious liability.

Common intention

The Supreme Court in a series of cases[21] explained the nature and ambit of section 34, IPC. Section 34 fastens criminal liability to a person for an offence committed by another, if it is done in furtherance of common intention of the persons who participated in its commission. Section 34 does not create a distinct substantive offence. It only lays down the principle of joint criminal liability. In order to bring section 34 into play, the prosecution has to establish by evidence, direct or circumstantial, that there was prior plan or meeting of mind of all the accused persons to commit the offence for which they are charged. Such a pre-concert or pre-planning may develop on the spot or at the spur of moment or during the course of commission of the offence. But the crucial test is that such plan must precede the act constituting an offence. The essence of section 34 is the existence of common intention amongst the participants to commit a criminal act and participation of all in doing the act(s) in furtherance of that common intention. It is, however, not necessary that the acts of the several

20 *Ranveer Singh* v. *State of Madhya Pradesh*, *supra* note 15, paras 9 & 13.

21 *Shripathi* v. *State of Karnataka*, 2009 Cri LJ 4646 (SC); *Munnilal Gokul Teli* v. *State of Madhya Pradesh*, AIR 2009 SC 1759; *Komal* v. *State of Madhya Pradesh*, AIR 2009 SC 1958; *Chimanbhai Jagabhai Patel* v. *State of Gujarat*, AIR 2009 SC 3223; *Jagan Shravan Patil* v. *State of Maharashtra* (2009) 11 SCC 517; *Daya Shankar* v. *State of Madhya Pradesh*, AIR 2009 SC 1426; *Y. Venkaiah* v. *State of Andhra Pradesh*, AIR 2009 SC 2311; *State of Uttar Pradesh* v. *Atul Singh*, AIR 2009 SC 2713.

persons charged with commission of an offence jointly must be same or identically similar. What is significant and essential is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. When two or more persons intentionally do a criminal act jointly, section 34 deems that each one of them has done it individually. Each participant, therefore, will be held liable as if he alone has done the criminal act. When each one of them have the 'same intention' and each one of them have, without prior plan, individually done some act with 'similar' intention, each one of them will be individually liable for the 'injury' caused by him. He will not be vicariously liable for acts done by 'some' of 'several persons' as section 34 does not say 'the common intention of all' nor does it say 'and intention common to all.'

In *State of Uttar Pradesh* v. *Sahrunnisa*,[22] the apex court, in an appeal against acquittal of the respondents-accused, ruled that mere helpless presence of a co-accused, with no avert act, does not make him guilty under section 34. The respondent-accused, along with other three co-accused - her husband, daughter and son-in-law, was prosecuted and convicted by the trial court under section 302 and section 307 read with section 34. It sentenced all to suffer rigorous imprisonment for life. They were also sentenced to rigorous imprisonment for 3 years for the offence under section 307. The facts of the case revealed brutal killing of two boys of tender age and an attempt to murder the third child under superstitious belief [that his daughter was smitten by evil spirit] by none other than their father and sister in the presence of their mother, the respondent-accused. These crimes were committed in the name of '*Peer Paigmabar*.' One day afternoon, father of the deceased boys caught hold of his elder son, while his accused daughter was reciting something and beating him with a pipe, and throttled his neck that caused his death. Thereafter, he caught hold of another son and killed him in the same way. The other two accused, respondents in the instant appeal, were present there. They were standing on one leg in a corner of the room. His daughter sat near the dead bodies and uttered when her father was repeatedly saying that the two boys who had died would become live on the sacrifice of the third boy. He, with this belief, injured the youngest one, but he was rescued by the police. The trial court convicted all the four accused under section 302 and section 307 read with section 34. On appeal, the Allahabad High Court confirmed the sentence of the first two accused, the husband and the daughter of the respondent-accused, and acquitted another two, the respondent and her son-in-law, of the charges and set aside their sentence. On the basis of evidence on record, it held that respondent-accused and her son-in-law had neither done any overt act nor shared common intention of the first two accused. It also observed that the facts that they stood on one leg when the two boys were killed and that they did

22 (2009) 15 SCC 452.

not raise any objection to the criminal acts done by the first two accused could not indicate that they shared common intention of the other two accused. They, plausibly, remained silent because they were afraid of the accused or their so-called 'power.' The state of Uttar Pradesh preferred the instant appeal against their acquittal to the Supreme Court. The apex court concurred with the High Court. It ruled that common intention could not be attributed to them merely because they were present. Similarly, their failure to object to the gruesome acts, in the absence of any overt act, could not 'speak in favor their nurturing common intention.'[23]

In *Munnilal Gokul Teli* v. *State of Madhya Pradesh*,[24] and *Daya Shankar* v. *State of Madhya Pradesh*,[25] the apex court, in a judicial tone similar to the *Sahrunnisa* case, held that the mere fact that a co-accused accompanied another accused, whose complicity in the commission of a criminal act in question is proved, does not, by virtue of section 34, make him guilty of the offence, unless some overt act on his part is proved. These judicial pronouncements, in ultimate analysis, lead to the proposition that mere *factum* of joinder of two or more persons in the commission of a criminal act does not *ipso facto* bring section 34 into action. It comes into play only when their participation was actuated by common intention. Liability of one person for an offence committed by another in the course of criminal act done by several persons arises under section 34 if such criminal act is done in furtherance of common intention of the persons who participated in the commission of the crime. In *Javed Alam* v. *State of Chhattisgarh*,[26] the apex court ruled that in the absence of credible evidence suggesting meeting of minds among the accused persons, the conviction of a person under section 34 becomes unsustainable. In *Dhian Singh* v. *State of Himachal Pradesh*,[27] the High Court of Himachal Pradesh also stressed that section 34 cannot be invoked in the absence of proof indicating prior meeting of minds of an accused with other co-accused.

In *Y. Venkaiah* v. *State of Andhra Pradesh*,[28] the Supreme Court was encountered with a very interesting issue as to whether acquittal of a co-accused, for want of evidence against him, entitle other co-accused to get relieved from the constructive liability arising under section 34. The facts, in brief, were that the present appellant-accused, a public servant working in the office of the deputy director of the social welfare department of Andhra Pradesh, was charged and prosecuted for conspiring with other three officials of different cadre for drawing scholarship to the tune of Rs 5,20,000 on the basis of fictitious post-*matric* students. All of them, after

23 *Id*. at 9 & 10.
24 AIR 2009 SC 1759.
25 AIR 2009 SC 1442.
26 2009 (8) SCALE 68.
27 2009 Cri LJ 1977 (HP).
28 AIR 2009 SC 2713.

seeking the requisite permission, were charged and prosecuted for committing the offences punishable under sections. 120-B, 420, 468, and 477-A read with section 34 of the IPC along with the offences punishable under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act. The trial court held all the accused guilty of the charges leveled against them in connection with two of the series of acts of misappropriation of government funds. However, the court gave the benefit of doubt to one of the accused pertaining to the transaction which was carried out by his co-accused when he was on leave. The conviction and sentence recorded by the trial court was affirmed by the High Court of Andhra Pradesh. The appellant-accused, it seems, attempted to get absolved by the apex court from the constructive liability on the ground that one of the 'conspirators' was acquitted of the common intention. The Supreme Court, after making an elaborate analysis of the constructive liability designed under section 34 and of its hitherto judicial interpretation, noted that judiciary in India has disfavored narrow or restricted interpretation of section 34, particularly the phrase 'in furtherance of the common intention' employed therein. Section 34 makes an accused responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all of them. The effect of common intention to commit the crime needs to be judged from the totality of the circumstances. It does not envisage separate acts by all the accused persons for becoming responsible for the ultimate criminal act. The word 'act' used in it, by virtue of section 33 of the IPC, denotes a series of acts as a single act. The Supreme Court, dismissing the instant appeal, also stressed that the acquittal of a co-accused does not by itself absolve other co-accused of their conjoint criminal liability of the crime. It is open to the court to convict the other accused on the basis of joint liability under section 34, if there is evidence against them of committing the offence in 'furtherance of the common intention'.

Common object

There are a number of judicial pronouncements delivered during the year under survey that dealt with, or touched upon, the nature and scope of joint liability arising from sharing of common object as well as inter-relationship between the constructive liability of a person for doing a 'criminal act' in 'furtherance of common intention' under section 34 and for committing an 'offence' in 'prosecution of the common object' of an unlawful assembly under section 149 of the IPC.

In *Akbar Sheikh* v. *State of West Bengal*,[29] the Supreme Court was called upon to decide as to whether some of the appellants who had not done any overt act when a mob of about 100 persons, most of them armed with deadly weapons, attacked and put two houses of the complainant, with which

29 (2009) 7 SCC 415.

accused had animosity, on fire in which 8 persons died, could be treated as members of the unlawful assembly or shared common object with the main accused. For holding a person responsible under section 149 of the IPC, the apex court asserted, prosecution is required to establish that he: (i) was present when the offence charged was committed, and (ii) shared common object. The Supreme Court, taking note of the absence of any clinching evidence on record against the present appellants-accused, along with others, indicating any overt act on their part, and that some of the accused persons were not named at all by prosecution witnesses, doubted their presence as well as sharing of common object. The present appellant, as evidence on record showed, was a member of the mob but did not do any overt act. The apex court, placing reliance on this evidence, doubted his presence in the mob. It ruled that the presence of an accused while an offence was committed is a *sine qua non* to find him guilty of being a member of unlawful assembly. If his presence is doubted, he cannot be held guilty of the offence committed by an unlawful assembly. It, accordingly, set aside conviction of the appellant. It observed:[30]

> We, therefore, are of the opinion that doubts legitimately arise as regards their presence and/ or sharing of common object. While saying so, we are not oblivious of the fact that the incident had taken place at the dead of night. Enmity between two groups in the village is admitted. But, we cannot also lose sight of the fact that a person should not suffer rigorous imprisonment for life although he might have just been a bystander without anything more.

In *Bhupendra Singh* v. *State of Uttar Pradesh*,[31] the Supreme Court, *inter alia*, also reiterated that mere presence of a person in an unlawful assembly cannot make him liable under section 149 of the IPC unless the prosecution proves that: (i) there was a common object, (ii) he was actuated by that common object, and (iii) that object is one of those set out in section 141 of the IPC. A person cannot be considered a member of an unlawful assembly unless some overt act is proved against him. What is required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts that fall within the purview of section 141.

In the present case, the accused persons attacked the deceased, his sister and mother with deadly weapons and fled away. The trial court, placing reliance on the testimony of eye-witnesses, convicted seventeen persons for committing offences punishable under section 302/147 and section 307/149 of the IPC and four of the accused were separately convicted under section 148 of the IPC. The present appellants-accused

30 *Id.* at 430, para 43.
31 (2009) 12 SCC 447.

appealed to the Allahabad High Court contending that their conviction could not be sustained in law as it was based on testimony of interested eye-witnesses as they were relatives of the deceased, the alleged act was done on the spur of the moment, and facts of the case did not warrant the application of section 149 as the prosecution did not lead specific evidence as to which member of the alleged unlawful assembly did which or what act. A division bench of the High Court, not pursuaded by these contentions, upheld their conviction. The appellants challenged the High Court's ruling in the apex court. Holding that the testimony of eye-witnesses cannot be overlooked merely because they happened to be family members and relatives of the deceased and section 149 requires common object, and not common intention, amongst members of an unlawful assembly, the apex court also dismissed the appeal.

The Supreme Court, in the light of its earlier decisions, ruled that evidence of the eye-witnesses cannot *per se* be discarded merely because they happened to be family members of the deceased. Mere statement of allegation that the witnesses related to the deceased are likely to falsely implicate the accused is not sufficient to discard the evidence which otherwise is cogent and credible. It needs to establish the interestedness.[32]

The Supreme Court stressed that section 149 gives emphasis on the common object and not on common intention. Common object is different from common intention as it does not require proof of prior concert or meeting of minds before the attack. It is enough if the prosecution proves that each of the group member had the same object in view and their number was five or more and that they acted as an assembly to achieve that object. In order to make 'object,' which basically connotes purpose or design, 'common,' it is required to be shared by all. In other words, the object should be common to the persons, who constitute the unlawful assembly. The phrase 'common object' connotes a sort of 'community of ideas.' A common object may be formed by express agreement after mutual consultation, but that by no means is necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The existence of 'common object' of an assembly at a particular stage of incidence, being a question of fact, is to be ascertained from, *inter alia*, the course of conduct adopted by its members, the nature of arms carried by them and their behavior before, at or after the incident. The expression 'in prosecution of common object' as appearing in section 149, the apex court ruled, needs to be strictly construed as equivalent to 'in order to attain the common object.'[33]

32 *Id*. at 451, para 9 *et. seq*.
33 *Id*. at 452-453.

In *Santosh Devidas Behade* v. *State of Maharashtra*,[34] the Supreme Court was called upon to adjudge the propriety of their conviction by the trial court [and concurred by the Bombay High Court] under sections 147, 148 and 302/149 of the IPC primarily based on the evidence of two eye-witnesses, the wife and the son of the deceased. Major contentions of the appellants were that: (i) the trial court erred in relying upon the testimony of eye-witnesses as they were close relatives of the deceased, particularly when other two eye-witnesses, *namely* the person who, according to the complainant, tried to rescue the deceased from the attack and the younger son of the complainant and deceased, were not examined, for holding them guilty, and (ii) the identification of only two accused persons, out of five named in the complaint, in the test identification parade made section 149 inapplicable. These arguments could not convince the High Court to interfere with the findings of the trial court. The same arguments were raised by the appellants in the Supreme Court. The apex court, like in the *Bhupendra Singh* case, ruled that the evidence of eye-witnesses cannot be discarded simply because they happened to be relatives of the deceased and the constructive liability incorporated in section 149 of the IPC is premised on the idea of sharing of common object and not of common intention. The Supreme Court, therefore, failed to see any merit in the instant appeal which it dismissed.

In *Raj Nath* v. *State of Uttar Pradesh*,[35] the Supreme Court, in essence, ruled that it is not necessary for the prosecution to prove which of the members of unlawful assembly did which or what act in the series of acts done in the prosecution of common object, once it is proved that members of the assembly had common object and they remained present at the scene of the incident. Constructive liability carved under section 149 cannot be either avoided or restricted to individual acts of the members of the assembly. Each member of the assembly is subject to constructive liability. The facts of the instant case were that the appellant-convict, Raj Nath, with his five sons, armed with licensed and country-made pistols attacked the deceased and the persons who accompanied him on the fateful day. The attack was prompted by certain grudges and the feelings of animosity nurtured by disputes over property. The attack resulted in the death of four persons and serious injuries to others. The trial court, placing reliance on the eye-witnesses, convicted all but one accused under sections 302/149, 307/149 and 148 of the IPC and sentenced them to life imprisonment, rigorous imprisonment for a term of 5 years, and rigorous imprisonment for 2 years, respectively. The accused-convict, who felt aggrieved by the conviction and sentence by the trial court, approached the Allahabad High Court contending that there was neither recovery of the gun nor injuries

34 2009(3) SCALE 727.
35 (2009) 4 SCC 334.

sustained by the deceased and others were relatable to any act purported to be done by them. The High Court declined to interfere with the trial court's order as the application of section 149 was fully established by the prosecution. The ruling of the High Court dismissing their petition was challenged in the Supreme Court through the instant appeal. The apex court, dismissing the appeal, ruled that it is not necessary to determine which or what act was done by individual member of an unlawful assembly for imposing constructive liability created by section 149 of the IPC. Mere presence of an individual in the unlawful assembly is sufficient to clinch him with constructive liability and hold him vicariously liable for the acts done, in prosecution of the common object, by other members of the assembly.

The Supreme Court, through *Siyaram* v. *State of Madhya Pradesh*,[36] conveyed that an acquittal of a person accused of certain offences read with section 149 on the basis of some minor contradictions and omissions in the evidence of the injured parties cannot only be reviewed by appellate courts but also amounts to miscarriage of justice. It stressed that there is no embargo on the appellate courts to re-appreciate the evidence upon which an order of acquittal is based and to set aside the acquittal if the deciding authority, in its opinion, has ignored admissible evidence. An appellate court is rather duty-bound to re-appreciate the evidence where admissible evidence is ignored and the accused has been acquitted. The apex court, taking note of the hitherto articulated judicial norm, observed:[37]

> Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

The Supreme Court came out with this judicial *dicta* when the appellants challenged the legality of a judgment of Madhya Pradesh High Court that set aside their acquittal recorded by the trial court. The appellants were charged and prosecuted by the trial court for committing the offences punishable under sections 148, 149, and 294 read with sections 149, 326/149 and 336/149 of the IPC. These charges were leveled against the appellants for

36 (2009) 4 SCC 792.
37 *Id*. at 794, para 9.

attacking, with deadly weapons, the complainant along with others and causing them injuries dangerous to life. Relying upon certain 'material contradictions and omissions' in the evidence of the injured eye-witnesses, the trial court acquitted all the appellants. The Madhya Pradesh High Court, on appeal by the state, however, found that the omissions and contradictions, though minor, were not of such magnitude to warrant complete rejection of the evidence tendered by the injured eye-witnesses. It also found that the evidence was supported by medical evidence. The High Court felt that the trial court erred in appreciating the evidence and in absolving the appellants of their charges. It convicted the appellants and imposed certain custodial sentences on them. The Supreme Court, reiterating that section 149 gives prominence to common object and not to common intention for imposing constructive liability on members of an unlawful assembly, failed to see any deficiencies in the High Court's ruling. It also justified the High Court's authority to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not and setting aside their acquittal.

In *Pandurang Chandrakant Mhatre* v. *State of Maharashtra*,[38] the Supreme Court was once again called upon to determine legal propriety and fairness of a judgment of the Bombay High Court that upturned the appellants' acquittal under sections 147, 148, 302 read with sections 149, 302/34, 307/149, and 326/149 of the IPC and convicted them for committing the offences punishable under sections 302/149, 326/149, and 148. The appellants contended, *inter alia*, before the apex court that their conviction by the Bombay High Court was based on inapt, rather uncorroborated, evidence of the so-called eye-witnesses and the High Court, by reversing an order of acquittal passed by the trial court, had gone against the *hitherto* evolved and invariably followed judicial *dictum* that an appellate court should not ordinarily interfere with an order of acquittal even though there is a possibility of 'another' view.

The facts that prompted the appellants to challenge the Bombay High Court's verdict in the Supreme Court were that the appellants, along with others, belonging to the group politically associated with the peasants and workers party (PWP) attacked with deadly weapons some members of the other group of the village having political affiliation with the Congress-I party. The attack resulted in the death of one person and serious injuries to many. After investigations, nineteen persons, belonging to PWP, were charged and prosecuted for committing the offences punishable under sections 147, 148, 302 read with sections 149, 302/34, 307/149, and 326/ 149 of the IPC. All of them were acquitted by the trial court primarily on

38 (2009) 10 SCC 773.

the ground that: (i) the evidence of the injured eye-witnesses, belonging to Congress (I), was not credible and reliable as they were not in a position to see the persons who assaulted them as they, because of the sudden attack, ran helter-skelter and ran away from the place of attack to save their own life, (ii) the evidence pertaining to assault on the deceased was not specific as he was attacked at some distance from the place where other eye-witnesses were attacked and none of the witnesses could see the actual assault on him as it was night time, and (iii) there was a probability of false implication of the accused due to political rivalry between the two warring groups of the village. The prosecution challenged the findings of the trial court in the Bombay High Court. The High Court reversed the judgment of the trial court in respect of eight of the accused persons, including the present appellants. It held that there existed an unlawfully assembly on the night of the incident and the eight accused persons, who carried deadly weapons with them, were its members. Their common object was to make a murderous attack on the deceased. It, therefore, convicted them under sections 302/149 and sentenced them to undergo imprisonment for life and custodial sentence of different periods along with fine and default stipulations. The appellants-accused, who felt aggrieved by their conviction by the High Court, approached the Supreme Court wherein they argued that: (i) the evidence of the eye-witnesses deserved to be rejected as they belonged to rival political party in a faction- ridden village, were related to each other as well as the deceased, and their testimony was not corroborated by any doctor who examined them after the incident, (ii) the reasons and reasoning given by the trial court for acquitting them were cogent and convincing and its reversal by the High Court, therefore, was without any justifiable reasons, (iii) there was no evidence on record to support the existence of an unlawful assembly as well as of the common object of its members (including the present appellants) to kill the deceased.

After a careful scrutiny of the evidence on record with apt supporting judicial *dicta*, the Supreme Court ruled that: (i) the evidence of the eye-witnesses was not only reliable but also broadly corroborated by the medical evidence as well as the injuries sustained by them, (ii) the testimony of the eye-witnesses, being members of the rival political party, could not be discarded merely on the ground that it is likely to be tainted with partisan, but what was required for the trial court was to examine it with utmost care and caution in order to exclude the possibility of false implication, (iii) the High Court's interference with the findings of the trial court could not be found faulty and uncalled for, as the view taken by the trial court as well as its appreciation of, and approach to, the evidence on record was neither possible nor plausible, and (iii) the prosecution, through the testimony of eye-witnesses, had established (a) that the party of assailants comprised of more than five persons, (b) that they formed unlawful assembly, and (c) the members of the unlawful assembly, who chased and attacked the deceased, shared common object of killing the deceased.

Reflecting on the reliability of the evidence of eye-witnesses from the rival political party and holding the evidence credible, the apex court relied upon the following observations made by it in its earlier dictum:[39]

> Where there is a melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence ..... is undoubtedly partisan evidence, the distinct possibility of innocent being falsely included with guilty cannot be easily ruled out. In a faction-ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation as it unfolds in the case before us, the easy tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee is a tendency which is more often discernible and is to be eschewed and, therefore, the evidence has to be examined with utmost care and caution.

It also sought support from the following observation of the Supreme Court:[40]

> There is no rule of law to the effect that the evidence of partisan witnesses cannot be accepted. The fact that the witnesses are associated with the faction opposed to that of the accused by itself does not render their evidence false. Partisanship by itself is no ground for discarding sworn testimony. Interested evidence is not necessarily false evidence. — [M]erely because the eyewitnesses are associated with one faction or the other, their evidence should not be discarded. It should, no doubt, be subjected to careful scrutiny and accepted with caution.

The apex court held that the whole approach of the trial court to the evidence of eye-witnesses was faulty and its judgment suffered from factual and legal errors. Against this background, the Supreme Court held that the Bombay High Court's interference was justified and within the permissible limits.

39 *Muthu Naicker* v. *State of Tamil Nadu* (1978) 4 SCC 385, para 6.
40 *State of Uttar Pradesh* v. *Ram Swarup* (1988) (Supp) SCC 262.

In *Prem Singh* v. *State of Haryana*,[41] the appellants-accused challenged in the Supreme Court a decision of the Punjab & Haryana High Court having certain unique features. The present appellants-accused, *Prem Singh & Karakbir @ Pappu*, with another three persons, were charged and prosecuted by the trial court for committing the offences punishable under sections 148, and 302/149 of the IPC. Relying upon the evidence brought on record, it found all the five accused persons guilty of committing the offences they were accused of. On appeal by the five accused-convicts, the High Court acquitted three of the appellants-accused, *inter alia*, on the premise that the injuries attributed to them were not found on the person of the deceased and the role played by them in causing death of the deceased was not corroborated by the medical evidence. It, therefore, gave them the benefit of doubt and acquitted them of all the charges. It, however, affirmed the order of conviction and sentence passed by the trial court against the present two appellants-accused and convicted them for committing the offence punishable under sections 302/34, IPC. The High Court, however, did not mention section 34 in the concluding portion of its judgment. It, as admitted by the apex court, failed to notice that all the accused persons were charged of having common object of causing murder of the deceased and were convicted therefor by the trial court.

Against this backdrop, the present appellants-accused pleaded that their conviction under section 302/34 could not be said sustainable and justified in terms of section 149 of the Code. But the Supreme Court, in the light of facts of the case, failed to see any merit in the appellants' argument. It ruled:[42]

> The contention of the learned Counsel, in our opinion, is also without any merit. It may be true that all the five accused persons were said to have a common object; they were punished under section 302/149 of the IPC; but the same would not mean that only because three of them were given benefit of doubt on a premise which may not be wholly correct, no case of common intention has been made out against the appellants.

The Supreme Court also rendered its judicial support to the findings of the High Court by observing that the appellants, in no way, were prejudiced by omission (of not mentioning section 34 in the operative part of the judgment) on the part of the High Court. The omission could plausibly be eclipsed by the fact that the High Court has made explicit reference to a sequence of facts that revealed sharing of common intention by both the appellants and the pre-conceived result of their attack (i.e. death of the

41 AIR 2009 SC 2573.
42 *Id*., para 15.

deceased). Justifying the lapse of the High Court and supporting its findings, the apex court observed:[43]

> A judgment as is well known is not to be read as a statute. It must be read reasonably and in its entirety. The effect of a judgment must be found out from the wordings used by it and the attending circumstances in which they have been used. The high court, on a plain reading of its judgment has attributed common intention on the part of the appellants in committing the aforementioned crime. Their conviction under section 302/34, therefore, was justified. In absence of any prejudice having been shown on the part of the accused, this court on such technicalities alone would not interfere with the impugned judgment

The facts scenario occasioned the apex court to recall the scope of sections 34 and 149 outlined by the constitution bench of the Supreme Court in *Mohan Singh* v. *State of Punjab*.[44] Section 34, like section 149, deals with cases of constructive criminal liability where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of vicarious criminal liability contemplated by section 34 is the existence of common intention. When such common intention animates the accused persons and leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Common intention, which is the *sine qua non* of section 34, is different from the common object which brings together an unlawful assembly of persons within the meaning of section 149. Section 149 comes into operation when there is an unlawful assembly of five or more persons as required under section 141 of the IPC.[45]

Corporate criminal liability

In *Raymond Menezes* v. *Sengunthar Kaikolar Mahajana Sangam by its President M. Mannickam*,[46] the revisionist challenged in the Madras High Court an order passed by a metropolitan magistrate (MM). The MM, by invoking the provisions of section 245(2) of the Cr PC, discharged M Mannickam, president Sengunthar *kaikolar mahajana sangam*, a registered society, from the criminal proceedings relating to the offences punishable under sections 464, 467, 471 and 474 of the IPC. It seems that the MM was

43 *Id*., para 16.
44 AIR 1963 SC 174.
45 *Ibid.*
46 2009 Cri LJ 4196 (Mad).

influenced by the fact that the revisionist made complaint against the society, which purchased land from his father and built thereon a marriage hall for public utility, and did not implead the respondent-accused, who was the power of attorney holder and who sold the property to the society in discharging the accused from the criminal proceedings. The respondent-accused argued that the *Sangam*, due to its inability to constitute the requisite *mens rea* for the alleged offences, could not be punished. The Madras High Court, turning down the argument, ruled that a company or a society or an association can be prosecuted for the offences, either minor or major, contemplated under the IPC and can also be punished with fine and not with custodial sentence. The High Court placed reliance on the *ratio* of the Supreme Court's *dictum* in *Standard Chartered Bank* v. *Directorate of Enforcement*[47] that a corporation or a company, by virtue of sections 2 and 11 of the IPC, could be prosecuted and convicted for committing any offence that is not subjected to *only* custodial sentence. The High Court, accordingly, directed the MM to proceed with case in accordance with law.

IV INCHOATE CRIMES

Criminal conspiracy

Essential elements

Criminal conspiracy, one of the inchoate crimes incorporated in the IPC, is a distinct offence from the crime that is the object of conspiracy. Agreement between two or more persons to do an illegal act or to do a lawful act by unlawful means, as articulated in section 120-A of the IPC and consistently perceived by courts in India in the past, is the rock bottom of criminal conspiracy. In a case where an agreement is to commit an act which by itself constitutes an offence, the agreement *per se* amounts to criminal conspiracy. A mere agreement to do an illegal act that is not by itself an offence, does not amount to criminal conspiracy unless some overt act, in pursuance of the agreement, is done by a party to the agreement. Mere intention of two or more persons does not amount to criminal conspiracy. Similarly, mere discussion of the plan for committing an illegal act does not *per se* constitute a conspiracy. So long as criminal design rests in intention of the parties only, it is not indictable. The moment they agree to carry it into effect, the very plot becomes punishable. The unlawful agreement is the *sine quo non* for constituting criminal conspiracy and not an accomplishment. It is complete when the combination is framed and it continues till the agreement is terminated. During the year under survey, the

47 2005 AIR SCW 2829.

Supreme Court, quoting with approval its earlier *dicta*,[48] summarized the essence of criminal conspiracy thus:[49]

> The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed.

The higher judiciary has consistently insisted that prosecution needs to prove that two or more persons have 'agreed' to do an 'illegal act' or a 'legal act by illegal means'. 'Meeting of minds' of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition of conspiracy.[50] It is trite to say that one person alone can never be held guilty for criminal conspiracy for the simple reason that one cannot conspire with oneself.[51]

In *Baldev Singh* v. *State of Punjab*,[52] the appellant urged before the Supreme Court that his conviction under section 302 read with 120-B of the IPC in connection with the murder of his brother, by the trial court and confirmed, on appeal, by the Punjab & Haryana High Court, was legally impermissible. The appellant, a convict undergoing life sentence, was on bail after his sentence was suspended. He convinced one Avtar Singh, a fellow jail-mate, to join Harbhinder Singh, his son, to kill his (Baldev's) brother, with whom he had dispute over property. Baldev Singh purchased a gun, which was used by his son to kill the deceased in a daytime attack at the latter's residence. The gun was recovered from the possession of his son. Avtar Singh, armed with gun, also accompanied him. A day before the deceased was shot dead, Baldev Singh left India for Canada. Three days after the incidence, Harbhinder Singh tried to fly to London, but he was arrested at the Delhi international airport. Subsequently, he and Avtar Singh were

48 *Mohd. Khalid* v. *State of West Bengal* (2002) 7 SCC 721 and *Devender Pal Singh* v. *State of NCT of Delhi* (2002) 5 SCC 234.

49 *Abuthagir* v. *State Represented by Inspector of Police, Madurai*, AIR 2009 SC 2797, para 14; also reiterated in *Baldev Singh* v. *State of Punjab* (2009) 6 SCC 564 (para 9); *Chaman Lal* v. *State of Punjab*, AIR 2009 SC 2979 (para 7).

50 See *State of TN* v. *Nalini*, AIR 1999 SC 2640.

51 See *Fakhruddin* v. *Statev of Madhya Pradesh*, AIR 1967 SC 1326; *Bhagat Ram* v. *State of Rajasthan*, AIR 1972 SC 1502; *Topandas* v. *State of Bombay*, AIR 1956 SC 33 and *Girza Shankar Misra* v. *State of UP*, AIR 1993 SC 2618.

52 (2009) 6 SCC 564 (para 9).

tried under sections 302/450, IPC, read with section 34, IPC, and section 25/27 of the Arms Act. The trial court found Harbhinder Singh guilty under section 302/450 of the IPC read with section 27 of the Arms Act and Avtar Singh under sections 302/450/34 of the IPC read with section 25 of the Arms Act.

When Baldev Singh returned to India, he was arrested, charged and prosecuted under section 120-B of the IPC. The trial court, after examining 28 prosecution witnesses, and placing reliance on certain facts, namely Baldev Singh had a motive to kill the deceased; recovery of the gun and material in pursuant of statements made by one of the co-accused, and the gun, with which shots were fired, belonged to him, found him guilty under section 302 read with section 120-B of the IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs.5,000. The Punjab and Haryana High Court dismissed the appeal filed by the appellant and declined to interfere with the trial court's verdict.

The Supreme Court, re-appreciating the evidence, relied upon by the trial court as well as the High Court, and placing reliance on its earlier rulings,[53] ruled that the appellant alone could not have been convicted under section 302 read with section 120-B of the IPC and it set aside his conviction. It re-asserted that it is incumbent on the court appreciating the evidence of conspiracy to keep in mind that each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. It discarded the deposition of the independent witness, who claimed that he, while taking the accused in his taxi, overheard the conversation amongst them in regard to hatching the conspiracy, as it was full of contradictions. The apex court, referring to the uncorroborated extra-judicial confession made by Avtar Singh, one of the accused, before a prosecution witness that he and Harbhinder Singh had killed the deceased at the instance of the appellant, opined that 'evidence of extra-judicial confession is generally of a weak nature' and 'no conviction can be based solely thereupon unless the same is corroborated in material particulars.'[54] Uncorroborated extra-judicial confession of a co-accused by itself, according to it, cannot even be held to be sufficient for convicting a co-accused in terms of section 30 of the Indian Evidence Act, 1872 (IEA).[55] Overlooking the cogent fact that the gun used by his son was purchased by the appellant and recovered on disclosure statements of one of the accused, the Supreme Court ruled that the chain of events did not sustain the conspiracy charge leveled against Baldev Singh. Further, the apex court was

53 *Major E. G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762 and *Yogesh @ Sachin Jagdish Joshi* v. *State of Maharashtra*, 2008 Cri LJ 3872 (SC).

54 *Supra* note 52, para 10.

55 *Id.* at 11.

also influenced by the fact that neither Avtar Singh nor Harbhinder Singh was charged for commission of offence punishable under section 120-B for allowing the appeal of the appellant.

Sanichar Sahni v. *State of Bihar*,[56] delivered by the Supreme Court three weeks after the *Baldev Singh* case, however, exhibits a different judicial approach. The appellant challenged his sole conviction and sentence (of rigorous imprisonment for life) under section 120-B. He was convicted for hatching conspiracy with his father and brother, the co-accused, for killing the deceased. None of the two co-accused persons was charged for criminal conspiracy under section 120-B. His father was convicted under sections 302 read with section 34, IPC. while his brother was convicted under section 302 read with sections 34, 394 & 412 of the IPC, and section 27 of the Arms Act. The appellant was not charged with any of the charges leveled against his brother and father. His major contention was that his conviction under section 120-B of the IPC was legally impermissible as it is impossible for a person to conspire with himself. It is important to recall here that the trial court placed its reliance on the deposition of two prosecution witnesses, who said that the appellant, when he was brought to a court from jail in connection with other hearing, met his father and brother and, in their presence, 'asked' and 'directed' them to kill the deceased, if he failed to concede their demand for certain money.

The High Court of Patna, on appeal, giving benefit of doubt, acquitted the father of the appellant. It, however, refused to interfere with the lower court's decision pertaining to the appellant and his brother. It found the witnesses fully trustworthy to draw the conclusion that the deceased was killed in pursuance of the conspiracy. The appellant, *inter alia*, contended before the Supreme Court that his conviction under section 120-B of the IPC was legally impermissible as the charge of conspiracy was not leveled against any of the co-accused and he also was not accused of committing the offences charged against the co-accused. No person, he argued, can conspire with himself and he, therefore, cannot be convicted under section 120-B of the IPC.

The Supreme Court, concurring with the trial court and the Patna High Court, ruled that the appellant hatched conspiracy with his father and brother to eliminate the deceased. Nevertheless, it, unlike the High Court,[57] addressed to the argument raised by the appellant that it is legally impermissible for a court to convict a single person for conspiracy as it is

56 (2009) 7 SCC 198.

57 It seems that the appellant raised the issue of framing charge of conspiracy against him *alone* and contested legality of his conviction under section 120-B of the Code in the Patna High Court, and the High Court raised it but opted not to trace it further as, in its opinion, there was 'sufficient material on record' to prove conspiracy against him; See *ibid*., para 11.

impossible for him to conspire with himself. The apex court perceived it as an issue of 'improper framing of charge' [and not a key issue that has a significant bearing on the idea of criminal conspiracy]. Relying upon section 464 of the Cr PC providing that no finding, sentence or order by a court of competent jurisdiction be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge, unless it results in failure of justice and its judicial pronouncements,[58] the apex court ruled that mere failure to level the charge of conspiracy against the co-accused, in the absence of prejudice caused to the appellant, does not warrant its interference in the concurrent findings of the lower courts. Mere defect in framing the charges unless it has caused 'real prejudice' to a convict, the apex court asserted, does not justify interference by a court of appeal. No appellate court should alter conviction on mere technicalities.[59]

A comparative reading of *Baldev Singh* and *Sanichar Sahni*, respectively, acquitting and convicting the sole person accused of criminal conspiracy, in the present submission, leads to, at least, three legal propositions. *First*, a single person accused of criminal conspiracy can be convicted under section 120-B of the IPC even though none of his co-accused persons is charged for the same, provided the charge of conspiracy against him is proved, through direct or indirect evidence, to the satisfaction of the court and the absence of charge of conspiracy against his co-accused has not caused him any prejudice. *Secondly*, a court is not justified in allowing a conspirator to go unpunished merely on the ground that his co-accused persons are not charged for criminal conspiracy. *Thirdly*, criminal conspiracy, which is hatched in secrecy, needs to be inferred from the circumstances of the case and the conduct of the accused. The court, however, is required to convince itself that every reliable incriminating circumstantial evidence proved beyond doubt by the prosecution forms a part of the chain of events that exhibits the guilt of the accused and does not hint at any other hypothesis against the guilt or innocence of the accused. The circumstances relied upon by the court should be crystal clear and free from any ambiguity and inconsistency in the chain of events.

Proof of conspiracy

Generally, criminal conspiracy is hatched in private. Invariably it is a clandestine act. Privacy and secrecy are more characteristic of a conspiracy. Direct evidence of a conspiracy is hardly available. It can be proved by

58 *State of A.P.* v. *Thakkidiram Reddy*, 1998 Cri LJ 4035 (SC); *Willie (William) Slaney* v. *State of M.P.*, 1956 Cri LJ 291 (SC); *Gurpeet Singh* v. *State of Punjab*, 2005 Cri LJ 126 (SC) and *Ramji Singh* v. *State of Bihar*, 2001 Cri LJ 4740 (SC).

59 *Supra* note 56, para 17.

either direct or circumstantial evidence. It requires the evidence of transmission of thoughts sharing the unlawful design. Evidence showing some kind of physical manifestation of the agreement is essential.[60]

In *Mahavir Singh* v. *State*,[61] the Delhi High Court, quoting with approval key judicial propositions articulated by the Supreme Court in *Kehar Singh* v. *State (Delhi Administration)*[62] and *State* v. *Navjot Sandhu*,[63] also stressed that the proof of conspiracy requires some kind of physical manifestation of the agreement. The term physical manifestation refers to the manifestation of the agreement itself, such as by way of meetings and communications. It cannot be equated to 'overt act.' The physical manifestation of agreement, therefore, need not be proved by overt acts. It may be gathered from conscious acts or conduct of the parties to conspiracy. It may be inferred from circumstances. However, a court, before it draws inference from circumstances, is required to remember that: (i) the circumstances from which the conclusion is drawn are fully established, (ii) all the facts are consistent with the hypothesis, (iii) the circumstances are of a conclusive nature and tendency, and (iv) the circumstances do actually exclude every hypothesis except the one that is proposed to be proved. No court, however, should allow to enter into its judicial verdict innocuous, innocent or inadvertent acts and events.[64] It also should not consider 'a few bits here and a few bits there,' relied upon by the prosecution, adequate for connecting an accused with criminal conspiracy.[65]

The High Court, after carefully analyzing the evidence adduced by the prosecution in support of conspiracy hatched by the four appellants to kill the deceased in pursuance of the conspiracy, concluded that the circumstantial evidence did not form a complete chain of events indicating meeting of minds between the appellant and other co-accused. It also stressed that even mere existence of ill-motive (of the appellant) by itself without any other evidence cannot form a complete chain of circumstances wherefrom an inference of guilt can be drawn. It also refused to place its reliance upon 'a few bits here and a few bits there' relied upon by the prosecution to sustain conviction of the appellant (and his co-accused) under section 302/120-B of the IPC.

In *Tejinder Virdi @ Dolly* v. *State of NCT of Delhi*,[66] the Delhi High Court, reiterating its propositions pertaining to the standard of circumstantial evidence required to prove conspiracy asserted in the *Mahavir Singh* case, re-emphasized that the chain of events must indicate

60 *Abuthagir* v. *State Represented by Inspector of Police, Madurai*, *supra* note 49 and *Chaman Lal* v. *State of Punjab*, *supra* note 49.
61 MANU/DE/1804/2009.
62 AIR 1988 SC 1883.
63 AIR 2005 SC 3820..
64 *Supra* note 61, para 97.
65 *Id.* at 98.
66 MANU/DE/3256/2009.

meeting of minds of the persons accused of conspiracy.[67] It also ruled that mere evidence of association of persons or of sharing of information is not sufficient to lead to the inference of conspiracy. Similarly, it stressed that mere suspicious conduct of the accused does not make them conspirators.[68]

Confession of a co-accused - evidentiary value

In the backdrop of the fact that criminal conspiracy is invariably hatched in the darkness of secrecy leaving behind hardly any direct evidence, the Delhi High Court, in *Tejinder Virdi @ Dolly*,[69] recalled that section 10 of the Indian Evidence Act 1872 (IEA) makes a statement made by one conspirator admissible against another conspirator.[70] The Delhi High Court, in the light of phraseology of section 10 of the IEA, opined that a statement made by a conspirator snapped out of the conspiracy cannot be used against other conspirators. The Allahabad High Court, in a criminal revision petition in *Manna Lal* v. *State of U.P.*,[71] was invited, *inter alia*, to dwell upon the value of the statement of confession of one conspirator against another conspirator made after carrying out the object of the conspiracy. Recalling the Supreme Court's observations in *State* v. *Nalini*[72] that a court has to guard itself against readily accepting the statement of a conspirator against a co-conspirator and to look for some corroboration for the statement, it, however, in the absence of evidence (yet to be produced and considered by the trial court) kept the question undecided.[73]

A statement made by a person to a police officer after his arrest is not admissible against any person accused of conspiracy unless it is protected by section 27 of the IEA which comes into play when prosecution establishes that: (i) an information given by the accused has led to the discovery of some fact, (ii) the fact discovered was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused, (iii) information given by the accused led to the discovery of a fact which was the direct outcome of such information, (iv) the discovery of the fact related to a material object, and (v) the discovery of the fact related to the commission of some offence.[74]

67 *Id*., paras 117 & 118.
68 *Id*., paras 201 & 203.
69 *Supra* note 66.
70 It says:
'Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.
71 2009 Cri LJ 2659 (All).
72 AIR 1999 SC 2640.
73 *Supra* note 71, para 20.
74 *Supra* note 66, para 396.

Territorial jurisdiction

In *Rajendra Ramchandra Kavalekar* v. *State of Maharashtra*[75] the Supreme Court, upholding the decision of the Bombay High Court not to quash the ongoing criminal proceedings connected with criminal conspiracy in Ranchi, Jharkhand, held that a court trying an accused for an offence of conspiracy is competent to try him for all offences committed in pursuance of conspiracy irrespective of the fact that any or all the other offences were not committed within its territorial jurisdiction.

Attempt

In *Rupesh Kumar* v. *State of Chhattisgarh*,[76] the High Court of Chhattisgarh, while dealing with a case of sexual assault on a minor girl by the appellant, reiterated the *hitherto* judicially articulated difference between preparation and attempt to commit a crime. It observed:[77]

> In every crime, there is first, intention to commit, secondly, preparation to commit, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence.

Applying the test that an attempt to commit a crime, in essence, is an act done in part-execution of the criminal design and amounts to more than mere preparation, the High Court concurred with the conviction of the appellant for the attempted rape on a minor girl because he, with intent to have sexual intercourse, was about to sit over her after he undressed himself and made her naked and laid her on the floor but had to abandon the act when brother of the minor girl and the police caught hold of him.

Abetment

In *Arjun Singh* v. *State of Himachal Pradesh*,[78] the appellant, who along with another co-accused, was prosecuted for committing the offences

75 AIR 2009 SC 1792.
76 2009 Cri LJ 1822 (Chhat).
77 *Id*., para 20.
78 AIR 2009 SC 1568.

punishable under sections 376, 511, 366 and 109 of the IPC. The appellant, a conductor of bus, was charged for kidnapping a minor girl with a view to compelling her to marry him and for having sexual intercourse in the bus at a stop when all the passengers had alighted. The driver of the bus was made co-accused and charged for abetting him. The trial court convicted the appellant for committing rape on a minor girl, as it was proved that the victim girl was below 16 years when he had penetrated her. His appeal to the High Court was dismissed. The Supreme Court, on appeal, concluded that he did not commit rape but only attempted it. During the course of judicial deliberations, the apex court also explained the gamut and ambit of abetment as outlined in section 109 of the IPC. It stated that under section 109 of the IPC, the abettor is liable to the same punishment which may be inflicted on the principal offender if: (i) if the act is committed in consequence of the abetment and (ii) no express provision is made in the IPC for punishment for such an abetment. Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed had the person committing the act the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Further, the act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to section 109. Intentional aiding and active complicity is the gist of the offence of abetment. Based on this analysis of section 109, the Supreme Court held that the appellant could not be held guilty under section 109. It absolved him of the charges under sections 376 and 109.

V SEXUAL OFFENCES

Rape

Rape-An affront to dignity of woman

The Supreme Court, in more than one judicial pronouncement delivered during the year under survey, as in the past, reiterated that 'rape', in its simplest term, is 'the ravishment of a woman, without her consent, by force, fear or fraud,' or as 'the carnal knowledge of a woman by force against her will.' 'Rape' or '*raptus*' is when a man hath carnal knowledge of a woman by force and against her will.' Non-consensual sexual assault on a woman affects her dignity. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. The physical scar may heal up, but the mental scar will always remain. The offender robs the victim of her most valuable and priceless possession, that

is dignity.[79] The perpetrator not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. He destroys the whole personality of his victim. He degrades the very soul of the helpless female.[80] Rape is violation with violence of the private person of a woman - an outrage by all means. Rape, by the very nature, is heinous and an obnoxious act of the highest order.[81]

The Delhi High Court also echoed that sexual violence is not merely a dehumanizing act and an unlawful intrusion of the right of privacy and sanctity of a female, but is also a serious blow to her supreme honor offending her self-esteem and dignity.[82]

During the year under survey, a few High Courts have also reiterated the *hitherto* well-settled key-element of rape that neither complete penile penetration nor emission of semen and rupture of hymen is necessary to constitute an offence of rape. The *sine qua non* of the offence of rape is non-consensual penile penetration, and not ejaculation. The depth of penetration is immaterial. Partial penetration within the *labia majora* of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the IPC.[83]

Consent

Consent of a woman, above the stipulated age under section 375 of the IPC, for the sexual intercourse is crucial in rape cases. Rape, as outlined in the IPC, in essence, is a non-consensual sexual intercourse with a woman who has attained the age of discretion mentioned in section 375 of the IPC. Consent, express or tacit, obtained prior to the sexual intercourse with a woman negates the charge of rape. When an accused asserts that sexual intercourse was consensual and his victim, with equal stress, denies it, a court is required to ascertain from the circumstances and facts of the case as to whether she consented indeed for the sexual intercourse. Ascertainment of consent of the victim of rape, thus, involves appreciation of facts of a case at hand. What does not amount to consent for the purpose of the IPC is indicated in section 90. The apex court, through its two leading judicial pronouncements,[84] has evolved a principle of law that consent

79 *State of Madhya Pradesh* v. *Basodi*, AIR 2009 SC 3081; *State of Punjab* v. *Rakesh Kumar*, 2009 Cri LJ 396 (SC) and *Arjun Singh* v. *State of Himachal Pradesh, ibid.*

80 *Rajinder @ Raju* v. *Himachal Pradesh*, AIR 2009 SC 3022; *Virender* v. *State of NCT of Delhi*, MANU/DE/2606/2009.

81 *Shekara* v. *State of Karnataka*, 2009 (3) SCALE 104.

82 *Narayani Gautam* v. *State of NCT of Delhi*, 164 (2009) DLT 182.

83 See *State Represented by the Public Prosecutor, High Court of A.P.* v. *Radhakrishna Nagesh*, 2009 Cri LJ 1870 (AP), *State of Maharashtra* v. *Suresh Shankar Jadhav*, MANU/MH/0356/2009, *Virender* v. *State of NCT of Delhi*, *supra* note 80.

84 *Uday* v. *State of Karnataka*, AIR 2003 SC 1639 and *Deelip Singh* v. *State of Bihar*, 2005 (1) SCC 88.

obtained by giving a promise to marry her with the intention of not carrying it but just to elicit her assent for sexual intercourse is not a 'true consent' and such a sexual intercourse, for the purpose of rape, is 'sexual intercourse without consent.' The *ratio* has been consistently relied upon, and followed by, courts subordinate to the apex court. However, the following four pronouncements handed down by the Delhi, Maharashtra and Madras High Courts during the year under survey, though refer to, and rely upon, the Supreme Court's *ratio*, exhibit certain peculiarities that deserve to be noted.

In *Ashok Rai @ Amit* v. *State of NCT of Delhi*,[85] the trial court convicted the appellant-accused under sections 376 and 306 of the IPC for committing rape on a girl and abetting her suicide. It sentenced him to life imprisonment and a fine of Rs.5,000. What is pertinent to note is that the court convicted the appellant by relying upon suicide-note of the deceased rape victim. She had given a detailed account of the inception and development of the illicit intimacy with the appellant, which was triggered off with the proposal of the latter to marry her. Later on, the promise turned to be a hoax. The deceased believed him and indulged in promiscuous intimacy with him. The trial court held that the consent obtained by the appellant was not a consent and the sexual intercourse based thereon was 'sexual intercourse without consent,' which amounted to rape. The High Court concurred with the trial court. It, however, set aside his conviction under section 306 and allowed, in the interests of justice, him to go with the term of imprisonment already served by him on the ground that he was young and had qualified to seek an appointment in the Indian administrative service (IAS).

In *Lawrence* v. *State of Tamil Nadu Represented by the Inspector of Police*,[86] the appellant, who was convicted under sections 376, 366 and 343 of the IPC, preferred an appeal to the Madras High Court challenging his conviction by the trial court. He was convicted, *inter alia*, for having sexual intercourse with the prosecutrix without her consent for three consecutive days. He was persistently promising the prosecutrix that he would marry and keep her like a queen if she accompanied him. She had been resisting his demands. One day, he approached her with the same request and threatened to commit suicide if she refused to accompany him. She left the house and accompanied him. He took her to a relative's house and subjected her to sexual intercourse continuously for three days. On her compulsion, he took her to Mariamman temple and tied '*Thalli*,' a symbolic thread signifying marriage. When she was taken back, the appellant's mother ill-treated her, removed the '*Thalli*,' and drove her out of the house. She returned and filed the complaint against the appellant. Evidence on record showed that the

85 MANU/DE/1161/2009.
86 MANU/TN/2629/2009.

appellant was living with another lady without marriage and had two children. The High Court, in the backdrop of the facts of the case and of the fact that he was leading a family life, held that the promise made by him to marry the victim girl was only with an idea of making her to agree for repeated sex. The court held that the prosecutrix consented for sexual intercourse under misconception of fact and the so-called consensual sexual act amounted to rape. Consent obtained through a dishonest and insincere promise to marry, the High Court echoed, does not alter liability of the perpetrator under section 376 of the IPC.

In *Vanraj @ Sunil Barkuji Masram* v. *State of Maharashtra through Police Station Officer*,[87] the appellant, after the first forced sexual intercourse with a girl below 16 years, continued to have sexual intercourse with her against her wish by silencing her with a threat of death in case she disclosed it to anybody. She became pregnant. People in the village came to know about the pregnancy. Later on, the prosecutrix and appellant, in the presence of the latter's father and a few villagers, married by exchanging garlands in the Lord Hanuman temple in the village. Thereafter, the prosecutrix stayed with the appellant for about 2-4 days in his house. They lived like husband and wife. Thereafter, the appellant left the village in search of a job. He neither returned back nor maintained her. Meantime, the prosecutrix reported the matter to the police. After his return, the police arrested him. He was subsequently prosecuted and convicted under sections 376 and 506 of the IPC. He was sentenced to 7 years' rigorous imprisonment with a fine of Rs.1,000 under section 376 and to rigorous imprisonment for a period of 6 months under section 506 of the IPC. The Bombay High Court, when approached by the appellant, held that the appellant fraudulently obtained consent of the prosecutrix for sexual intercourse. From the beginning, he had no genuine and honest intention to marry her. He had sexual intercourse with her by making a show of marriage. She, thus, 'consented' for sexual intercourse under the 'misconception of fact', *i.e.* dishonest promise to marry her. Such consent, the court ruled, cannot absolve the perpetrator. It accordingly dismissed the appellant's appeal.[88]

It is pertinent to note that the evidence on record, as reported in the High Court's judgment, reveals that the appellant had the first non-consensual sexual intercourse with the prosecutrix when she was below 16 years of age. He did not make any proposal for marriage for seeking her consent for the first sexual intercourse. He did it forcibly. After she became pregnant, he married her in a village temple and stayed with her as her husband before he left the village in search of labor. The prosecutrix

87 MANU/MH/1152/2009.
88 *Id*., para 12.

delivered a baby-boy when she was still under the age of 16 years. In the light of the provisions of section 375 *Sixthly* of the IPC, the judicial deliberation on the legality of 'consent' of the prosecutrix as well as of the fact whether it was or was not hit by the dishonest marriage performed by the appellant with the prosecutrix was, in the present submission, uncalled for. The legality of sexual intercourse *vis-à-vis* marriage performed in the village temple, at the most, became relevant for ascertaining whether the prosecutrix consented for sexual intercourse, if any, after the marriage was performed. But such an incidence of sexual intercourse between the prosecutrix and the appellant was not brought on record. Section 375 *Sixthly* declares that sexual intercourse with a woman below 16 years of age amounts to rape irrespective of the fact whether she consented (or not consented) for the sexual intercourse. The instant case, in fact, was a case of statutory rape and not of sexual intercourse 'without consent' of the prosecutrix.

The Madras High Court in *S. Albert* v. *State of Tamil Nadu Represented by the Inspector of Police*,[89] had been able to identify such a split of circumstances and the applicability of the *hitherto* principle of law developed by judiciary that consent given in pursuance of dishonest proposal of marriage made by a person accused of rape is regarded as consent given under misconception of facts and the sexual intercourse made in consequence thereof amounts to rape. The appellant, who was convicted by the trial court under section 376 and sentenced to undergo 7 years' rigorous imprisonment and imposed a fine of Rs. 1,000 and under section 417 and sentenced him to undergo 1 year rigorous imprisonment and to pay a fine of Rs. 250, urged the Madras High Court to acquit him of the charges. The facts brought on record revealed that he had sexual intercourse with a girl of above 16 years of age with her consent that subsequently bloomed into illicit intimacy between the two. Due to sexual intercourse on several occasions, the victim became pregnant. He asked her not to disclose her pregnancy to anybody and to terminate it. He promised her that he would marry her if she carried miscarriage. He gave her some tablets, which after she consumed, caused abortion. Thereafter, he retracted from his promise and firmly refused to marry. The victim's complaint led to his prosecution and conviction under sections 376 and 417 of the IPC. The trial court held the appellant guilty of committing rape as the victim's consent for sexual intercourse was based on misconception of fact, *i.e.* the promised marriage which the appellant never desired to honor. It also held him guilty under section 417 of the IPC for cheating the victim.

The Madras High Court, in the backdrop of section 90 of the IPC, the *ratio* of the two leading pronouncements of the Supreme Court[90] and the

89 MANU/TN/0378/2009.

90 *Uday* v. *State of Karnataka*, AIR 2003 SC 1639 and *Deelip Singh* v. *State of Bihar*, 2005 (1) SCC 88.

evidence brought on record, ruled that the appellant could not be held guilty of rape as the sexual intercourse was with the consent of the victim. He had not given a promise to marry the victim from the inception of the sexual intercourse but only after she became pregnant. The dishonest promise to marry her was given by him just to persuade her to carry abortion. It, therefore, acquitted him of the charge rape and set aside his conviction therefor. It also acquitted him of the charge and conviction under section 417 of the IPC. The High Court observed that the trial court failed to consider the legal aspects involved in the case and the conviction and sentence of the appellant was based on mere surmises and conjectures. It also observed that the judgment of the trial court was absurd. Further the approach of the trial court to the issues involved in the case was highly deplorable and condemnable.[91]

Statutory rape on a minor girl

A reading of *Md. Jainal Uddin @ Abedine* v. *State of Tripura*[92] discloses disgusting inhuman sexual assault by the appellant, a man of about 60 years old, on a sick minor girl of 15 years entrusted to him for 'treating' her for the so-called 'evil spirits' and of superstitious belief of the victim's father that desisted him from rescuing his daughter from the repeated sexual assaults. The appellant, Md. Jainal Uddin, locally known as '*Ojha*' (a person who is said to treat the person suffering from evil spirits), was believed to posses some spiritual power, '*jhar fuke*,' of driving away the evil power from a person by enunciating some words. One day, he confined the victim in a room of her father's house between 9.00 p.m. and 3.00 a.m. for her 'treatment' and asked her father and other relatives to remain outside the room and stay in other room. He also instructed them not to come out of their room even after hearing any kind of cry from the girl. If they dared to do so, the *devata* would kill them. Thereafter, he undressed her, massaged her body with oil and raped her three times. Her father heard some sound in the room, but he, out of fear of the *devata*, did not come out of his room. He also thought that spiritual activities were going on inside the room.

The trial court convicted the appellant for committing rape on a minor girl punishable under section 376(1) of the IPC and sentenced him to suffer rigorous imprisonment for 8 years and to pay a fine of Rs. 5,000, in default to suffer 1 year simple imprisonment. The appellant urged the Gauhati High Court to interfere with the lower court's verdict, *inter alia*, on account of contradictions in the depositions, the absence of any external injury either in the genital or on the body of the victim, and the absence of spermatozoa in the vaginal swab of the victim.

91 *Supra* note 89, para 29.
92 2009 Cri LJ 2572 (Gau).

The High Court, referring to, and making analysis of, the *thitherto* judicial pronouncements of the apex court, ruled that 'mere absence of external injury on the body of the victim girl cannot be a ground for disbelieving the prosecution story, particularly the 'victim girl' and the 'absence of semen or spermatozoa in vaginal swab, by itself, is not sufficient to disprove the fact of rape.' It, therefore, refused to interfere with the trial court's decision.

Gang Rape

In *Pradhan @ Jitender* v. *State of NCT of Delhi*,[93] the Delhi High Court, referring to earlier judicial pronouncements, among other things, stated that, to prove gang rape, the prosecution is required to prove that: (i) more than one person acted in concert with the common intention, (ii) more than one accused had acted in concert in the commission of rape with pre-arranged plan, and (iii) one or more persons of the group had actually committed rape in furtherance of such common intention.

The most important among these requisite elements of gang rape is the sharing of common intention amongst the accused persons who had participated in the commission of rape. It is not necessary that each person of the group is required to have non-consensual sexual intercourse with the girl. However, the liability of the members of the group may differ. In *Shefiq Youseph* v. *State of Kerala*,[94] the Kerala High Court ruled that the liability of a person convicted, by virtue of the Explanation 1 to section 376(2) of the IPC, under section 376(2)(g) may be lesser than the minimum sentence provided for gang rape as well as the punishment awarded to the members of the group who had raped a girl. The appellant-convict was a member of the group of three medical students, which, under the guise of ragging, took a new entrant fellow female student to the histo-pathology laboratory of the college. The evidence brought on record revealed that other two students from the group undressed her and raped her. The appellant did not have sexual intercourse with her. He merely kissed her on her face and chest and fondled her body parts. The trial court convicted those two students under section 376(2(g), along with other related offences under the IPC and the Kerala Prohibition of Ragging Act of 1998, and sentenced them to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs 20,000. It also convicted the appellant, along with the other two convicts, under section 376(2((g) and other provisions of the IPC and the Kerala Prohibition of Ragging Act of 1998. It, however, sentenced him to undergo rigorous imprisonment for a period of 3 years and to pay a fine of Rs 5,000. The trial court acquitted the other two students of the charge under section 376(2)(g) even though they stood outside the laboratory to ensure that

93 184 (2009) DLT 767.
94 2009 Cri LJ 3148 (Ker).

nobody could enter in the laboratory. The Kerala High Court concurred with the trial court's ruling. It also refused to suspend the sentence of the appellant and to release him on bail.

A very interesting question as to whether a woman could be punished for gang rape arose in *State of Rajasthan* v. *Hemraj*[95] One Smt. Kamla, along with Hemraj and Chandan, was charged and prosecuted for committing offences punishable under sections 342 and 376(2) of the IPC. The trial court found that Chandan, a juvenile, had committed rape on the victim. It held Hemraj guilty under section 342. It ruled that Smt. Kamla could not be convicted in terms of section 376(2). The state of Rajasthan, which felt aggrieved by the trial court's ruling, preferred an appeal to the Rajasthan High Court. The High Court, concurring with the trial court, held that Smt. Kamla, in any event, could not be held guilty of the offence punishable under section 376(2). The matter reached the Supreme Court. The Supreme Court, recalling provisions of section 375, opined that it is conceptually inconvincible that a woman can commit rape even though the Explanation 1 to section 376(2) clarifies that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each such person should be deemed to have committed gang rape within the ambit of section 376(2). The explanation, which is a deeming provision, makes it clear that a person who has not actually committed rape is deemed to have committed rape even if only one member of the group, in furtherance of their 'common intention,' has committed rape. The phrase 'in furtherance of their common intention,' appearing in the Explanation, in the backdrop of section 34 of the IPC, relates to 'intention to commit rape.' It, in no sense, makes a woman guilty of committing rape. A woman cannot be said to have an intention to commit rape. A woman, therefore, cannot be prosecuted and convicted for alleged commission of gang rape made punishable under section 376(2)(g).[96] However, question as to whether a woman could be prosecuted for abetting gang rape, like in *Priya Patel* v. *State of Madhya Pradesh*,[97] was kept open by the apex court.

In *Nitin @ Nitu Ramprasad Bachich (Dhobi)* v. *State of Gujarat*, [98] the Gujarat High Court, confirming the judgment and order of the trial court convicting the appellants, among others, for committing gang rape, with other accused boys, on a girl of 17 years-old after kidnapping her, ruled that a court, by virtue of section 114-A of the Indian Evidence Act, 1872, has to presume that a victim of gang rape did not consent for sexual intercourse once the prosecution has proved that there was sexual intercourse by a member of the group in furtherance of common intention of all. It also refused to reduce their sentence of rigorous imprisonment for a period of

95 AIR 2009 SC 2644.
96 *Id.*, para 7.
97 (2006) 6 SCC 263.
98 2009 Cri LJ 2330 (Guj).

10 years with a fine of Rs 1,000 awarded by the trial court under section 376(2)(g) in spite of the fact they all were within the age group between 19 years to 22 when they raped the girl.

In *Raj Pal* v. *State of Haryana*,[99] the High Court of Punjab & Haryana categorically ruled that mere fact that a few persons accused of gang rape figured in the accusation does not make the prosecution's story doubtful, if deposition of the prosecutrix and supporting evidence inspires confidence. Similarly, in *Sohan Singh* v. *State of Bihar*,[100] the Supreme Court ruled that mere delayed FIR as well as the absence of spermatozoa, dead or alive, in the vaginal swab of a victim of gang rape cannot be fatal to the prosecution, if evidence of the prosecutrix and of others inspires confidence.

Incestuous rape

Three disgusting instances of incestuous rape, wherein lustful fathers inflicted atrocious sexual assaults on their minor daughters, came before the Delhi High Court. These cases indeed reveal that bestiality and human sexual frailty have no moral or familial limits! In *Gurudev* v. *State of NCT of Delhi*,[101] the appellant, an unemployed and drunkard, who was convicted for raping his ten year old daughter and sentenced to undergo imprisonment for life, urged the Delhi High Court to reduce his sentence to 10 years' imprisonment. The testimony of the daughter as well as of her mother, supported by the medical evidence, disclosed that the daughter was subjected to repeated sexual assaults with violence by none other than her own father. Unfortunately for him, his sexual assault on the minor daughter in the presence of his wife led to the complaint and consequential investigation, trial and conviction.

The High Court, concurring with the trial court, refused to concede the appellant's plea. Justifying the imprisonment for life imposed by the trial court, the court observed:[102]

> The aggravating circumstances which have bearing on the sentence to be imposed are:
>
> a. Abuse of position of trust by the appellant. Being a father of the prosecutrix, obviously, the appellant had the trust and confidence of his daughter.
>
> b. Family is the smallest social unit in a society. The institution of marriage is an institution in which society has a stake. The sanctity of a social institution has been violated by the appellant.

99 2009 Cri LJ 4074 (Punj).
100 JT 2009 (13) SC 161.
101 MANU/DE/1444/2009.
102 *Id.*, para 23.

c. The daughter has been subjected to repeated sexual assault by the appellant.

The age of the appellant at the time of commission of the crime was around 38 years. He was not an immature person. Being married and father, he knew the moral worth of his acts.

In *Chander Shekhar* v. *State of NCT of Delhi*,[103] the appellant, step-father of the prosecutrix of 9 years old, urged the Delhi High Court to reduce his sentence of imprisonment for ten years. He picked up his daughter from her grandfather's residence on the pretext of taking her to *Vaishno Devi*. Instead, he took her to his residence and raped her before he dropped her back at her grandfather's house. The visible tooth bite marks on face and neck of the prosecutrix and difficulty to walk properly faced by the victim made her grandmother to make inquisitive inquiries with the grand-daughter. The inquiries led to the revelation of the two atrocious sexual assaults by her step-father and of the threat of her death in case she disclosed it to anyone. The victim also deposed that she was subjected to similar sexual assault one and a half month prior to the instant one. The trial court ordered the appellant to undergo rigorous imprisonment for a term of 10 years, the minimum punishment stipulated under section 376(2), for the forced sexual assault on his minor step-daughter. The High Court, concurring with the trial court, refused to show any leniency and to reduce his punishment.

A reading of *Jitender* v. *State of NCT of Delhi*[104] exhibits another sordid and inhuman forced sexual assault on a girl of about 5-6 years by her protector, the step-father. He, when alone with the daughter, used to tie a piece of cloth on her eyes, remove her panty and insert his private part into her private part. When she used to cry due to lot of pain, he used to put cloth in her mouth, and to beat her on her hands, head and back with a wooden *danda* (stick). The torn hymen, perineal tear extending up to anal margin, bruise around *labia majora* of the victim, and multiple bruises of different colors on her entire body (medically termed as *battered baby syndrome*) medically suggested the forced sexual intercourse. The High Court failed to see any reason to interfere with the sentence of rigorous imprisonment for a term of 10 years awarded to the appellant for, *inter alia*, committing rape on a minor girl.

It is unfortunate to note, in the back drop of the *Gurudev* case, that Chander Shekhar and Jitender were allowed by the respective trial courts to go with comparatively lighter punishment even though, they like Gurudev, ravished their (step) daughters and left them to live with the unwarranted feeling of shame, humiliation and embarrassment and to carry throughout

103 MANU/DE/2708/2009.
104 MANU/DE/2591/2009.

their life the rekindling trauma of the sexual assaults. The aggravating factors justifying higher punishment in the Gurudev case did not, for undisclosed reasons, strike the courts that convicted and sentenced Chander Shekhar and Jitender for incestuous rape. Surprisingly, the Delhi High Court also preferred not to express its judicial reaction to such a lighter punishment awarded by the respective trial courts to the fathers found guilty of incestuous rape on their tender and hapless daughters!

Sole testimony of a rape victim- basis for conviction

The higher courts have reiterated the *hitherto* judicially articulated proposition that a victim of rape cannot be put at par with an accomplice. She is a hapless victim of the unwanted sexual assault. Her testimony, therefore, can be accepted by a court without further corroboration. Conviction based on the sole testimony of a victim is justified. The Indian Evidence Act, 1872, even by necessary implications, does not stipulate that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under section 118 of the Act and her evidence should receive the same weight as is attached to an injured in cases of physical violence. A court should attach the same degree of care and caution when it evaluates evidence of a rape victim as in the case of an injured complainant or witness and no more.[105]

In *S. Ramakrishna* v. *State Represented by the Public Prosecutor*,[106] the Supreme Court, referring to its earlier *dicta*,[107] re-asserted as under:[108]

> A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Indian Evidence Act, 1872 (in short the Evidence Act) nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person

105 *Bholaram* v. *State of Chhattisgarh*, 2009 Cri LJ 4753 (Chhatt); also see *Jagat Ram* v. *State of Himachal Pradesh*, 2009 Cri LJ 3271 (H.P.).

106 AIR 2009 SC 885 : (2009) 1 SCC 133; also see *Rajinder @ Raju* v. *State of Himachal Pradesh*, *supra* note 80.

107 *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, 1990 Cri LJ 889 (SC), *Karnel Singh* v. *State of Madhya Pradesh*, 1995 Cri LJ 4173 (SC) and *Sri Narayan Saha* v. *State of Tripura* (2004) 7 SCC 775.

108 *Supra* note 106, para 10. A few High Courts also took similar view; see *Maruti* v. *State of NCT of Delhi*, MANU/DE/2043/2009; *State of Maharashtra* v. *Suresh Shankar Jadhav*, *supra* note 83.

> who is interested in the outcome of the charge leveled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

A court should ordinarily not be hesitant to convict a rapist on the sole testimony of his victim if her evidence is found to be cogent, creditable, convincing, trustworthy and reliable and does not suffer from any basic infirmity or inherent improbability.[109] The whole prosecution case is liable to be abandoned, if the statement of the prosecutrix is found to be unnatural, untrustworthy and unreliable.[110] A court is required to be extremely careful in accepting the sole testimony of the prosecutrix when the entire story of the alleged sexual assault is improbable.[111] Referring to its earlier judicial pronouncements,[112] the Supreme Court, in *Rajinder @ Raju* v. *State of Himachal Pradesh*,[113] justified the judicial reliance on uncorroborated sole testimony of a rape victim for convicting the rapist. It observed:[114]

> In the context of Indian Culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she

109 *Chnader Shekhar* v. *State of NCT of Delhi*, *supra* note 116, *State of Himachal Pradesh* v. *Suresh Kumar @ DC*, 2009 (8) SCALE 628.

110 *Ratan Lal* v. *State of Rajasthan*, 2009 Cri LJ 4221 (Raj), *Virender* v. *State of NCT of Delhi*, *supra* note 80.

111 *Rajinder @ Raju* v. *State of Himachal Pradesh*, *supra* note 93; *Virender* v. *State of NCT of Delhi*, *supra* note 80.

112 *Radhu* v. *State of Madhya Pradesh* (2007) 12 SCC 57; *State of Rajasthan* v. *N. K.* , 2000 Cri LJ 2205 (SC); *State of Punjab* v. *Gurmit Singh*, 1996 Cri LJ 1728 (SC).

113 *Supra* note 80.

114 *Id.*, para 21.

> would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honor at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.

The apex court, in another judicial pronouncement,[115] setting aside conviction of the appellant under section 376 of the IPC by the trial court and confirmed by the Delhi High Court solely premised on the judicial perception that no self-respecting woman or her husband would make a humiliating statement against her honor or make an allegation of rape, added:[115a]

> It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.

The testimony of a minor victim of rape, having intellectual capacity to understand questions and to give rational answers thereto, can also be the basis for convicting her rapist. Testimony of a child victim is not liable to be rejected or treated as unreliable by the court merely on the ground that the evidence has come from a child of tender age.[116] In *State of Himachal Pradesh* v. *Suresh Kumar @ DC*,[117] the state of Himachal Pradesh challenged the judgment and order of the High Court of Himachal Pradesh whereby it set aside the judgment of the trial court convicting the respondent-accused, *inter alia*, for committing rape on a girl aged about 12 years and awarding him rigorous imprisonment for a term of 7 years with a fine of Rs 2,000. The High Court acquitted the respondent of all the charges and directed that he be released forthwith. For acquitting the respondent-accused, it placed reliance mainly on: (i) the medical report of

115 *Tameezuddin @ Tammu* v. *State of NCT of Delhi* (2009) 14 (Addl.) SCR 80.

115a *Id.* at 84.

116 *Mohd. Rafiq* v. *State of NCT of Delhi*, 162 (2009) DLT 551, *State of Himachal Pradesh* v. *Suresh Kumar @ DC*, *supra* note 109.

117 *Ibid* .

the prosecutrix and the doctor's opinion, who examined the prosecutrix, that the date of rape could not be precisely ascertained, and (ii) the doctor's admission that the absence of hymen proved that the prosecutrix had been used to sexual intercourse earlier. By doing so, the High Court, as noted by the Supreme Court, overlooked the cogent and credible evidence of the prosecutrix on record, corroborated by her mother and sister and supported by the medical evidence. The High Court ignored the fact that the respondent-accused, as testified by the prosecutrix, raped the victim a year before the instant sexual assault that caused the rupture of her hymen. The apex court, in line with the established principle that conviction of a rapist can be based on the sole testimony of the victim, failed to see any reason to suspect the credible and convincing evidence of the prosecutrix and to concur with the High Court's order. It accordingly set aside the order of acquittal passed by the High Court as it was illegal and unjustified, restored the judgment and order of the trial court and directed the accused-respondent to surrender to serve out the remaining period of the sentence. However, the apex court stressed that a court is required to evaluate evidence of a child-victim with great circumspection as a child is susceptible to be swayed by what others tell her and is an easy prey to tutoring. Before relying upon her sole testimony for convicting a person accused of rape on her, the court, according to it, is required to convince itself that the statement of the girl victim was her voluntary expression and that she was not under the influence of others.

Even the absence of any injuries either on body of the prosecutrix or on her private parts, or of seminal stains and spermatozoa in her vaginal swab does not render cogent testimony of a minor rape-victim unreliable. In *Md. Jainal Uddin @ Abedine* v. *State of Tripura*,[118] the Gauhati High Court categorically ruled that mere absence of external injury on the body or private parts of the victim girl cannot be a ground for disbelieving her cogent and credible testimony. It also endorsed the juristic view that a doctor's opinion that no rape was committed on a prosecutrix as her hymen was intact cannot belie cogent and trustworthy version of sexual assault on her.[119]

A court, trying a person accused of rape, is required to show greater responsibility. It is required to examine the broader probabilities and not to get swayed by minor contradictions or insignificant discrepancies.[120] Minor discrepancies on matters which do not touch the core of the case should not be given undue importance and would not ordinarily warrant rejection of the testimony of the witness as a whole. In the absence of strong and convincing

118 *Supra* note 92.

119 Also see *Kapoor* v. *State of Madhya Pradesh*, 2009 Cri LJ 1967 (Chatt), and *Virender* v. *State of NCT of Delhi*, *supra* note 80.

120 *Jitender* v. *State of NCT of Delhi*, *supra* note 104.

reason, it would not be appropriate for the court to reject the testimony of a witness on ground of minor contradictions here or there on matters which are not really significant to the case.[121] The court is expected to appreciate evidence on record in the background of the entire case and not in isolation. It is also required to keep in view that every defective investigation need not necessarily result in the acquittal. In *Zindar Ali SK* v. *Sate of West Bengal*[122] the Supreme Court, ignoring several discrepancies and shabby investigation, placed reliance on the 'truthful' testimony of the rape-victim to disallow the appeal preferred by the appellant against his conviction under section 376 of the IPC. The apex court ruled that defence cannot take advantage of shabby investigation and discrepancies galore where there is clinching evidence available to the prosecution.[123] It, nevertheless, has to show extra caution while evaluating evidence when investigation appears to be defective.[124]

In *Virender* v. *State of NCT of Delhi*,[125] the Delhi High Court, stressing the importance of judicial sensitivity, indeed articulated a tip of advice for the courts to follow while handling a case of sexual assault. It observed:[126]

> (T)he embarrassment, and reservations of those concerned with the proceedings including the prosecutrix, witnesses, counsel may result in a camouflage of the trauma of the victim's experience. The judge has to be conscious of these factors and rise above any such reservations to ensure that they do not cloud the real facts and the actions which are attributable to the accused persons. The trial courts must be alive to the onerous responsibility which rests on their shoulders and be sensitive in cases involving sexual abuse.
>
> It is, therefore, necessary and incumbent on the court to sensitively examine a prosecutrix in a trial relating to commission of an offence under section 376 of the IPC to ensure that the prosecutrix understands and brings out in her deposition as to what has transpired. This requires a matured and sensitive handling by the court.

Sentencing below the statutory minimum punishment for rape - judicial approach

Section 376 of the IPC deals with punishment for rape. It prescribes minimum sentence for rape *per se* as well as for aggravated forms of rape enumerated under section 376(2). Nevertheless, it allows a court to judicially quantify punishment within the prescribed minimum and

121 *Nadeem* v. *State of NCT of Delhi*, MANU/DE/2740/2009.
122 AIR 2009 SC 1467.
123 *Id*., para 13.
124 *Ibid*.
125 *Supra* note 80.
126 *Id*., paras 22 & 23.

maximum scale of punishment. However, it allows a court, in its discretion, to impose a sentence of imprisonment lesser than the prescribed minimum for 'adequate and special reasons' to be recorded by it. The reasons given should not merely be 'adequate' but also 'special.' They should not be fanciful. What reasons qualify to be 'adequate and special' obviously depend upon several factors and no strait-jacket formula can be indicated. In *State of Madhya Pradesh* v. *Basodi*,[127] the Supreme Court observed:[128]

> In order to exercise the discretion of reducing the sentence the statutory requirement is that the court has to record 'adequate and special reasons' in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. — What is applicable to trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court.

It, setting aside the order of the Madhya Pradesh High Court, it ruled that 'the accused belonged to rural areas, was an illiterate laborer and belonged to scheduled tribe - can by no stretch of imagination be considered either 'adequate' or 'special' reasons for reducing punishment lower than the minimum sentence prescribed under section 376 of the Penal Code.

In *State of Madhya Pradesh* v. *Sheikh Shahid*,[129] the state of Madhya Pradesh felt aggrieved by the decision of the Madhya Pradesh High Court whereby it reduced the sentence of the respondent-accused below the minimum sentence prescribed under section 376. The trial court found the respondent guilty of rape and ordered him to undergo rigorous imprisonment for a period of 7 years with a fine of Rs 1,000. On appeal, the Madhya Pradesh High Court directed the sentence to be reduced to the period of sentence already undergone by the respondent, *i.e.* period of about 6 months. The reason given by the High Court for reducing the sentence was that the respondent came from rural area. The Supreme Court ruled that such a ground, by no stretch of imagination, could be considered either 'adequate' or 'special' mentioned in section 376. It, therefore, set aside the High Court's order by labeling it as 'unsustainable' and directed the respondent to surrender to custody forthwith to serve the remaining period of his sentence awarded by the trial court. The apex court reminded the courts subordinate to it the caution sounded in its earlier pronouncement[130]

127 AIR 2009 SC 3081.
128 *Id*., para 18; also reiterated in *State of Punjab* v. *Rakesh Kumar*, 2009 Cri LJ 396 (SC).
129 AIR 2009 SC 2951.
130 *Seveka Perumal* v. *State of Tamil Nadu*, 1991 Cri LJ 845 (SC).

> (U)ndue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.[131]

In *Zindar Ali SK* v. *State of West Bengal*,[132] the Supreme Court, however, reduced the sentence of imprisonment for 10 years awarded by the trial court to the appellant to the term of imprisonment already undergone (5 years) by him on the ground that the incident of rape took place before 6 years and the appellant was poor. In *Jayarama @ Mamma Shivanna* v. *State of Karnataka*,[133] the Karnataka High Court, however, felt that the trial court, which convicted the appellant for raping a minor girl and sentenced him to rigorous imprisonment for 10 years and imposed a fine of Rs.50,000, was unduly harsh. Placing reliance on the facts that the appellant did not have any criminal antecedents, he was the sole bread-earner of the family and the supporter of his aged parents, the High Court, with a view to meet ends of justice, reduced the term of rigorous imprisonment from 10 years to 4 years and scaled down the amount of fine from Rs. 50,000 to Rs. 15,000. In *Mohd. Rafiq* v. *State of NCT of Delhi*,[134] the High Court of Delhi ruled that a trial court is required to record reasons even when it awards a sentence of imprisonment more than the minimum prescribed under section 376. In the instant case, the trial court convicted the appellant and ordered him to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs.10,000 for committing rape on a minor girl but it failed to record reasons therefor. The absence of reasons made the High Court virtually impossible to assess the propriety of the sentence of rigorous imprisonment for 12 years. Recalling that the appellant was of barely 24 years old when he committed the offence and was the sole bread-winner of the family, and taking note that the minimum sentence prescribed under section 376(2) is rigorous imprisonment for 10 years, the High Court felt that the rigorous imprisonment of 12 years awarded to the appellant was 'unduly harsh.' It, therefore, reduced the period of rigorous imprisonment from 12 years to 10 years.

131 *Supra* note 129, para 9; also see *State of Punjab* v. *Rakesh Kumar*, *supra* note 128.
132 AIR 2009 SC 1467.
133 2009 Cri LJ 4470 (Kant).
134 *Supra* note 116.

Outraging modesty of woman

Essential ingredients

In *Shekara* v. *State of Karnataka*,[135] the Supreme Court, admitting that there is no abstract conception of modesty that can be applied to all cases, spelt out the essentials of the offence of outraging modesty of a woman. Section 354 of the IPC, according to it, can be invoked if the prosecution, to the satisfaction of the court, proves that: (i) the person assaulted was woman, (ii) the accused has used criminal force on her, and (iii) the accused has used criminal force on the woman with intent to outrage her modesty.[136] The intention to outrage modesty of a woman, however, is not the sole criterion of the offence. It can be committed by a person, assaulting or using criminal force, if he knows that the modesty of the woman is likely to be affected by his act. The existence of intention or knowledge, are essentially things of the mind and has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed.[137]

The High Court of Himachal Pradesh, in *Shali Ram* v. *State of Rajasthan*,[138] placing reliance on the abovementioned essentials of section 354, concurred with the court below that convicted the appellant for outraging modesty of a woman by showing his tongue to a woman and sitting on her chest after throwing her on the ground when she asked him to show it (tongue) to his mother or sister and not to her.[139] In *Mrityunjay Kumar* v. *State of Sikkim*,[140] the High Court of Sikkim dismissed a petition of the appellant, a 32 year old chemist, popularly known as '*Dr Bhaia*', who was convicted by the trial court for outraging the modesty of a girl of about 9 years. As evident from the facts, the appellant took the girl, who complained of fever and backache, to a room for 'check-up', asked his daughter, who was playing there, to leave the room and bolted the door from inside. Then he put some ointment on her back and massaged. Slowly he fondled with her body, kissed and hugged her. Thereafter, he slipped off her undergarments with a pretext to check her body and touched her private part. She did not show any protest. Then he removed his undergarments and tried to insert his private part into her but he did not succeed, as the girl said that her back was still aching and she wanted to ease the pain with a warm water compress. The High Court declined to accept the plea of the appellant that absence of any physical mark on the victim's body negated the prosecution's contention of use of criminal force, one of the key requisite elements of section 354 of the IPC. It reasoned that 'criminal force' used in section 354

135 2009 (3) SCALE 104.
136 *Id.*, para 7.
137 *Id.*, paras 7 & 8.
138 MANU/HP/0128/2009.
139 *Id.*, para 15.
140 MANU/SI/0010/2009.

need not necessarily manifest some physical force. It may be exhibited even in the absence of physical element. The court also declined to give him the benefit of probation.

It is, however, difficult for the present writer to comprehend the reasons for not charging the appellant for attempt to commit rape as the facts on record show that he indeed transgressed the stage of preparation and commenced the act of penetration with the requisite intent to have intercourse.[141]

Outraging modesty of minor child - a plea for reforms

In *Tara Dutt* v. *State of NCT of Delhi,* the[142] High Court of Delhi, when encountered with a case of digital rape by the appellant, a 54 year old married man with four children including one married daughter, on a hapless girl of about 7/8 years, had to unwillingly re-affirm his conviction for outraging modesty of a woman, though he committed a disgusting unnatural sexual assault, akin to rape. He removed her undergarments and inserted his finger twice in her private parts. The High Court also concurred with the lower courts' decision not allowing the appellant to compound the offence. It also rejected the plea of the petitioner to substitute his sentence of 2 years' rigorous imprisonment by the sentence already undergone (i.e. imprisonment of 1 year 2 months & 23 days with a remission of 3 months and 15 days). Taking note of the heinous nature of the act, the High Court even refused to give him the benefit of the Probation of Offenders Act, 1958. In a helpless tone, the High Court felt that the inadequacy of the law had prevented the trial court from awarding a sentence greater than 2 years' rigorous imprisonment as the appellant could only be charged for outraging modesty of a woman (punishable by rigorous imprisonment for a term up to 2 years) and not for either committing rape (punishable by an imprisonment for a term not less than 7 years and a term up to 10 years or imprisonment for life) or unnatural sexual act (punishable by an imprisonment for a term up to 10 years or for life).[143]

The High Court expressed its anguish over the inadequacy of the rape law in vogue in India. Exhibiting its deep concern to the legislative non-response to a decade old proposal of the Law Commission of India for a gender-neutral definition of 'sexual assault' incorporating non-penile penetration of vagina as well as anus[144] and to a half-decade old appeal by

141 See *Pandharinath* v. *State of Maharashtra*, JT 2009(8) SC 688; *Rupesh Kumar* v. *State of Chhattisgarh*, *supra* note 89 and *Sanjay Paswan* v. *State of West Bengal*, 2009 Cri LJ 1820 (Cal).

142 MANU/DE/0401/2009.

143 *Ibid*., para 18.

144 Law Commission of India, *One Hundred and Seventy Second Report on Review of Rape Laws* (Government of India, March 2000), para 3.1.2. For further comments and analysis, see K.I. Vibhute, "Rape and the Indian Penal Code at the Crossroads of the New Millennium: Between Patriarchiast and Gender Neutralist Approach", 43 *JILI* 25 (2001).

the Supreme Court, for reforms in the law of rape,[145] the High Court hoped that the instant case would 'add to the growing demand for a change in the law consistent with the recommendations and concerns expressed both by the Law Commission of India as well as the Supreme Court of India.'[146] It also hoped that the present case and the growing instances in the recent past of sexual assault of minors would 'serve as a wake-up call' for the legislature 'to make the appropriate amendments to the IPC without further delay.'[147]

Unnatural carnal intercourse

Nature

In *Ram Bhagat Ram* v. *State of NCT of Delhi*,[148] the Delhi High Court, was called upon by the appellant-accused to adjudge the legality and propriety of his conviction by the trial court for committing non-consensual sodomy on a boy of 18 years-old, who was abducted by him and his accomplice with a view to subjecting him to anal intercourse as a punishment for refusing to give them Rs.100 for purchasing liquor. The trial court ordered him to undergo rigorous imprisonment for a period of 4 years and to pay a fine of Rs.1,000. It observed, and rightly so, that forced sexual assault on a non-consenting young adult not only invades his privacy but also violates his right to dignity. A victim of such a sexual assault is left to live for the rest of life with a traumatic experience of the uninvited sexual violence. The High Court, plausibly charged with the above concern, confirmed the conviction of the appellant under section 377 of the IPC and refused to concede his plea for reduction of the sentence even on the grounds that he (i) was a married man with three children, (ii) was the sole bread-earner in the family, and (iii) did not have any previous conviction. None of these factors persuaded the High Court to take a lenient view of the conduct of the appellant to reduce his liability.[149] In *Imran* v. *State of NCT of Delhi*,[150] the Delhi High Court likewise held that testimony of a victim of unnatural sexual assault, even tainted with some minor contradictions, could be relied upon to convict the perpetrator, provided it is supported by medical evidence.

145 *Sakshi* v. *Union of India* (2004) 5 SCC 518.

146 *Supra* note 142.

147 *Id*., para 1. A student of criminal law might recall that the Delhi High Court in *Sudesh Jhaku* v. *K.C.J.* [1998 Cri LJ. 2428 (Delhi)], also expressed similar concern about inadequacy of law to combat child sexual abuse and conceded the fact that it was for the legislature, and not for the judiciary, to bring apt reforms in the rape laws. For further comments, see K.I. Vibhute, "Reforms in the Law Relating to Child Sexual abuse in India - A Circuitous Journey from *Sudesh Jhaku* to *Sakshi*?", 29 CULR 184 (2005).

148 MANU/DE/1237/2009.

149 *Id*., para 26.

150 MANU/DE/0380/2009.

Punishment

Shri Bhondu @ Santlal Ramdhar Yadav v. *State of Maharashtra*[151] represents a glaring example not only of the way an uncontrolled sexual desire and lust could make a hapless child of tender age a victim but also the manner a human being could turn into a beast. The appellant-accused, a grown up boy, made a child of barely 14 months-old a victim of his lust. He satisfied his sexual lust by having anal intercourse, an act punishable under section 377 of the IPC, with the girl of extremely tender age whilst she was sleeping. The mother of the victim-child, when informed by a boy playing in the lane that her daughter was crying, rushed, with other neighbors, to the room where her daughter was sleeping. She saw her daughter was profusely bleeding from her anus. She also saw that the appellant had covered his body with a quilt. He left the room when the mother of the victim and neighbors entered the room. The trial court, placing sole reliance on the testimony of the mother of the child-victim, supported and corroborated by circumstantial and medical evidence, convicted the appellant-accused under section 377 and ordered him to suffer imprisonment for life and to pay a fine of Rs.1,000.

The appellant challenged his conviction and sentence in the Bombay High Court primarily on the ground that he was falsely implicated and that the mother of the victim-child had lodged the complaint under pressure from the public gathered at the spot of the incident. These pleas, in the absence of supporting evidence, did not persuade the High Court to allow the appeal. It concurred with the findings of the trial court. It, however, on its own reduced the sentence of imprisonment for life to rigorous imprisonment for 10 years that, in its opinion, would meet the ends of justice. Referring to *State of Uttar Pradesh* v. *Kishan*,[152] it justified its decision of scaling down the punishment as under:[153]

> [S]entencing policy of the Court must be such as would reflect the conscience of the society. The society must treat the offence against children resulting in such sexual abuse with empathy as well as sentipathy. In this case, the say of the accused itself shows the agitated crowd that had gathered who wanted the accused to be brought to the book. That itself reflects the demands of the society from the criminal justice system. The offence, which has been clearly established, calls for punishment of at least 10 years rigorous imprisonment to be awarded to the accused. It is only because the act of the accused may have been stopped short of further harm and injury to the child by the child's cries that the life imprisonment awarded to the accused may call for modification.

151 MANU/MH/1287/2009.
152 2005 (1) Cri LJ 333 (SC).
153 *Supra* note 151, para 21.

However, one may, in the present submission, doubt veracity of the above justification when (s)he finds the following proposition in the same ruling:[154]

> The commission of the unnatural offence has been clearly shown. If the accused was not prevented by the cries of the child or the other boy who called the mother and coming of the mother, the offence would have been more grievous. The intention to commit such an offence, therefore, is clearly seen. The act of the accused has resulted in the unnatural offence being committed. The extremely tender age of the child makes the acts of the accused even more deplorable calling for stringent punishment.

Unnatural sexual assault on, and killing of, victim of tender age - judicial response

The judicial pronouncements of the High Courts of Orissa and Delhi, respectively in *Satgun Paswan* v. *State of Orissa*[155] and *Shakalu* v. *State of NCT of Delhi*[156] exhibit different judicial approach to appreciation of the circumstantial evidence, in the absence of direct evidence, in the determination of the guilt of the persons accused of making children of tender age victims of unnatural sexual assault and of killing them thereafter or thereby. In *Satgun Paswan,* the appellant-accused, along with other two, was charged and prosecuted under sections 376, 377 and section 302 read with section 34 of the IPC for having vaginal and anal intercourse with a girl of 11 years-old and causing her death by throttling. The trial court, in the absence of eye-witness, relied upon medical and circumstantial evidence to convict the appellant-accused, a man of 28 years-old, under sections 376, 377 and section 302 and to acquit his other two co-accused, to whom it gave the benefit of doubt. The trial court placed heavy reliance on the testimony of the doctor, who examined the appellant-accused and other accused persons on the same day, to convict the appellant. He deposed that the injury found on the fraenum penile organ of the appellant (which was not found on the private parts of other two accused) was caused during the forceful sexual intercourse. The doctor's opinion, which was supported by other *ante-mortem* injuries found on the deceased, certain injuries on the person of the convict-accused, and circumstantial evidence and tallied with the explanatory medical observations found in *Modi's Medical Jurisprudence and Toxicology*, the court held, proved the appellant's guilt beyond reasonable doubt. The cause of death was asphyxia due to throttling. The High Court of Orissa, which refused to interfere with the conviction and sentence passed by the trial court, held that the evidence relied upon by the trial court did not suffer from any infirmity. It observed:[157]

154 *Id.*, at para 20.
155 108 (2009) CLT 666.
156 MANU/DE/1106/2009.
157 *Id.*, para 11.

> (T)he circumstantial evidence is like a rope which is composed of several cords & if one strand of the cord might be insufficient to sustain the weight, but the rest stranded together may be of quite sufficient strength. The circumstances from which conclusion of guilt has to be drawn, at the first instance, should be fully established. All the facts so established should be consistent with the hypothesis of guilt of the accused-appellant. The circumstances should be in a conclusive nature & such conclusion has to exclude any other hypothesis. It is needless to say that it is the duty of the prosecution to establish all the circumstances conclusively to hold that the accused alone committed the offence.

In *Shakalu*, the appellant-accused, who was convicted under section 377 and section 302 and sentenced to life imprisonment with a fine of Rs. 10,000 and rigorous imprisonment for a period of 10 years with a fine of Rs. 5,000, respectively for having anal intercourse with a boy of about 5 years-old before he killed him, urged the Delhi High Court to interfere with his conviction and sentence. The trial court, in the absence of direct evidence, relied upon certain circumstances for convicting the appellant-accused. The circumstances that were primarily relied upon were: (i) a squad sniffer dog that smelled the stone which was purported to be lying on the deceased boy, took the police party to a room on the first floor of the same building where the appellant was living, circled the appellant and sat by his side, (ii) the extra-judicial confession of the appellant made to the doctor (who did the *post-mortem* of the deceased boy) who examined him on the next day of his arrest that he had committed anal intercourse with the deceased boy that resulted in his death and in the past he had unnatural sex with other five boys and sexual intercourse with six minor girls, and (iii) the recovery in pursuance of disclosure statement of the appellant of a *lungi* and *banyan* soaked in blood from his room on the first floor of the building where the deceased's body was lying.[158]

The Delhi High Court, persuaded by the arguments advanced by the appellant-convict, held that the circumstantial evidence relied upon by the trial court failed to form the chain of circumstances to prove the guilt beyond reasonable doubt of the appellant under section 377 and section 302. The High Court, in the light of judicial *dicta* of the apex court,[159] held that identification of an offender by a sniffer dog cannot be considered to

158 These incriminating circumstances were put to the appellant in the statement under section 313, Cr PC. He denied them without giving any cogent explanation for furnishing such incriminating evidence against him. He also preferred not to examine any witness in his defence.

159 *Dinesh Bharathakur* v. *State of Assam*, AIR 2008 SC 2205 and *Gade Lakshmi Mangraju* v. *State of Andhra Pradesh*, AIR 2001 SC 2677.

be 'a substantive piece of evidence' or 'a link in the chain' to convict an accused.[160] It, at the best, is a tool for investigation. It also declined to accept the extra-judicial confession of the appellant as a proof of his guilt on the ground that it was vitiated by the provisions of section 313 of the Cr PC and sections 24 and 26 of the India Evidence Act, 1872. Even though it was made to the doctor, it would still be considered as a confession recorded while the appellant was in police custody, which, by law, is an inadmissible piece of evidence.[161] The High Court also ruled that the fact that a *lungi* and *banyan* soaked with blood recovered from the appellant, in the absence of conclusive evidence showing that it matched with the blood group of either the appellant or deceased boy, could not, in any manner whatsoever, connect the appellant with the commission of crime.[162] Based on this reasoning, the High Court held that the prosecution had failed miserably to prove beyond reasonable doubt that the appellant committed the offence punishably under section 377 and section 302. It also ruled that the trial court had fallen into 'grave error' in relying upon the circumstantial evidence to convict him. The High Court, therefore, set aside the trial court's judgment and acquitted the appellant of all the charges. Nevertheless, it observed:[163]

> No doubt, it is really very unfortunate that a young life has been lost after being subjected to sodomy but sympathy with the family of the victim, cannot take the place of proof although there is suspicion that the appellant might have committed the aforesaid offence.

Constitutional validity

In *Naz Foundation* v. *Government of NCT of Delhi*,[164] Naz Foundation, a NGO, filed a public interest litigation (PIL) in the Delhi High Court, challenging the constitutional validity of section 377 of the IPC, which criminalizes homosexuality, consensual as well as non-consensual, and bestiality. It urged the High Court to decriminalize 'unnatural' sexual intercourse between two consenting adults in private. It contended that section 377 unreasonably curtails the sexual autonomy and sexual preference of two consenting adults who, for any reasons whatsoever, show preference to homosexuality, rather than hetero-sexuality. It, therefore, urged the court to limit section 377 only to non-consensual penile non-vaginal sexual intercourse and penile non-vaginal sex involving minors. It

160 *Supra* note 156, paras 28 & 29.
161 *Id*., paras 33-34 & 38-39.
162 *Id*., para 35.
163 *Id*., para 40.
164 160 (2009) DLT 277.

contended that section 377, in this context, deserved to be declared unconstitutional as it, in effect, goes against the spirit of the right to personal liberty [encompassing the right to privacy, the right to dignity, individual autonomy] and to equality before law [prohibiting any classification based on irrational basis] guaranteed under articles 21 and 14 of the Constitution of India, respectively. Section 377, the NGO contended, at its operational level, not only violates the most cherished right to privacy, individual autonomy and human dignity (of those voluntarily engaged in homosexual acts) but also, in effect, classifies on irrational norms sexual acts between procreative (legally permissible or natural sexuality) and non-procreative sexual (legally impermissible or unnatural) acts. Prohibition against homosexuality under section 377, it stressed, contravenes constitutional spirit of article 15, which, *inter alia*, prohibits classification based solely on 'sex', which, according to the petitioner, takes into its ambit 'sexual orientation' of a person. It also argued that section 377 goes against the basic freedoms assured under art 19(1)(a), (b), (c) and (d) of the Constitution as it unjustly curtails, rather infringes, ability of a person involved in homosexuality: (i) to make personal statement about his sexual preferences, (ii) to associate himself with an association or assembly of homosexuals, and (iii) to move freely so as to engage in homosexual conduct.

The Delhi High Court, after taking note of responses of the Union of India and other organizations and offering a thread-bear analysis, in the light of judicial pronouncements and juristic opinions from home and abroad, of the arguments advanced by the petitioner and issues, legal as well as moral,[165] declared section 377 of the IPC, insofar it criminalizes consensual sexual acts of adults (i.e. persons of or above 18 years) in private, unconstitutional being violative of articles 21, 14 and 15 of the Constitution.[166] Nevertheless, it, as stressed by the petitioner NGO, ruled that the provisions of section 377 will, however, continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.[167]

VI SENTENCING

The Indian Penal Code, like other major penal statutes, prescribes punishment for various offences created under it. It provides for four kinds of punishments: (i) death; (ii) imprisonment for life; (iii) imprisonment for

165 For some observations of the author about these arguments, see K.I. Vibhute, "Consensual Homosexuality and the Indian Penal Code : Some Reflections on Interplay of Law and Morality", 51 *JILI* 3 (2009). The Delhi High Court's *dictum* is challenged in the Supreme Court. The apex court's verdict is awaited. Meantime, it declined to stay the operation of the Delhi High Court's judgment.

166 *Supra* note 164.

167 *Id*., para 132.

various terms which may be either simple or rigorous, and (iv) fine.[168] A further peep into the legislative paradigm of the Code discloses that certain offences are made punishable with a minimum sentence with a *cap qua* the maximum, with or without fines. For some offences, it prescribes an upper limit of sentence, leaving the minimum, to the discretion of the court, which may even be of one day.

The Code, thus, gives much leeway to, and confers wide discretion on, the judiciary to pick up an apt punishment, if the offence concerned is made punishable by different forms of alternate punishment and a choice is given to it to opt either of them, in isolation or combination, and/or to quantify 'punishment' within the range of 'minimum' and 'maximum' punishment, if any, prescribed for the offence. In the absence of any sentencing policy or standardized guiding principles in India, a court is virtually left to determine sentence which, in its opinion, meets the ends of justice. However, it is the duty of a court to use its judicial discretion to award a sentence that is 'proper' in the backdrop of circumstances of the case at hand, and 'matches' with the guilt of offender.

The Supreme Court, through its judicial pronouncements, debating upon the issue as to when the extreme penalty of death has to be imposed/ sustained or be replaced by a lesser sentence of imprisonment for life, has been voicing its concern for 'proper' (in the factual matrix and circumstances of case at hand) and 'proportionate' (in the context of gravity and nature of the offence committed) sentence. It has justified punishment with these dual attributes on certain philosophical and pragmatic propositions and principles. Some of these propositions and principles again re-surfaced in a couple of the cases handed down by it during 2009.

In *Gurumukh Singh* v. *State of Haryana*,[169] the Supreme Court not only emphasized that it is the duty and obligation of every court to award proper sentence but also enumerated various factors that the court is required to consider while determining the sentence. They are: (i) motive or previous enmity, (ii) whether the incident had taken place on the spur of the moment; (iii) the intention/knowledge of the accused while inflicting the blow or injury; (iv) the gravity, dimension and nature of injury; (v) the age and general health condition of the accused; (vi) whether the injury was caused without pre-meditation in a sudden fight; (vii) the nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted; (viii) the criminal background and adverse history of the accused; (ix) number of other criminal cases pending against the accused; (x) incident occurred within the family members or close relations, and (xi) the conduct and behavior of the accused after the incident, whether the accused had

168 S. 53, IPC.
169 2009 (11) SCALE 688.

taken the injured/the deceased to the hospital immediately to ensure that (s)he gets proper medical treatment? In the same breath, the apex court has made it clear that these factors are only illustrative and not exhaustive. These are some of the relevant factors which are required to be kept in view by a sentencing court. Each case, obviously, has to be seen from its special perspective. The court must ensure that the accused receives appropriate sentence and that it must be proportionate to the gravity of the offence committed by the convict. Proportion between 'crime' and 'punishment' is one of the accepted goals of criminal justice system. The principle of proportion between crime and punishment essentially requires a court to prepare a balance-sheet of mitigating and aggravating circumstances and quantify the 'punishment' based thereon. The principle of proportionality is evolved to remove (or at least to minimize) arbitrariness in the sentencing process.

In *Jameel* v. *State of Uttar Pradesh*,[170] the apex court further stressed that the imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice, the court stated, demands that the courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime and conscience of the society. It also reminded the courts of the need that they, while modulating sentence, need to be stern or be tempered with mercy whenever factual matrix of a case at hand warrants. The nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and other attending circumstances may be necessary pointers for the court in tailoring 'proper' sentence.[171] In *State of Uttar Pradesh* v. *Sattan @ Satyendra*[172] and *Rameshbhai Chandubhai Rathod* v. *State of Gujarat*,[173] the Supreme Court highlighted the underlying philosophy of 'appropriate' sentence. It stated that courts by imposing appropriate sentence help the state, through law, to protect the society and to stamp out criminal proclivity. The contagion of lawlessness would undermine social order and lay it in ruins. It will be a mockery of justice to permit an accused to go away with the punishment 'lighter' than what he 'deserves.' The common man will lose faith in courts. Undue sympathy to accused and inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society, it apprehends, could not long endure under such serious threats. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The apex court, however, lamented that sometimes courts

170 2009 (13) SCALE 578.
171 *Id*., paras 10 & 11.
172 (2009) 4 SCC 736.
173 2009 (6) SCALE 469.

are influenced by the correctional needs of the perpetrator, the desirability of keeping the perpetrator out of circulation, and the tragic results of his crime while determining sentence. It opined that these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.[174]

The ideas revolving around the principle of proportionality, soliciting the punishment that befits the crime and aptly responds to the society's cry for justice, in ultimate analysis, get support from the retributive penal policy, rather than reformative philosophy, of punishment. Some jurists feel that retributive contour of punishment should get priority only when reformation of a criminal does not seem feasible. Sentencing policy reflected in *Rameshbhai Chandubhai Rathod* v. *State of Gujarat*[175] exhibits such a dichotomy in judiciary also. Arijit Pasayat J, believing that the principle of proportionality in spite of some recent inroads in, and objections to, it, still holds strong influence in the determination of sentences, confirmed the sentence of death awarded to a person for, *inter alia*, raping and killing a girl of about 10 years. The judge considered it a fit case to join the cadre of the 'rarest of rare cases' justifying death sentence.[176] Asok Kumar Ganguly J dissenting from Arijit Pasayat J stressed that possibility of reform or rehabilitation of a criminal must be at the heart of the sentencing process. Ganguly J, justifying the assertion, observed:[177]

> While I fully share my learned Brother's anxiety about the expectation of society to the adequacy of the sentence to the nature of the crime, at the same time, we cannot be oblivious of the person who is alleged to have committed the crime and his rights under a fair and structured sentencing policy…. (B)efore imposing death sentence, an abiding concern for the dignity of human life must be shown by Court.
>
> We must recognize that 'cry for justice' is not answered by frequent awarding of death sentence on a purported faith on 'deterrence creed.' Before choosing the option for death sentence, the Court must consciously eschew its tendency of 'retributive ruthlessness.'

In consonance, with this judicial reasoning, the learned judge held that the appellant deserved rigorous imprisonment for life, and not the sentence of death. The former, and not the latter, would serve the ends of justice.[178]

174 *Supra* note 172, paras 10-14 and paras 23-26 & 29-30, *ibid.*
175 *Supra* note 173.
176 *Id.*, para 39.
177 *Id.*, paras 91 & 92.
178 *Id.*, para 108.

In *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*[179] and *Dilip Premnarayan Tiwari* v. *State of Maharashtra*,[180] the Supreme Court, while considering propriety of the death sentence awarded by the trial court and confirmed by the High Court, stressed the need to give due consideration to the circumstances pertaining to the criminal as well as social setting in which the crime was committed in the sentencing process. A court should not merely concentrate on the circumstances relating to the crime committed while deciding 'proper' sentence.

VII CONCLUSION

During the year under survey, it seems that some of the High Courts and the Supreme Court have reiterated and re-emphasized certain principles of law or propositions to convert them into more crystallized and normative propositions of law. In the process, they have, whenever felt necessary, added a new dimensions thereto. Judicial approach to some of the sexual offences seems to be humane and more pragmatic motivated by the ideas of physical integrity and autonomy of victims of sexual offences. With this spirit, some of the higher courts have attached much more evidentiary value to the sole uncorroborated testimony of the victims of sexual assaults, unless, in the backdrop of the attending circumstances, it seems to be highly improbable or false. It has also pleaded for certain reforms in the law relating sexual offences. The pronouncement of the Delhi High Court declaring section 377 of the IPC unconstitutional to the extent of its application to consensual homosexuality between two adults in private exhibits the concern of the higher judiciary in India. The judicial pronouncements dealing with sentencing in India convey, without any decisive approach, that both the ideas, retributive and reformative, are at the heart of sentencing process in India. The inclination of most of the judges of the Supreme Court seems to be in favor of the latter. However, contrary to the assertion of the apex court that courts are not expected to keep in view only the rights of the criminals but also the rights of the victims of crime while considering the imposition of appropriate punishment, one hardly finds a single major judicial pronouncement delivered in 2009 that concretizes the idea of compensation to victims of crime.

179 (2009) 6 SCC 498.
180 2009 (14) SCALE 489.