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10
CRIMINAL LAW

*Jyoti Dogra Sood**

I INTRODUCTION

EACH MEMBER of the organized society must conform to the norms of behaviour prescribed by that society. When some of the more important norms are violated, society punishes the deviant. But the function of penalizing is given to judiciary which fixes the liability on the principles of fair trial. The present survey is an attempt to analyze the resolution of such conflicts by the Supreme Court in the area of criminal law for the year 2011.

II EUTHANASIA

The year 2011 was witness to a case which caught the nation's imagination both through print and electronic media. *Aruna Ramachandra Shanbaug* v. *Union of India*[1] was a writ petition under article 32 of the Constitution on behalf of the petitioner Aruna Ramachandra Shanbaug who was a nurse in a hospital in Mumbai. She was sodomized by a sweeper and during the act he twisted an iron chain around her neck which damaged her brain. She has been in a vegetative state for the last 36 years and has been looked after well by the hospital staff. The prayer of the petitioner was that the respondents (the hospital staff) be directed to stop feeding her and let her die peacefully. The court undertook a very detailed analysis of euthanasia in other jurisdictions and its own decisions in cases of suicide[2] and dismissed the petition. It also gave direction to all the high courts that if an application is filed in any high court, the Chief Justice of the concerned court should forthwith constitute a bench of at least two judges who should work on the principle of 'best interest of the patient' laid down by the House of Lords in *Airedale*.[3] It is submitted that this is a major issue and requires informed debates and deliberations within the precincts of Parliament. The courts should refrain from law making and should not invariably take a mandate for doing so from *Vishakha*[4] every time.

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1 (2011) 4 SCC 454.

2 *Gian Kaur* v. *State of Punjab* (1996) 2 SCC 648 and *P. Rathinam* v. *Union of India* (1994) 3 SCC 394.

3 *Airedale N.H.S. Trust* v. *Bland*, 1993 AC 789.

4 *Vishakha* v. *State of Rajasthan* (1997) 6 SCC 241.

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III HOMICIDE

Murder

Killing of a human being is considered as the most heinous crime. In early days *actus reus* alone was sufficient to impute culpability but gradually the subjective element of *mens rea* became central to criminal liability. It is because of this development that homicide is differently graded into murder, culpable homicide not amounting to murder etc.

State of M.P. v. *Ramesh*[5] was an appeal against the acquittal of a woman and her paramour who had murdered her husband. The trial court had convicted them under section 302 read with section 120 B IPC and sentenced them to life imprisonment. On appeal, the high court acquitted them and the state then appealled against the acquittal. The Supreme Court deliberated at length on the status of a child witness. The minor daughter of the couple (Rannu Bai) was an eye witness in the instant case and had deposed that her father was battered by the respondent accused with the help of her mother. The trial court after analyzing the case law on child witness had observed thus:[6]

> In the present case, statement of child witness gets affirmed by the circumstances of the incident, facts and from the activities of the other witnesses carried out by them on reaching the place of occurrence. Thus, on the basis of above said law precedents, statement of (child) witness Rannu Bai not being unreliable in my opinion is absolutely true and correct. Statement of Rannu Bai gets affirmed by the statements of (other witnesses) and from the medical evidence.

The court also took note of the fact that the accused wife had walked for 8 kms in the night to lodge a FIR that her husband had died due to a fall caused by giddiness and registered a complaint under fictitious name. All these pointed to her guilt. More so she was not able to deny incriminating circumstances after entering the witness box under section 315 Cr PC. The Constitution guarantees a right against self-incrimination under article 20(3) of the Constitution. However, when an accused agrees to enter into the witness box, to take oath and to be cross-examined on behalf of the prosecution and/or of the accomplice, if it is so required, he/she becomes a competent witness whose evidence can be considered and relied upon while deciding the case. The resultant cumulative effect of reading the provisions of article 20(3) read with sections 161(2), 313(3) and proviso (b) to section 315 Cr PC means that law provides for rule against adverse inference from the silence of the accused. Taking all these into consideration the apex court, while allowing the appeal, took the view that the high court had ignored the most material incriminating circumstances and upheld the judgment of the trial court.

A.Shankar v. *State of Karnataka*[7] was a homicide case where the court reiterated that presumption of innocence of the accused is the fundamental principal of criminal

5 (2011) 4 SCC 786.
6 *Id*. at 795.
7 (2011) 6 SCC 279.

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jurisprudence. In this case there were discrepancies in the prosecution version and material contradictions were discerned in the witnesses' account which made the trial court to give a verdict of acquittal. However, these were ignored by the high court which recorded a guilty verdict. The apex court upholding the acquittal held thus:[8]

> In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon.

In *State of Rajasthan* v. *Islam*[9] the question was as to the intention of the accused in committing culpable homicide. As is clear from an analysis of sections 299 and 300 IPC, in the absence of a guilty mind the conviction could be altered from murder to culpable homicide not amounting to murder. In the instant case there was some meeting to raise funds for repairing a mosque. There were some allegations about misappropriation of money and tempers ran high leading to a scuffle. Subsequently, the respondent-accused along with others went home and came back armed with a *farsa* which he used to hit Jenu who subsequently succumbed to injuries. The trial court convicted the respondent-accused under section 302 IPC. In appeal the high court brought it under exception 4 appended to section 300 IPC and held him guilty under section 304 part II IPC. It was crystal clear from the facts of the case that there was no prior intention to kill; it was a meeting for a noble purpose. But the law nowhere lays down that intention could not be formed at the spur of the moment and in the instant case this intention cannot be said to be negated by the benevolent provisions of grave and sudden provocation since the accused had enough time to cool his emotions. The accused went home and returned armed, clearly points to a guilty intention and the apex court rightly overturned the high court judgment to give a verdict under section 302 IPC and observed thus:[10]

> In order to bring a case under exception 4 to section 300 IPC, the evidence must show that the accused acted without any premeditation and in a heat of passion and without having taken undue advantage and he had not acted in a cruel or unusual manner.

In *S.K. Yusuf* v. *State of West Bengal*[11] one Sahanara Khatun, aged 13 years, had gone to her *jhinga* field to pluck *jhinga*. When she did not return, her father along with two others went to look for her but she was not in the fields. They looked for her in the bamboo grove in the nearby graveyard but could not find her.

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8 *Id*. at 286.
9 (2011) 6 SCC 343. See also *Veeran* v. *State of M.P.* (2011) 11 SCC 367.
10 *Id.* at 348.
11 (2011) 11 SCC 754.

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What they found was some freshly dug earth and when they removed the soil, Sahanara's dead body was found. FIR was lodged and the appellant was named as the suspect since there were witnesses who had seen him with the deceased. When the appellant was questioned he had a spade in his hand and he insisted that he was fishing near the railway track. He absconded after that and was caught by the villagers and on his disclosure an old spade, one *ghuni* and one enamel *thala* were recovered. The theory put forward by the prosecution was that he had tried to sexually assault the girl and when she showed resistance he killed her and buried her. The case was based on circumstantial evidence, as there was no eye witness to the crime. The trial court as well as the high court convicted him under sections 302 and 201 IPC and sentenced him to life imprisonment under section 302 and one year under section 201 IPC. On appeal, the Supreme Court entered into a detailed examination of the accused's abscondence, extra judicial confession, last seen theory and circumstantial evidence and pointed out various loopholes in the trial as well as in the high court's finding of guilt. Apart from other things, the court discerned a serious lacuna on the part of the investigation agency that they did not send the spade etc. for chemical analysis. There was also no mention of attempt to rape in the medical report which may have been the motive for the murder. Keeping all the facts in mind the court held that to impute culpability there has to be strong and cogent reasons and "mere imagination that such thing might have happened is not enough to record conviction". The court while allowing the appeal held:[12]

> [W]hile deciding the case involving the commission of serious offence based on circumstantial evidence the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

While there is no doubt that the chain of circumstantial evidence was not complete so as to warrant liability but what is disturbing is that case after case, due to the shoddy investigation, the culprits go scot free and the victim is denied justice There must be an end to this.

The scenario where death results from a single blow to the body becomes a contentious one in terms of fixing the liability of the accused as it becomes very difficult to decipher the nature of mental element. In order to include all scenarios, section 300 envisages two situations. First, where the blow is dealt with the intention of causing bodily injury with the knowledge that such injury is in all probability sufficient to cause death of the person to whom the blow is given.[13] Second, where the blow is given with the intention of causing bodily injury and such injury is sufficient in the ordinary course of nature to cause death.[14] If the single blow falls in none of these two categories, the court may find it difficult to convict the accused under section 302. This question came up for the consideration of the Supreme

12 *Id.* at 764.
13 S. 300, 2ndly.
14 S. 300, 3rdly.

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Court in *Ashokkumar Magabhai Vankar* v. *State of Gujarat*[15] where a single blow by a wooden pestle on the head of the victim resulted in his death. In appeal against conviction under section 302, IPC, the defence pleaded for conversion of the offence into one under section 304 IPC since death was by a single blow. The apex court approved the approach of high court in holding that "the act of the respondent, though solitary in number had caused multiple fractures on the skull of the deceased leading to almost instantaneous death". The Supreme Court also took into account the features of the weapon pestle which was 39 inches long and 4 inches thick with a steel ring at the striking end, and as such, it held that "any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with such a weapon would cause death".[16] The apex court did not have to ascertain the applicability of the parts of section 300 to the given situation because the injury sustained by the deceased not only exhibited the 'intention' of the accused in causing death of the victim but also the 'knowledge' of the accused as to the likely consequence of such attack which could be none other than causing the death of the victim.[17] Further, the court refused to read the act as falling into one of the exceptions to section 300 since the victim was not an aggressor but only a pacifier between quarrelling parties.

Takdir Samsuddin Sheikh v. *State of Gujarat*[18] involved an appeal against conviction under section 302 read with section 114 IPC and the sentence of life imprisonment awarded under the same. It was the case of the prosecution that appellants had murdered the deceased, who was their business partner, in the presence of the complainant, who was another partner, because of a dispute over non-payment of money in a property deal. According to the post-mortem report, a total of 33 injuries had been caused on the body of the deceased. In the opinion of the doctor, the cause of death was shock and haemorrhage following multiple incised wounds. The appellants were arrested by the police 13 days after the incident and blood stained clothes were found from the boot of the car. Blood stained swords were also recovered based on the disclosure statements of the appellants. The high court dismissed the appeal against the conviction and sentence of life imprisonment passed by the sessions court. In appeal before the Supreme Court, the appellants contended that being a sole and an interested witness, the evidence of the complainant could not be relied upon without corroboration. The apex court rejected the contention that the complainant was an interested witness in as much as, being a partner in the firm, he would have been a beneficiary in the transaction of land involved herein, in case one partner had been eliminated and the other partner had landed in jail. It was asserted by the Supreme Court that "while appreciating the evidence of witness considering him as the interested witness, the court must bear in mind that the term 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some other reason".[19] Referring to the evidentiary value of testimony of a sole witness, the

15 (2011) 10 SCC 604.
16 *Id*. at 605.
17 *Ibid.*
18 (2011) 10 SCC 158.
19 *Id*. at 162 quoting *Kartik Malhar* v. *State of Bihar* (1996) 1 SCC 614.

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court stressed that the same can be acted upon provided the single witness is wholly reliable; only in cases of doubts, the courts should insist on corroboration. The Supreme Court cited a number of cases to reiterate the principle that the legal system lays emphasis on "value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses".[20] The apex court, thus, endorsed the competence of courts to fully and completely rely on a solitary witness and record conviction, and conversely, to acquit the accused in spite of testimony of several witnesses if not satisfied about the quality of evidence".[21]

The Supreme Court also found favour with the settled legal proposition that "minor contradictions, inconsistencies, omissions or improvements on trivial matters without affecting the case of the prosecution should not make the court to reject the evidence in its entirety".[22] Based on the same, all omissions/contradictions pointed out by the appellants' counsel were held to be trivial in nature, which did not go to the root of the cause. The submissions of the appellants that it was not possible for two persons to cause 33 injuries on the person of the deceased, and therefore, the villagers could have caused these injuries were discarded by the court. The Supreme Court affirmed the findings of the lower courts as it found no reasons to interfere with their judgments.

Shivlal v. *State of Chhattisgarh*[23] relates to the murder of a villager owing to factional rivalry with another group in the village. Out of the 14 persons charged under sections 147, 148 and 302 read with 149 IPC, nine were acquitted by the trial court and four more were acquitted by the high court. The present appeal was by the remaining two persons whose conviction and sentence was upheld by the high court. The Supreme Court while analyzing the evidence pointed out that grave irregularity existed in various aspects of the case. Not even a single accused was named in oral complaint made to the police at the time of incident. There was no eyewitness except PW 9, whose evidence was considered unreliable on a rather questionable ground of her ignorance and illiteracy. The testimony of other witnesses was discredited and recovery of weapons was also doubtful. Further, the court pointed out that the mandatory requirement of sending a copy of the FIR to *ilaqa* (local) magistrate was not complied with. Placing reliance on *State by Inspector of Police, Tamil Nadu* v. *N. Rajamanickam,*[24] which had identical factual matrix, the court acquitted the appellants believing them "to be entitled to benefit of doubt".

Culpable homicide not amounting to murder

In villages, property disputes are common as evident from the facts of *Gurdial Singh* v. *State of Punjab.*[25] There was an altercation over construction of a drain. When the measurement was being taken tempers ran high and a fight ensued resulting in death and injuries. The trial court convicted the appellant accused under section 302 read with section 34 IPC and was sentenced to life imprisonment. The high

20 *Id.* at 163.
21 *Ibid.*
22 *Id*. at 162.
23 (2011) 9 SCC 561.
24 *Id.* at 568.
25 (2011) 2 SCC 768.

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court dismissed the appeal. The Supreme Court altered the conviction to one under section 304 part II, read with section 34 as there was no intention to kill and the weapon that had been used - *gandasa* and *dangs* - are the ones which the villagers usually carry. The injury which was inflicted was from the blunt side of the *gandasa*. If intention was definite, a sharp edged weapon would have been used. In contrast is the decision in *Gurudev Singh* v. *State of M.P.*[26] where it was held not to be a sudden attack as it was proved that the accused persons were armed with deadly weapons like *lohangi* and *kirpan* at the time of the incident.

In *Yomeshbhai Pranshankar Bhatt* v. *State of Gujarat*[27] the appellant accused went to her maid's house as she had not turned up for work. The accused asked her to resume duty and on her refusal to do so got enraged and sprinkled kerosene on her and lit the matchstick. The fact that the maid was wearing a polyester saree made matters worse. However, drawing an analogy from the "thin skull principle" it is submitted that this fact should not be of much relevance. The court reasoned that "it is nobody's case that the appellant went to the house of the deceased, being armed with any weapon or was carrying any inflammable substance. Therefore, any premeditation on the part of the appellant in causing any bodily harm or injury to the deceased is *admittedly* ruled out".[28] The court altered the conviction from section 302 to section 304 part II. It is submitted that the intention should have been presumed to be there at the time of the incident and this factor should not have been brushed aside by noting that the appellant must have lost self-control on some provocative utterances of the deceased. Would the case be decided in the same manner if there was a role reversal?

The factual matrix of *Ajit Singh* v. *State of Punjab*[29] led to a split verdict. The divergence of views was that Gyan Sudha Mishra J was of the opinion that the case was covered under exception 4 to section 300 and so qualified to be culpable homicide not amounting to murder, whereas H.S Bedi J was for conviction under section 302 IPC. As per the record Laxmi Devi (the deceased) along with her son and another person was cutting fodder in the *kinnu* field of Ajit Singh, the appellant. Ajit Singh was present in the field along with his servant. He accused Laxmi Devi of spoiling his fields and soon they were abusing each other. Things came to such a pass that Ajit Singh ordered his servant to get a spade. Laxmi Devi kept up with her volley of abuses and Ajit Singh told the servant to hold her and gave her deadly blows with the spade. When alarm was raised and one person (prosecution witness) ran towards them, the appellant and the servant fled from the spot. Laxmi Devi succumbed to her injuries in the hospital after 3-4 days. Mishra J was of the opinion that the case fitted well under exception to section 300 which states that "culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner". The judge brought to her aid the case of *Patel Rasiklal Becharbhai* v. *State of Gujarat*[30] wherein there was a

26 (2011) 5 SCC 721.
27 (2011) 6 SCC 312.
28 *Id.* at 318. (Emphasis added).
29 (2011) 9 SCC 462.
30 1993 Supp (1) SCC 217.

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quarrel and agricultural instruments were used as weapons and the court upholding the appeal against acquittal had held that the "weapons which the accused respondents were carrying with them were agricultural implements which the farmers usually carry and possess". It is submitted that *Patel* has to be distinguished from the present one as Ajit Singh was not carrying that spade which he used in the course of a sudden fight. He specifically asked his servant to get the spade and it is an established principle that intention can be formed at the spur of the moment and has to be inferred from the circumstances. Hence it is submitted that the views of H S Bedi J is more in sync with the provisions of the statute. However, the final verdict by the larger bench is awaited.

Motive

The apex court in *State* v. *Mahender Singh Dahiya*[31] reiterated that motive is not relevant in criminal law when there is sufficient evidence to prove an offence. But absence of motive assumes significance in the case of circumstantial evidence. However, if motive is proved in a case which relies upon testimony of eye witnesses, it strengthens the prosecution case.[32]

Honour killings

India has the dubious distinction of crimes which may be termed as *sui generis*. First it was dowry death and now honour killing which is nothing but plain and simple murder. What distinguishes the latter is the element of family honour. In *Bhagwan Dass* v. *State (NCT of Delhi),*[33] the father was very annoyed with his daughter for having left her husband and staying in a live-in relationship with her uncle. To save the family honour he strangulated her with an electric wire. The appellant-father was convicted for murder under section 302 IPC both by the trial court as well as the high court. The apex court, speaking through Markandey Katju J, while dismissing his appeal voiced its strong disapproval thus:[34]

> [W]e would like to state that "honour" killings have become commonplace in many parts of the country, particularly in Haryana, western Uttar Pradesh and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. We have held in *Lata Singh case* (2006) 5 SCC 475 that there is nothing "honourable" in "honour" killings, and they are nothing but barbaric and brutal murders by bigoted persons with feudal minds. In our opinion honour killings, for whatever reason, come within the category of the rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilised behaviour. All persons who are planning to perpetrate "honour" killings should know that the gallows await them.

31 (2011) 3 SCC 109.
32 See *Sheo Shankar Singh* v. *State of Jharkhand* (2011) 3 SCC 654 at 663.
33 (2011) 6 SCC 396.
34 *Id*. at 404-05.

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In *Ashok Kumar Todi* v. *Kishwar Jahan*[35] there was an inter caste marriage and the father of the girl being an influential man got the police to harass the couple. Ultimately, the boy's dead body was found. The police's role in the entire episode had been dubious. They repeatedly called on the couple and interfered in their conjugal life which they had no business to do; in fact they were supposed to prevent others from doing so. The CBI filed a report before the single judge of the high court which indicated that the deceased committed suicide and sought permission to file charge sheet against the accused persons under section 120-B read with sections 306 and 506 IPC. The single judge granted liberty to the CBI to file the charge sheet. Liberty was also granted to the CBI to conduct further investigation before it actually files the charge sheet. On appeal, the division bench ordered fresh investigation by treating the complaint filed by the brother of the deceased as FIR and register a case of murder. On appeal to the Supreme Court, the order of the single judge was upheld as the court was of the view that it would be a futile exercise, more particularly when there was no adverse comment on the investigation carried out by the CBI. It further held that "any action against the officers of the State Police Department shall be in accordance with law and service conditions applicable to them and after affording opportunity to them". Given the peculiar caste dynamics in India it is submitted that like the *D.K. Basu* guidelines the directions in *Lata Singh* v. *State of U.P.*[36] must be mandatorily put in all police stations:

> This is a free and democratic country, and once a person becomes a major, he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

Police atrocities

Satyavir Singh Rathi, Assistant Commissioner of Police v. *State through CBI*[37] is yet another chapter in the sordid tale of police high handedness. A police party had the intention to eliminate a notorious criminal with a bounty on his head. It would have fetched them a hefty cash reward and accelerated their promotions. But there was a mistake of identity and they ended up killing innocent persons in

35 (2011) 3 SCC 758.
36 (2006) 5 SCC 475 at 480.
37 (2011) 6 SCC 1.

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the heart of the capital city of Delhi.[38] The police party immediately after the incident realized its mistake and cooked up a story that there was firing on them and they shot back in private defence. The investigation itself was a challenging task since some of their own were involved and even the trial court hinted that there was some connivance between the appellants and the investigation team. The policemen were held guilty under section 302 read with section 34 of the IPC.

The case is an eye opener since the police are often accused of fake encounters. The facts of the case show the grim reality wherein the police behave as law unto themselves and so are not keen on making the person surrender and be subjected to the rigors of law but flout article 21 with impunity. The court's observation in a like case is self explanatory:[39]

> We are of the view that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake "encounters" are nothing but cold-blooded, brutal murders by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.

Haricharan v. *State of M.P.*[40] is yet another blot on our policing. The deceased Mathura was taken into custody illegally flouting *D.K. Basu* guidelines which adorn the walls of all police stations. He was tortured in an inhuman manner even to the extent of giving electric shock to his scrotum with the intention of extracting confession. The Supreme Court dismissing the appeal by the appellant accused holding him guilty under section 304 part-II held thus:[41]

> The Supreme Court, as the custodian and protector of the fundamental and the basic human rights of the citizens, would view with deep concern any allegation made against the police officials about custodial crimes. In the present case, we are dealing with the torture of a detenu, resulting in death. Using any form of torture for extracting any kind of information from a suspect was declared to be "neither right, nor just, nor fair". It was specifically laid down that though a crime suspect must be interrogated—indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law, he cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information or extract a confession. The aforesaid observations of this Court, in our opinion, have been totally disregarded in the present case.

38 See s. 301 IPC.
39 *Prakash Kadam* v. *Ramprasad Vishwanath Gupta* (2011) 6 SCC 189 at 197.
40 (2011) 4 SCC 159.
41 *Id*. at 167.

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IV OFFENCES AGAINST WOMEN AND CHILDREN

Bigamy

Section 494 of the IPC upholds the sanctity of the institution of marriage making a monogamous alliance sacrosanct. In *A. Subhash Babu* v. *State of A.P.*,[42] the appellant had contracted a second marriage by fraud, averring that his first wife had died and the children were studying in the hostel. Not only did he contract the second marriage by fraudulent means but also indulged in dowry demands and cruelty. The second wife lodged an FIR under sections 498-A and 420 IPC. Since the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992 makes the offences under sections 494 and 495 cognizable, the police officer after investigation, filed a charge sheet in respect of the alleged commission of offences by the appellant under sections 494, 495, 417, 420 and 498A of the IPC. The court after a thorough analysis of sections 494 and 495, the constitutional provisions and to the submission that the aggrieved party to complain under section 198 of the Cr PC is the first wife, held thus:[43]

> Once the First Schedule to the Code of Criminal Procedure, 1973 stands amended and the offences punishable under sections 494 and 495 IPC are made cognizable offences, those offences will have to be regarded as cognizable offences for all purposes of the Code of Criminal Procedure, 1973 including for the purpose of section 198 of the Criminal Procedure Code.

As far as the offence under section 498-A was concerned, the high court quashed the proceedings pending before the magistrate on the ground that under section 11 of the Hindu Marriage Act, 1955, the second marriage was void and hence the complainant not being the "wife" such a charge could not hold. The apex court, castigating the high court's view drew attention to apex court's judgment in *Reema Aggarwal* v. *Anupam*[44] wherein the court held: [45]

> Such legalistic niceties would destroy the purpose of the provisions. Such hair splitting legalistic approach would encourage harassment to a woman over demand of money… It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the control of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or concern her in any manner or any of the purpose enumerated in the relevant provisions – sections 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of sections 498-A and 304 B IPC.

The apex court dismissed the appeal and set aside the high court judgment quashing the complaint under section 498-A. It indeed is a welcome judgment as

42 (2011) 7 SCC 616.
43 *Id*. at 633.
44 (2004) 3 SCC 199.
45 *Id*. at 210.

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anything less would have been a double jeopardy for the woman. She was enticed into a fraudulent marriage and then she would have no remedy as such in law to book her erring husband. As they say procedural law is handmaid and not mistress of law.

Section 304 B

In *Jaladhar Mondal* v. *State of West Bengal*[46] the deceased Roma Mondal died allegedly by catching fire at the matrimonial house. What was indeed surprising was that none of the other inmates of the house which included the husband of the deceased and his parents sustained any burns. The medical evidence proved that burn injuries were post mortem in nature and the death was caused by injuries due to manual strangulation by more than one person. The redeeming feature of this case unlike *Amar Singh* v. *State* of *Rajasthan*[47] was that the charges were framed under sections 302/201 IPC and alternatively under sections 304-B/498-A IPC. The apex court concurred with the finding of the trial court and the high court and held the appellant[48] guilty of murder under section 302 IPC.

In cases of death in matrimonial home, direct evidence is not available and the court has to rely on circumstantial evidence and if the chain is complete then the conviction can be made solely on its basis. This was the principle reiterated in *Birender Poddar* v. *State of Bihar*[49] where a woman died which according to the doctor's report was a homicidal death.

In *Bachni Devi* v. *State of Haryana*[50] the appellants were held guilty of causing dowry death as the victim had died within three months of the marriage and there was evidence that there was demand for a motor cycle and on failing to meet that demand she was continuously harassed. The case squarely fell within the contours of section 304-B IPC.

The court must not get swayed by allegations of dowry demand but must sift evidence to reach the truth. In *Nachhattar Singh* v. *State of Punjab*[51] there was an unnatural death of a woman within seven years of marriage. The prosecution story of dowry demand was not supported by proof and hence the high court held that section 304-B was not made out as held by the trial court but convicted the accused under section 306 IPC for abetting suicide. On appeal, the Supreme Court set aside the conviction and noted that merely "because the appellants were of the opinion that the deceased as a good daughter-in-law should look after them in old age could not be said to be an abetment of suicide". A prudent person would not commit

46 (2011) 6 SCC 382.

47 (2010) 9 SCC 64. In this case there was no charge under s. 302 IPC and so the apex court felt constrained to reduce the punishment to ten years.

48 The father and mother of the appellant had died during the pendency of the appeal.

49 (2011) 6 SCC 350. See also *Shindo* v. *State of Punjab* (2011) 11 SCC 517 where due to technical infirmities as the doctor not being cited as witness etc. the accused appellants were acquitted.

50 (2011) 4 SCC 427.

51 (2011) 11 SCC 542. See also *Bansi Lal* v. *State of Haryana* (2011) 11 SCC 359 where there was conviction under s. 304 B and the suicide note was discarded as no evidence was led.

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suicide on this and the aim of the law is not to take difference of opinion within a family on everyday mundane matters as abetment to commit suicide.

Rape

In *Mohd. Imran Khan* v. *NCT of Delhi*,[52] the trial court convicted two accused under sections 366 and 376 of IPC and the high court confirmed charge under section 376. The victim-prosecutrix, a school student at the time of the incident, had called up her parents seeking permission to stay overnight at a female classmate's place. When she did not return even the next day, police was informed and she was recovered along with the appellants. In appeal before the Supreme Court, the appellants contended that the prosecutrix was over 16 years of age and it was a case of consent. The Supreme Court highlighted the fact that the accused persons showed her a knife and told her in case she tried to run away or raise noise, they would kill her. As a result, she could not raise a hue and cry as she was totally in a position of shock. Further, the apex court relied on the birth certificate of the prosectrix as corroborated by the chief medical officer. On the question of credibility of the sole testimony of the prosecutrix, the Supreme Court held that "the prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury… her evidence need not be tested with the same amount of suspicion as that of an accomplice" but it should be treated at par with an injured complainant or witness.[53] The apex court exhorted the courts to be responsible and sensitive in rape cases as "rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore…non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence".[54] *State of Punjab* v. *Gurmit Singh*[55] was quoted favourably by the apex court on the point that courts "evaluating evidence (must) remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her". Thus, the law that emerges on the issue is to the effect

52 (2011) 10 SCC 192.

53 *Id.* at 200.

54 *Ibid*. Referring to *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, AIR 1990 SC 658; *State of U.P.* v. *Pappu @Yunus,* AIR 2005 SC 1248 and *Vijay @ Chinee* v. *State of M.P.* (2010) 8 SCC 191.

55 AIR 1996 SC 1393. The court further derived assistance, on an arguable point, from *Wahid Khan* v. *State of Madhya Pradesh* (2010) 2 SCC 9 where it was observed that "it is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing there from. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-looking as the western countries are".

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that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration.

The Supreme Court also castigated the suspect role played by the investigating officer in the case and referred to a number of cases to drive home the point "that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it… Criminal justice should not be made a casualty for wrongs committed by investigating officers… who are supposed to investigate an offence avoiding any kind of mischief or harassment to either party".[56] On the question of sentence, the apex court agreed with high court in awarding a sentence of five years to the convict, which is less than the minimum sentence prescribed under section 376.

In *Prem Prakash* v. *State of Haryana*[57] the prosecutrix had gone to attend the call of nature along with her five year old brother and was kidnapped and gang raped by three persons. The police refused to register an FIR in the case. The father of the prosecutrix then went to the sub-divisional headquarters and approached the deputy superintendent of police where again they faced total apathy. It was only after a written application to the sub-divisional magistrate that the criminal law machinery got into action. It is indeed a national shame that the police just refuses to file an FIR which is the starting point of criminal inquiry.[58] The Supreme Court while dismissing the appeal which among other things averred that there was discrepancy in her statement reiterated that the "prosecutrix cannot be expected to make a perfect statement after a lapse of time without even a normal variance".[59] Moreover, the statement was not read out to her and no thumb impression was taken and it was not even produced before the court by the prosecution. The court rightly held that the lacuna on the part of the investigation agency cannot be plugged by shifting the burden on the prosecutrix. As long as (as in the instant case) the statement is supported by prosecution witnesses as well as medical records, interference with the findings of the trial court and high court is not called for.[60] The court showed its concern towards the apathy in the functioning of investigating agencies in heinous crimes when they add insult to injury by refusing to register an FIR. The court lamented that "we do express a pious hope that such occurrences will not be repeated in any police station in the country".

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56 Quoting *State of Karnataka* v. *K. Yarappa Reddy*, AIR 2000 SC 185 and citing *Jamuna Chaudhary* v. *State of Bihar*, AIR 1974 SC 1822; *State of Bihar* v. *P.P. Sharma,* AIR 1991 SC 1260 and *Babubhai* v. *State of Gujarat* (2010) 12 SCC 254.

57 (2011) 11 SCC 687.

58 The Supreme Court in *Lalita Kumari* v. *Govt. of U.P* (2008) 7 SCC 164 had issued directions for the registration of FIRs. In its order in *Lalita Kumari* v. *Govt. of U.P.* (2011) 11 SCC 331 the court has requested the Chief Justice of India to constitute a constitutional bench to deal with the matter.

59 *Supra* note 57 at 694. See also *Srivalla Srinivasa Rao* v. *State of A.P.* (2011) 8 SCC 113 where it was held that rape brings enormous shame to victim and it is after much persuasion that a rape victim goes to police, and if some delay is occasioned that cannot in any way detract from other credible evidence.

60 They were charged with sections 376 (2)(g) and 366 and were sentenced to rigorous imprisonment for 10 years and a fine of Rs. 500/- each and also two year rigorous imprisonment for kidnapping. Both the sentences were to run concurrently.

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There was accusation of a forcible marriage in *State of Maharashtra* v. *Ravikant Shankarappa Patil*[61] and *Murugan* v. *State of Tamil Nadu*.[62] In the former case, it was alleged that the respondent accused solemnized *nikah* with the alleged victim and subsequently raped her. She was a well educated girl from a well to do family. The prosecution theory could not stand as FIR was lodged after about a month and the girl's natal family had attended the *nikah* and were supposedly in the same house when the girl was ravished. The accusation that the *nikah* was solemnized at gun point was never reported to the police. In contrast, in the latter case, the victim was a minor who was kidnapped by the appellant and was then forced to marry him and was raped. The apex court on the basis of evidence ruled that the girl was a minor and there was cross-examination at length and she stood by her testimony. Under such circumstances the court held that the appellant accused was rightfully convicted under sections 366 and 376 IPC.

Outraging modesty

Kailas v. *State of Maharashtra*[63] is a very interesting case. The facts of the case are very painful but the judgment is indeed interesting. A tribal woman belonging to Bhil tribe had an illicit relationship with a member of the higher caste and had a daughter from that relationship. The boy's marriage was fixed with a girl of the same social standing and the accused person's family enraged by the fact that this tribal woman is having an affair with this boy and beat her up and paraded her naked in the village. As far as IPC is concerned, though the act was heinous but it could only fit into outraging the modesty of a woman. Now the range of offences under section 354 extends from pinching of buttock[64] in a party to parading naked in the village. The accused persons were charged under sections 354, 452, 323, 506 part II read with section 34. They were also charged under the Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which is more penal in nature. The additional sessions judge convicted them under sections 452, 354, 323, 506 part II read with section 34 IPC and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 150/-. They were also sentenced under sections 323/34 IPC and sentenced to three months' RI and a fine of Rs. 150/-. The appellants were further convicted under section 3 of the SC/ST Act and sentenced to rigorous imprisonment for one year and to pay a fine of Rs.100/-. In appeal by the accused persons to the high court the conviction under SC/ST Act was dropped and the one under the IPC provisions was upheld. Against this also the accused persons appealed to the Supreme Court. Surprisingly, the state did not appeal against dropping of charges under the SC/ST Act. While dismissing the appeal by the accused appellants the court entered into a long discussion as regards the history of tribal people as to how they were the original inhabitants of this land and all others are immigrants. The court went on to castigate Guru Dronocharya for asking for Eklavya's right thumb as "*Guru Dakshina*". It is indeed shocking that the court was not able to give justice to this poor woman. Even the state failed in its duty by not

61 (2011) 6 SCC 416. See also *Alamelu* v. *State* (2011) 2 SCC 385.
62 (2011) 6 SCC 111.
63 (2011) 1 SCC 793.
64 See *Rupan Deol Bajaj* v. *K.P.S. Gill*, 1995 SCC (6) 194.

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filing an appeal against acquittal under SC/ST Act and for enhancement of punishment. The scholarship of the court could have been better appreciated if justice was meted out to the hapless woman by awarding exemplary punishment to the accused persons.[65]

Domestic violence

A very important judgment was passed in the year as far as women are concerned. In cases of offences under section 304-B, it is not only the husband but also, at times, the in-laws including the mother-in-law who are guilty. The apex court in *Sandhya Manoj Wankhade* v. *Manoj Bhimrao Wankhade*[66] rightly held that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005.

Unnatural offences

Childline India Foundation v. *Allan John Waters*[67] is a sordid saga of exploitation of children in the very homes which are established for the children in need of care and protection. The children were sexually and physically abused by the accused. The trial court convicted them for offences under section 377 of the IPC. The high court, however, allowing the appeal acquitted them and took a very narrow view of sexual exploitation falling under the provisions of section 377. After a perusal of the dictionary meaning of carnal intercourse and various decisions came to the conclusion that the said offence was not made out against the accused! The Supreme Court, allowing the appeal, upheld the conviction awarded by the trial court under section 377 IPC and exhorted the central, state and union territories to protect children from such evils. It is submitted that the case sends shivers down one's spine and what is frustrating is that we still have laws which could be interpreted by the courts to acquit the accused persons based on technicalities. It is submitted that Parliament must wake up, and given that child sexual abuse is on the rise, must make immediate laws to deal with child sexual exploitation. It must be remembered that sexual abuse is not confined to penetration alone and it can take myriad forms which scar the very life of these children. The state is under a moral and a constitutional duty to protect the children.

V GROUP LIABILITY

Common intention

Section 34 of the IPC provides that if two or more persons intentionally do an act jointly, the position in law would be just the same as if each of them has done the offence individually by himself. This doctrine of constructive criminal liability is well-established in law. In *Mahesh* v. *State of MP*[68] the appeal was filed by the

65 See *Keesari Madhav Reddy* v. *State of Andhra Pradesh* (2011) 2 SCC 790 where the Supreme Court awarded life imprisonment under s. 302 wherein the high court had convicted him under s. 304 B.

66 (2011) 3 SCC 650.

67 (2011) 6 SCC 261.

68 (2011) 9 SCC 626.

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co-accused in a murder case, who were acquitted by the lower court but convicted, on appeal, by the high court along with the main accused under section 302 read with section 34 of IPC. The Supreme Court rejected the contention of the co-accused that they did not share a common intention with the accused and pointed out that "the very fact that appellants were holding the hand of the deceased and also at the same time exhorting main accused to bring the gun and to fire upon the deceased so as to kill him speaks volume and also prove and establish that they have done the act intentionally so as to see that the deceased is fired upon and shot dead".[69] The active participation of the accomplices thus established, the court negated the lack of motive by pointing out that enmity between the party already existed and the same had given rise to an altercation which was sufficient to constitute a motive.[70] All other aspects like delay in recording statements by police, discrepancy in FIR etc. being fully explained, the apex court upheld the order of conviction and sentence.

In *Deepak Verma* v. *State of Himachal Pradesh*,[71] the two accused - A1 and A2, who were brothers, came to the house of PW2 on a scooter, armed with a double barreled gun and shot his daughter Kamini Verma and brother-in-law Rakesh Kumar; and injured his mother Sumitri Devi. Sonia, Rakesh Kumar's wife was present on the occasion but she was left unharmed. Rakesh Kumar died on his way to the hospital but Kamini survived and gave her statement in the hospital to a police official. She too later died while being transferred to another hospital. Later, A1 and A2 were arrested along with the scooter and the weapon used in the act. The present appeal arose against their conviction under section 302 read with section 34 of IPC and also under section 27 of the Arms Act, 1959. The trial court sentenced them to life imprisonment and fine and the same was confirmed by the high court. The first and foremost contention of the appellants before the apex court was that the case set up by the prosecution was false and fabricated. The court, however, rejected the contention that despite the two accused being well-known to the entire family, all the family members remained tight-lipped till the eventual disclosure of the names of the two accused by Kamini Verma herself at the hospital, the family members must be deemed to have been tutored by the investigating officers. It was reasoned by the court that "none of the close family members could have been expected to proceed to the police station to lodge a report when both the injured were critical" and required immediate attention.[72] The court further failed to find any contradiction in the statements of the three eyewitness' testimonies and that of Kamini Verma. The court refused to accept the stand of the defence that A2 did not share a common intention with A1. It saw no merit in the argument that since A1was carrying the gun all the time and he fired all the shots, A2 could not be held to be guilty since he was a mere by-stander, and had no role whatsoever in the commission of the crime in question. The apex court referred to the fact that A1 and A2 came together for commission of crime and left together after committing the same. Moreover, A2 handed over two spare bullets after the first set of bullets were shot

69 *Id*. at 631-32.
70 *Id*. at 630-31.
71 (2011) 10 SCC 129.
72 *Id*. at 137.

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by A2 which clearly reflected presence of common intention.[73] The defence counsel had also argued that common intention of A2 was very unlikely in light of the fact that he had no motive to commit the crime and any motive, if at all present, was on the part of A1 since he was the one whom Kamini Verma refused to marry. The Supreme Court cleared the misconception by recourse to the principle that "proof of motive is not a *sine qua non* before a person can be held guilty of the commission of a crime. Motive being a matter of the mind, is more often than not, difficult to establish through evidence".[74] Oral evidence on the issue being extensive and satisfactory, the argument that section 34 should not apply in the case to include A2 was not deemed meritorious. All other discrepancies in the dying declaration, overwriting etc. being too trivial to brush aside the overwhelming oral evidence produced by the prosecution, the order of conviction and sentence passed by the high court was affirmed by the apex court.

The case of *Mrinal Das* v. *State of Tripura*[75] involved a political murder of a local CPI(M) activist when he was returning after attending a public meeting by a group of rival student faction. The trial court convicted two of the accused from amongst the accused group under section 32 read with section 34. The high court, apart from upholding their conviction and sentence, also vacated the acquittal of four others of the group and convicted them similarly. The question, *inter alia*, before the Supreme Court was whether the four accused persons acquitted by the lower court but convicted by the high court shared a common intention with the main accused so as to be brought under the purview of section 34. The Supreme Court clarified that "the burden lies on prosecution to prove that the actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concept".[76] The court took it as settled position that in order to convict a person constructively liable, it is not necessary that individual act of accused persons has to be proved by direct evidence, nor that acts of accused charged jointly must be the same or identically similar, or, to prove that each and every one of them had indulged in overt acts. The apex court reiterated the principle that "there must be prior meeting of minds… (which) can also be developed at the spur of the moment but there must be pre-arrangement or pre-meditated concept". It stressed the point that common intention has to be inferred from proved facts and circumstances and once there exists common intention, mere presence of the accused persons among the assailants would be sufficient proof of their participation in offence.[77] After stating the principles, and having discussed in detail the disclosure made by the approver (PW 6), coupled with statement of eyewitnesses, the court made it clear that the assailants had planned and remained present on shore of river to eliminate the deceased.[78] The judgment of the high court in invoking section 34 for convicting six accused including two convicted appellants was thus, upheld by the apex court.

73 *Id*. at 142.
74 *Id*. at 133.
75 (2011) 9 SCC 479.
76 *Id.* at 507.
77 *Ibid.*
78 *Id*. at 508.

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In *Nand Kishore* v. *State of M.P.*[79] the court explained constructive liability under section 34 thus:[80]

> Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and "mens rea" as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and different.

Common object

In *Rama Chandran* v. *State of Kerala*[81] apart from other issues the question was one of constructive liability (invariably erroneously the courts use the term vicarious liability instead of constructive liability for common intention and common object) under section 149. There was enmity between the two groups and criminal cases were pending in courts. The appellants formed an unlawful assembly to kill one Sobhanan and managed to catch hold of him. They inflicted serious injuries on him and hearing the hue and cry, Shobanan's father Kuttappan and one Babu reached there. They also attacked them and Kuttappan succumbed to his injury. The trial court convicted the appellants under sections 143,147, 148, 307, 323, 324, 449, 427 and 302 IPC read with section 149. The high court in appeal modified the order of the trial court and conviction of three accused under section 302 IPC was set aside and for other charges the appeal was dismissed. The moot question advanced by the appellant was that a distinction was sought to be made insofar as one set of appellants stood convicted under sections 302/149 and another set of appellants stood convicted under sections 307/149 IPC. The Supreme Court after a careful perusal of relevant case law on unlawful assembly observed thus:[82]

> [W]here general allegations are made against a large number of persons the court would categorically scrutinize the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under the second part of section 149 IPC, if the offence was such as the members

79 (2011) 12 SCC 120.

80 *Id.* at 126.

81 (2011) 9 SCC 257.

82 *Id*. at 269. See also *State of Rajasthan* v. *Arjun Singh* (2011) 9 SCC 115 and *State of Rajasthan* v. *Abdul Mannan* (2011) 8 SCC 65.

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> knew was likely to be committed. Further inference has to be drawn as to what was the number of persons, how many of them were merely passive witnesses; what were their arms and weapons. The number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident.

The court dismissed the appeal on the basis of the above mentioned observations since the common object to kill may have been developed at the time of incident and some, as per the evidence, did not participate in that common object.

In *Waman* v. *State of Maharashtra*[83] while upholding the conviction under section 302 read with section 149, the court reiterated that whenever it convicts any person or persons of any offence with the aid of section 149, a clear finding regarding the common object of the assembly must be given and the evidence disclosed must show not only the nature of the common object but also that the object was unlawful. In order to attract section 149 it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in furtherance of the common object. If members of the assembly knew or were aware of the likelihood of a particular offence being committed in furtherance of a common object, they would be liable under section 149.

The facts of *Noorul Huda Maqbool Ahmed* v. *Ram Deo Tyagi*[84] are extraordinary. The very protectors turned perpetrators.[85] The state had to file complaint against 18 of its police officers who were members of the Special Operations Squads (SOS) for offences punishable under sections 302 and 307 read with section 34 of the IPC. The trial court discharged the accused persons but the state did not file any appeal. However, a private party claiming to be a victim challenged the acquittal which was dismissed by the high court and the same party came before the Supreme Court by way of appeal. The factual matrix revealed that the incident related to the Bombay riots which were the issue of inquiry by the Sri Krishna Committee. The atmosphere was charged with communal riots and there was firing from Suleman Bakery on the police picket. A wireless message was sent and a squad of SOS which is specifically trained for such operations was summoned. The respondent was the officer of the squad at that relevant point. He asked the squad to enter the Suleman Bakery. They knocked at the door and finally broke it open and entered the premises and opened fire in which eight persons were killed. The appellant contended that the SOS be declared an unlawful assembly and the members be booked for homicide as according to him the situation was normal and it was just with a view to teach a lesson to the members of a particular community that the respondent gave orders to SOS to open fire. Sri Krishna J had headed the enquiry under the Commission of Inquiry Act, 1952 to look into the alleged atrocities by the police and had arrived at a conclusion that the police force had on many

83 (2011) 7 SCC 295.

84 (2011) 7 SCC 95.

85 See also *Ravindra Pal Singh* v. *Ajit Singh* (2011) 4 SCC 238 and *Ravindra Pal Singh* v. *Santosh Kumar Jaiswal* (2011) 4 SCC 746.

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occasions used more force than was necessary. The Supreme Court, on appraisal of the facts of the case, could not concur with the complainant that the situation was normal and the SOS was an unlawful assembly. The court clarified that the investigation agency may take advantage from the views of the commission but it has no evidentiary value in criminal cases. The apex court agreed that some of the police officers may have acted in excess of their powers but that does not make the SOS an unlawful assembly out to kill innocent people. Since no specific act could be attributed to respondents the appeal was dismissed.

It is submitted that in cases of communal riots the job of the law enforcers becomes very difficult and it is for the court to carefully sift through evidence so that justice prevails. However, somewhere, it is felt that there is lacuna in the training regimen. Taking away life is an extreme step and since these squads are specifically trained for such operations the casualty rate must be at the lower side.

In order to hold a conviction under section 149 five or more persons must be there to constitute an unlawful assembly. In *Shaji* v. *State of Kerala,*[86] out of the six persons named, two were acquitted by the trial court and only four were convicted under section 302 read with section 149. The court quoting from a constitution bench decision in *Mohan Singh*[87] held that it is not necessary that five or more persons must be convicted before a charge can be successfully brought home to any members of the unlawful assembly. The court explained thus:[88]

> It may be that less than five persons may be charged and convicted under Sections 302/149 if the charge is that the persons before the court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted.

However, the court affirmed that in order to attract section 149 IPC the court must give a clear finding regarding the nature of common object and that the object was unlawful. In the absence of such a finding it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

In *Amerika Rai* v. *State of Bihar*[89] the question was whether the appellant and others formed an unlawful assembly insofar as the appellant did not use any firearms

86 (2011) 5 SCC 423. See also *Kuldip Yadav* v. *State of Bihar* (2011) 5 SCC 324.
87 AIR 1963 SC 174.
88 *Supra* note 86 at 426.
89 (2011) 4 SCC 677.

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which resulted in killing. He was merely standing and at the most exhorted others for bringing the guns. The court holding the appellant constructively liable clarified constructive liability thus: [90]

> The law of vicarious liability under section 149 is crystal clear that even the presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly.

The court in *State of Kerala* v. *Raneef*[91] stated that mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to acts of violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resorting to imminent violence. Similar question arose in *Indra Das* v. *State of Assam*.[92] In the instant case the appellant was a member of ULFA but it could not be proved that he was an active member and not merely a passive member. Law enacted to tackle terrorism made membership of a banned organization illegal. However, the fundamental rights guaranteed under the Constitution gives a right to association. Section 3(5) of Terrorist and Disruptive (Prevention) Act, 1987 and section 10 of the Unlawful Activities (Prevention) Act, 1967 on their plain language make mere membership of a banned organization criminal. It was held that ordinarily literal rule of interpretation is to be followed in construing a statutory provision, but if the literal interpretation makes the provision unconstitutional, one can depart from it so that the provision becomes constitutional. The court's observations are noteworthy:[93]

> The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of the court should be to try to sustain the validity of the statute by reading it down.

Hence the court departed from the literal rule of interpretation and read down the provisions of these Acts to make it constitutional. The appellant was, accordingly, set free.

VI GENERAL DEFENCES

In *Elavarasan* v. *State*[94] the accused took the plea of insanity. The court held that the mere fact that the appellant had assaulted his wife, mother and child and had not run away from the place of occurrence was not *ipso facto* suggestive of his being an insane person. The burden of proof in case of general defense is on the defendant but the defendant in the present case, could not prove so.

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90 *Id*. at 682.
91 (2011) 1 SCC 784.
92 (2011) 3 SCC 380.
93 *Id*. at 388.
94 (2011) 7 SCC 110.

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In *Surendra Mishra* v. *State of Jharkhand*[95] the accused-appellant shot the deceased from point blank range. The accused pleaded insanity. From the medical record what could be proved was that the accused-appellant had paranoid feeling but that too was not proximate to the date of occurrence. Explicating on defense of insanity the court observed thus:[96]

> [A]n accused who seeks exoneration from liability of an act under Section 84 of the Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Penal Code and it has mainly been treated as equivalent to insanity. But the term "insanity" carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the 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 affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer, are not sufficient to attract the application of Section 84 of the Penal Code.

VII INCHOATE OFFENCES

Criminal conspiracy

The offence of criminal conspiracy has been made a distinct offence under section 120A of the IPC. Since conspiracy involves mental element, the exact contours of which cannot be determined with certainty, in the absence of manifestation of the unlawful agreement, it becomes extremely difficult to practically prove the 'meeting of minds' and hence, the offence of conspiracy. It was held in *Satyavir Singh Rathi, ACP* v. *State*[97] that section 120B IPC constitutes an offence and positive evidence on this score has to be produced for a successful prosecution whereas section 34 does not constitute an offence and is only a rule of evidence and inferences on the evidence can be drawn.

The Supreme Court was faced with this task in *Sherimon* v. *State of Kerala*[98] where the conviction under section 324 read with section 120 B of IPC was appealed against. The appellant was the managing partner of 'City Auto Finance', a financial establishment which forwarded a loan amount of Rs. 40,000/- to PW-4 for purchase of an auto-rickshaw. PW-4 while still in arrears of the loan, sold the auto to another, who in turn sold it to the deceased. The appellant (A-4) allegedly hatched an agreement with A1, A2 and A3 to repossess the auto-rickshaw. On the day of the incident, A1, A2 and A3 under the pretext of going for a trip hired the said auto-rickshaw which was being driven by the deceased. They stopped the driver on the

95 (2011) 11 SCC 495.
96 *Id*. at 499.
97 (2011) 6 SCC 1 at 34.
98 (2011) 10 SCC 768.

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way, attacked him with knives and took away the said auto-rickshaw. Later A1 to A3 were charged and convicted under sections 302, 324, 392 read with section 120B separately. Their appeal was dismissed by the high court. The present appeal related solely to the appellant who was alleged to have entered into a conspiracy with A1 to A3 and was charged with section 324 read with section 120B.

The Supreme Court, while dwelling on the factum of conspiracy in the instant case, maintained that it was erroneous on the part of the trial court and the high court to come to the conclusion that the evidence referred to hereinabove indicated the existence of a strong motive on the part of the City Auto Finance to repossess the said auto rickshaw at any cost and irrespective of the consequences. The court paraphrased the golden rule that "there must be meeting of minds resulting in an ultimate decision taken by the conspirators regarding commission of the crime".[99] The court held that there was nothing on record to establish meeting of minds of the appellant and the other accused. The apex court did not give any weightage to PW-5, an employee of the City Auto Finance who was the only witness examined by the prosecution to prove the alleged meeting between the appellant and the other accused, since the latter turned hostile. The Supreme Court refused to conclude, only on the basis of certain documents pertaining to the said autorickshaw, that the appellant entered into a conspiracy with A-1 to A-3 to repossess the said autorickshaw because loan amount was not repaid.[100] The evidence on record being totally inadequate to sustain a charge of criminal conspiracy, the impugned judgment was set aside. However, it is submitted that it is an oversight by the court to disregard the vitality of this witness even if he later turned hostile. The witness was an employee in the company of the appellant himself which indicates that he could have been easily pressurized to change his stance. Moreover, since direct evidence of criminal conspiracy is next to impossible in most of the cases,[101] the court should have been more circumspect while rejecting the testimony of the witness even though he later turned hostile. What also appears questionable is that when the offence of criminal conspiracy was not proved, what occasioned the defence counsel's non-insistence on setting aside of payment of the fine of Rs. 1,50,000/- and what caused the Supreme Court to agree to it?

Mohd. Arif v. *State (NCT of Delhi)*[102] is a direct attack on the sovereignty of India. On 22.12.2000 at about 9.00 p.m. some intruders started indiscriminate fire on army jawans manning Red Fort which is of great historical significance to India. Three jawans lost their lives and the intruders fled. Massive man hunt was conducted. The accused were nabbed and the present appellant was convicted under section 302 read with section120 B of the IPC. It was argued that the appellant alone could not be convicted for conspiracy since all the other accused were acquitted. The court reiterated the principle that once the prosecution proves that there was meeting

99 *Id*. at 772.

100 *Ibid.*

101 See *State(NCT of Delhi)* v. *Navjot Sandhu* (2005) 11 SCC 600 and *State* v. *Nalini* (1999) 5 SCC 253.

102 (2011) 13 SCC 621.

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of minds of two persons to commit a crime, there would be an emergence of conspiracy. The court relying on facts held thus:[103]

> The fact that barely within minutes of the attack the BBC correspondents in Srinagar and Delhi were informed, proves that the attack was not a brainchild of a single person. The information reached the BBC correspondents at Srinagar and Delhi sufficiently proves that there was a definite plan and conspiracy. Again the role of other militants was very clear from the wireless message intercepted at the instance of BSF. Unless there was a planning and participation of more than one person, all this could never have happened.

Preparation and assembly for the purposes of dacoity

The criminal law ordinarily takes cognizance of offences at the stage of commission or at the stage of attempt. Mere preparation is not culpable; however, there are few serious offences where the mere preparation is enough to impute culpability. And one such offence is dacoity and the Supreme Court had the occasion to deal with it in *Birbal B. Chouhan* v. *State of Chhattisgarh*.[104] A group of persons carrying sticks tried to stop and chase two bike-riders during night time. The bikers informed the police who reached the spot and found the appellants under a tree armed with lethal weapons. Some of them escaped under the cover of darkness but the police party apprehended the rest along with arms and other articles. The Supreme Court concurred with the high court in holding the appellants guilty under sections 399 and 492 of IPC. It upheld the same as cogent and credible as the appellants were residents of different villages who had gathered with lethal arms at an unearthly hour in a desolate place under a tree with no explanation for their conduct whatsoever much less an acceptable one.[105] The apex court held that the orders under challenge did not suffer from any legal infirmity nor did they suffer from any perversity in the appreciation of evidence adduced by the parties. Hence, it affirmed the conviction but reduced the sentence from five years to three years on both counts as it appeared to be 'somewhat harsh'.[106]

Abetment

The offence of abetment is an intent loaded crime. In *M. Mohan* v. *State*[107] a lady committed suicide by hanging. The ostensible reason for suicide was that her sister-in-law did not allow her to use the family car and taunted her to get a car from the matrimonial home for her own use. So there was charge under sections 306 and 107 of IPC. The court observed:[108]

> Abetment involves a mental process of instigating a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

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103 *Id*. at 627.
104 (2011) 10 SCC 776.
105 *Id.* at 778.
106 *Ibid.*
107 (2011) 3 SCC 626.
108 *Id*. at 638.

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When people stay together, bickerings and fights are inevitable and some people's hyper sensitivity cannot be made the reasons for conviction. It is also submitted that there must be some filtering process so that the apex court does not have to deal with such frivolous cases.

VIII SOCIO – ECONOMIC CRIMES

In India consumption of illicit liquor has many times resulted in tragedy. *Chandran @ Manichan* v. *State of Kerala*[109] dealt with one such tragedy wherein 31 persons died, six were blinded and 500 suffered serious injuries due to consumption of spurious liquor. On evidence it was found that there was a criminal conspiracy to mix methyl alcohol (which is a poisonous substance) with ethyl alcohol and this concoction was mixed with toddy and sales were made through regular licensed shops. In Kerala a special legislation, the Akbari Act, 1984, is in force to deal with such nefarious practices. Section 57 A of this Act penalizes persons who mix or permit to mix any noxious substances or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drink. As in other socio-economic crimes the burden of proof is on the defense to disprove the offence. (In ordinary criminal trials the prosecution has to prove the offence beyond reasonable doubt). The court was of the opinion that the procedure, presumption and burden of proof placed on the accused was not unjust, unfair or unreasonable. After a careful perusal of the record, the apex court noted that the appellant and his brothers were involved in the manufacture of illicit arrack. The state of affairs as observed by the court is quite disturbing:[110]

> We are not only perturbed by the enormousness of the tragedy but the enormousness of the liquor trade run by A-7 (the appellant) and that was under the so-called vigilant eyes of those who had duty to stop it. The avarice is not only on the part of the accused persons, but also on the part of those who benefit from this horrible business.

The case is a sad reflection of the unholy nexus between the law enforcers and the law breakers.

IX SENTENCING

Capital punishment

It is now established in Indian criminal jurisprudence that death penalty is to be imposed only in "rarest of rare cases".[111] The exact contours of the phrase "rarest of the rare" cannot be defined and the same is left to the wisdom of judges to examine it in relation to facts of each case. The Supreme Court had the occasion to determine the scope of capital punishment in *Sham @ Kishore Bhaskarrao Matkari* v. *State of Maharashtra*[112] where the accused was convicted by the trial court under

109 (2011) 5 SCC 161.
110 *Id.* at 213.
111 *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684.
112 (2011) 10 SCC 389.

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section 302 IPC for having brutally killed his own brother, brother's wife, their son and assaulting their two other children. The high court enhanced the sentence of life imprisonment to one of death against which an appeal was preferred. Before the Supreme Court the main question was whether the extreme penalty of death sentence was warranted in the facts and circumstances of the case. The apex court took into consideration both the aggravating and the mitigating circumstances. It was pointed out before the court that the triple murders were carried out by the convict on his own kin and that too, in the dead of the night when the victims were defenceless which showed that "respondent acted dastardly and was completely depraved". Another aggravating circumstance that the court considered was "the nature of injuries which were inflicted on the child, more particularly, the injuries on his head itself showed how the respondent acted brutally showing extreme depravity and ruthlessness".[113]

Weighing against this, the apex court brought into light a number of mitigating circumstances too. Due consideration was given by the apex court to the fact that murders were not preplanned or premeditated as "no weapon, much less dangerous, was used in the commission of offence".[114] *Ajitsingh Harnamsingh Gujral* v. *State of Maharashtra,*[115] which was cited by the prosecution, was distinguished by the highest court on the ground that there was no pre-meditated plan and no bad antecedents of the accused in the instant case unlike in the one cited. The appellant, who was 28 years old at the time of the incident, had already spent more than 10 years in jail and more than five years in death cell. Further, the court showed reformist approach in maintaining that it could not be said that appellant would be a menace to society inasmuch as there was "no reason to believe that the appellant cannot be reformed or rehabilitated or would constitute a continued threat to society".[116] After weighing the balance of aggravating and mitigating factors, the court came to the conclusion that this "was not rarest of the rare case where extreme penalty is called for". The Supreme Court chose to side with the trial court "which had opportunity of noting demeanour of all the witnesses and accused, and thought it fit that life sentence would be appropriate".[117] Hence, the award of capital punishment by the high court was set aside and sentence of life imprisonment was restored.

In *Kamleshwar Paswan* v. *Union Territory of Chandigarh*[118] a father brutally killed his two children with a *lathi* in an inebriated state. The court commuted the death sentence to life imprisonment on a plea by the legal aid counsel when she submitted thus:[119]

> We cannot also ignore the fact that the appellant was a rickshaw- puller and a migrant in Chandigarh with the attendant psychological and economic pressures that so often overtake and overwhelm such persons. Village

113 *Id.* at 396.
114 *Id.* at 397.
115 (2011) 14 SCC 401.
116 *Supra* note 112 at 397.
117 *Ibid*.
118 (2011) 11 SCC 564.
119 *Id*. at 565.

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> Kishangarh is a part of the Union Territory of Chandigarh and at a stone's throw from its elite sectors that house the Governors of Punjab and Haryana, the Golf Club, and some of the city's most important and opulent citizens. It goes without saying that most such neighbourhoods are often the most unfriendly and indifferent to each others' needs. Little wonder his frustrations apparently came to the fore leading to the horrendous incident.

In another case,[120] a man poured kerosene oil on his wife and four daughters aged between 1 to 10 years in a highly inebriated state and set them on fire resulting in their death. The court was in sync with the trial court's reasoning that it was the "rarest of rare" case warranting a death penalty. But the high court had given an acquittal and the accused-respondent had been a free man for six years. The court, therefore, awarded life imprisonment owing to the peculiar circumstances.

In *Rajesh Kumar* v. *State (through Govt. of NCT of Delhi),*[121] the appellant-accused was convicted for murder of two young children in a very cruel and diabolic manner and was sentenced to death by the trial court which was affirmed by the high court. The limited issue in appeal was of the sentence. The court referred to a catena of cases dealing with mitigating and aggravating circumstances to commute the sentence to life imprisonment. It is submitted that sentencing is a value judgment and a retentionist judge always finds aggravating circumstances and the abolitionist judge the mitigating.

The modern day *mantra* is reformation and rehabilitation. But in *B.A. Umesh* v. *Registrar General, High Court of Karnataka,*[122] the court looking at the antecedents of the accused as he had been previously convicted in robbery, dacoity and rape and still committed rape and murder in the instant case, sentenced him to death penalty. The court observed:[123]

> [T]he antecedents of the appellant and his subsequent conduct indicates that he is menace to the society and is incapable of rehabilitation. The offences committed by the appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape on the victim. He did not feel any remorse in regard to his actions, inasmuch as, within two days of the incident he was caught by the local public while committing an offence of the similar type.

In *Sheo Shankar Singh* v. *State of Jharkhand*[124] the court altered the death penalty to life imprisonment as there was "nothing particularly brutal, grotesque, diabolic, revolting or dastardly in the manner of its execution". But it is submitted that the 'coal mafia' which the court refers to is very powerful and brooks no interference as is clear from the instant case. Hence, a harsher sentence between life imprisonment and death penalty is the need of the hour.

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120 *Id*. at 565-66.
121 (2011) 13 SCC 706.
122 (2011) 3 SCC 85.
123 *Id.* at 108.
124 (2011) 3 SCC 654.

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In *Mohd. Mannan* v. *State of Bihar*[125] a man who was 45 years old raped and killed in a brutal manner a girl of seven years and had tried to destroy evidence. Upholding death penalty the court observed that the appellant had stooped very low to unleash his monstrous self on the innocent, helpless and defenseless child. And the crime was such which shook the collective conscience of the society and hence fell in the "rarest of rare" category.

In contrast is *Naresh Mohandas Rajput* v. *State of Maharashtra*[126] wherein a girl aged 10 was raped and murdered by a neighbour. The apex court set aside the death penalty awarded by the high court and restored the life imprisonment awarded by the trial court.

There was a difference of opinion amongst the two judges as regards the capital punishment in *Rameshbhai (1)*[127] hence the case came up before a three judge bench in *Rameshbhai Chandubhai Rathod (2)* v. *State of Gujarat*[128] wherein the judges concurred with Ganguly J and held that given the young age of 27 years of the accused there is a chance of rehabilitation and reformation and on that count distinguished it from *Dhananjoy Chatterjee,*[129] where otherwise the facts were more or less the same. The court upheld life imprisonment, which they said, must extend to the full life of the appellant but subject to any remission or commutation at the instance of the government for good and sufficient reason.

Deterrant sentencing

As far as sentencing is concerned the submission in *Kaushalya Devi Massand* v. *RoopKishore Khore*[130] was that in cases of dishonor of cheques under section 138 of the Negotiable Instruments Act, 1881 "in order to maintain the faith of the people in the judicial system, it was only proper that a jail sentence be awarded to the respondent to serve as a deterrent to others involved in similar activities". The Supreme Court on a careful perusal of the case very wisely held thus:[131]

> We are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones.

Statutory minimum

In *Baldev Singh* v. *State of Punjab*[132] the special reasons for reducing the sentence below the statutory minimum under section 376 was that the incident (rape) occurred 14 years ago and both are now married (not to each other) and that the prosecutrix "has also two children". One fails to fathom as to what the two

125 (2011) 5 SCC 317.
126 (2011) 12 SCC 56.
127 (2009) 5 SCC 740.
128 (2011) 2 SCC 764.
129 *Dhanjoy Chatterjee* v. *State of W.B*. (1994) 2 SCC 220.
130 (2011) 4 SCC 593.
131 *Id*. at 595.
132 (2011) 13 SCC 705.

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children of the prosecutrix have to do with the punishment. What is more bizarre is that judicial notice has been taken of the compromise reached between the parties. It is submitted that rape is considered as one of the heinous crimes and death penalty is sometimes advocated and that is perhaps the reason for it to be out of the purview of plea bargaining. Pendency and long delay is one of the ills that plague criminal administration in India but why only this case was singled out to give punishment below the statutory minimum defies all logic!

In *A.B. Bhaskara Rao* v. *Inspector of Police, CBI Vishakhapatnam*,[133] the appellant, who was a head clerk with the Railways, was caught red-handed by CBI officials while accepting bribe for getting a regular office work done. He was convicted under sections 7 and 13(1)(d)(ii) read with section 13(2) of the Prevention of Corruption Act, 1947 and sentenced to undergo six months RI, and one year RI respectively. His appeal against the conviction was dismissed by the high court. In appeal before the Supreme Court, the appellant prayed for reduction of sentence on the consideration that 14 years had elapsed since the incident took place and he had already served 52 days in prison. The Supreme Court referred to the proviso to section 5 of the Prevention of Corruption Act, which provided for relaxation of minimum sentence for special reasons, and reasoned that since the same was done away within the 1988 Act, the intention of legislature on minimum sentence was clear and no other interpretation was possible. The apex court distinguished *Bechaarbhai S. Prajapati* v. *State of Gujarat*[134] cited by the appellant on the ground that the convict in that case, unlike in the present one, had already undergone imprisonment for the minimum period, i.e., six months. Long delay in disposal of appeal, quantum of amount, loss of job etc. according to the apex court, may not be mitigating circumstances for reduction of sentence, particularly, when the statute prescribes minimum sentence.[135] *State of M.P.* v. *Shambhu Dayal Nagar*[136] was referred to highlight the difficulty in taking a lenient view in corruption cases since "corruption by public servants has become a gigantic problem. It has spread everywhere. No facet of public activity has been left unaffected by the stink of corruption. It has deep and pervasive impact on the functioning of the entire country".[137] The appellant urged unsuccessfully before the Supreme Court that in order to do complete justice, the court has ample power to reduce the sentence even to the extent of period already undergone by sweep of article 142 of the Constitution of India. The apex court discussed the application of article 142 in criminal and other cases through reference to a spate of judicial pronouncements[138] before holding that "the power under article 142 of the Constitution is a constitutional power and not restricted by statutory enactments. However, this Court would not pass any order under article 142 which would amount to supplant the substantive law applicable or ignoring statutory provisions dealing with the subject. In other

133 (2011) 10 SCC 259.
134 (2008) 11 SCC 163.
135 *Supra* note 133at 276.
136 (2006) 8 SCC 693.
137 *Supra* note 133 at 269-70. See also *Swatantar Singh* v. *State of Haryana* (1997) 4 SCC 14 quoted in the judgment.
138 *Id.* at 271-75.

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words, acting under article 142, this Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case".[139] Consequently, it refused to intervene in the order of sentence passed by the lower court and affirmed by the high court.

Preventive detention – habitual offender

The appellant in *D M Nagaraja* v. *Govt. of Karnataka*[140] was a habitual criminal with a history of crimes such as murder, attempt to murder, dacoity, rioting, assault, damaging public property, provoking the public, attempt to grab the property of the public, extortion while settling land disputes and possessing of illegal weapons etc. Consequently, a detention order was passed against the appellant under the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985 and the writ challenging the order was dismissed by the high court.

In the present appeal, the appellant contended before the Supreme Court that inasmuch as action could be taken against the detenue under the ordinary laws, there was no need to detain him under the said Act. Rejecting the contention, the court gave details of involvement of the appellant in as many as 11 cases which went on to show that he was not amenable to ordinary course of law. There was evidence that even after his release on bail from the prison on various occasions, he again started indulging in same type of offences which necessitated his detention under the Act as a 'goonda'. After referring to the statement of objects and reasons and sections 2 and 3 of the Act, the court opined that "the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it".[141] The validity of the detention order was tested by the Supreme Court on the benchmark of articles 19 and 21 of the Constitution and the principles laid down in *Haradhan Saha* v. *State of West Bengal*.[142]

X CONCLUSION

The judiciary has, by and large, done a good job but somehow has failed in its mission when it came to offences against women and children. *Baldev Singh*[143] case stands out as an eyesore. It is also submitted that in cases like *Allan John Waters*[144] the accused should have been given exemplary punishment as the averments of the children shakes up the so called "collective conscience" of the society. It is felt that till the time the legislature does not enact stringent laws to tackle the problem, the judiciary should have given exemplary punishment. As far as socio-economic crimes are concerned the court has dealt with them sternly. Police atrocities are on the rise and it is a very disturbing trend which needs to be tackled

139 *Id*. at 275.
140 (2011) 10 SCC 215.
141 *Id*. at 218.
142 (1975) 3 SCC 198. See also *Rekha* v. *State of Tamil Nadu* (2011) 5 SCC 244.
143 *Supra* note 132.
144 *Supra* note 67.

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with iron hands. The apex court also made clear that reformative approach should be adopted by the court while sentencing. The modern approach should be reformative. The judicial approach to sentencing can be summed up in the words of Markandey Katju and Gyan Sudha Mishra JJ[145] wherein they observed that "our approach should be to ignore minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives….The modern approach should be to reform a person instead of bonding him as a criminal all his life". These are benevolent words but no crime should go unpunished and a just deserts approach is desirable. Within that the prison system should work so as to reform the person and we are getting to hear through newspapers and electronic media that jails are taking steps in that direction.[146]As far as offences are concerned the courts decide on the basis of evidence available. However punishment is altogether a different ball game. The sentencing disparity leaves much to be desired. The Supreme Court through judicial ingenuity in *Swami Shraddananda (2)*[147] had sentenced the accused to life imprisonment for a term in excess of 14 years and to put that category beyond the application of remission. However, by doing so the judiciary overstepped and entered the domain reserved for the executive. Perhaps, keeping this in mind the apex court in *Rameshbhai Chandubhai Rathod (2)* v. *State of Gujarat,*[148] while extending life imprisonment to the convict subjected it to any remission or commutation at the instance of the government for good and sufficient reasons. Since the movement for abolition of death penalty is fast catching up in India, it is the need of the hour to revisit life imprisonment as it presently exists.

145 *Commissioner of Police* v. *Sandeep Kumar* (2011) 4 SCC 644 para 8, 9.
146 Recently Tihar jail in Delhi gave employment opportunities to prison inmates.
147 *Swami Shraddananda (2)* v. *State of Karnataka* (2008) 13 SCC 767.
148 *Supra* note 128.

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