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CRIMINAL LAW

*Jyoti Dogra Sood**

I INTRODUCTION

CRIMINAL LAW concerns itself with inflicting punishment on those found guilty of the crime or the wrong doing, after following due procedure of law. "Criminal liability is the strongest formal condemnation that society can inflict".[1] The criminal process involves identifying the crime situations and pursuing it with appropriate criminal proceedings by adjudicating upon the guilt or innocence of the accused, resulting in conviction or acquittal by the court of law. This adjudication is a very onerous and cumbersome task which the courts are pursuing relentlessly in every criminal case brought before them. The present survey discusses the contours of this process for IPC crimes and cases of preventive detention for the year 2012.

II OFFENCES AGAINST PERSON

Murder

In *Atmaram* v. *State of M.P.*[2] the accused party had attacked the deceased and his relatives on the pretext that they had set their crop afire and had to be taught a lesson. In this attack one of the persons died and others were injured. There was *inter alia*, conviction under section 302 IPC. The appellants argued that there was no intention to cause death and no single injury inflicted was of a nature which was sufficient in the ordinary course of nature to cause death and hence, they may be acquitted of charges under section 302. They further contended that if at all conviction was to stand under section 302 only one accused Gokul who had caused injuries to the accused should be liable under the section and all others should be convicted under section 326 IPC. The court examined in detail the conduct of the parties. Causation in criminal law is a very tricky issue, there has to be a causal connection between the acts and the resultant harm. Intention to kill can be inferred only from the circumstances of the crime.

In the instant case the cumulative effect of all the injuries–that it was bound to cause death, was obviously known to each of the accused. The doctor had opined

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1 Andrew Ashworth, "Criminal Justice and the Criminal Law" in *Principles of Criminal Law* 1 (2009).

2 (2012) 5 SCC 738. See also *Para Seenaiah* v. *State of A.P.* (2012) 6 SCC 800.

that the deceased had died due to multiple injuries and fracture on the vital organs resulting in shock and hemorrhage. And hence, when the medical evidence clearly proved that death was due to injuries caused on vital parts the intention to cause death could be inferred under clause thirdly of section 300 IPC. Hence, the court dismissing the appeal upheld the conviction under section 302 IPC.

In *Nagesh* v. *State of Karnataka*[3] a girl was poisoned by the accused appellant when she resisted him from his attempt of outraging her modesty. The girl was brought down the stairs by the accused persons from the house supposedly to be taken to the hospital. Though the police was present there at that time but no steps were taken to book the crime or to take the girl to the hospital. The accused appellants instead of taking her to the hospital took her to the village and she died on the way. The appellants were held guilty, based on circumstantial evidence,[4] under section 302 IPC. The court's strictures on the police need to be given serious consideration to avoid such mishaps in future:[5]

> [W]e will be failing in our duty if we do not direct the Director General of Police/Commissioner of Police, Karnataka to take disciplinary action against the police officers/officials at Belgaum, whether in service or not, who were present at the place of occurrence when Ms Nagaratna was brought from her room downstairs where the car was park, and failed to take appropriate action and register the case despite the fact that it was openly stated that Ms Nagaratna had consumed poison.
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> ...
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> We further direct that the Director General of Police shall view the matter seriously and ensure completion of the disciplinary proceedings within six months from the date of this order.

In *State of Rajasthan* v. *Mohan Lal*[6] it was held that if the respondents had really intended to commit the murder of the deceased they would have attacked on the vital parts of the body since they had sharp edged weapons. The injuries caused were simple in nature inasmuch as the post mortem report also did not certify that injuries caused were sufficient in the ordinary course of nature to cause death. Hence, the court opined that the accused could not be attributed with the knowledge that the injuries inflicted by them were likely to cause death. So the charge under section 302 read with section 149 IPC was dropped.

The case of *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra*[7] stands out in the sense that a terrorist who was a foreign national guilty of waging war against India and was caught in camera perpetrating the heinous designs of the terrorists across the border was given a fair trial which is one of the hallmarks of the criminal justice administration in India. For a layman it was a open and shut case but the

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3 (2012) 6 SCC 477.

4 For conviction based on circumstantial evidence see *Munna Kumar Upadhyay* v. *State of A.P.* (2012) 6 SCC 174 and *Sahadevan* v. *State of T.N.* (2012) 6 SCC 403.

5 *Supra* note 3 at 490.

6 (2012) 4 SCC 564.

7 (2012) 9 SCC 1

manner in which the case was handled speaks volumes of the criminal justice system in India. Kasab was offered the services of a lawyer at all relevant stages in the proceedings. At the pre-trial stage he refused the Indian lawyer and asked for a Pakastani lawyer. But when Pakistan refused to oblige he asked for a lawyer and immediately a set of two lawyers were provided to him. His lawyer argued the case passionately as is expected of a defense lawyer. The court in its postscript to the judgment observed thus:[8]

> The discourses were luminous, warm and stimulating but completely free from heat, rancour or anger, leave alone any vengefulness. Mr. Subramanium, erudite and sensitive, was full of restraint; always downplaying the prosecution case a notch or two and never making a statement of fact unless absolutely certain of its correctness. Mr. Ramachandran, cool and clinical, gently tried to persuade the court to his point of view. In the course of the hearing of the case, which was spread over 13 weeks, not once were the voices raised, not once was the counsel of the other side interrupted and contradicted on a statement of fact. In my twenty years on the Bench, I have not heard a serious case debated in such a congenial atmosphere as created by Mr. Subramanium and Mr. Ramachandran in this case.

The accused in *Raj Paul Singh* v. *State*[9] came home drunk and started abusing his brother and his family. This was protested by the brother's family. The accused asked his wife to get a knife and stabbed his brother who died subsequently in the hospital. The contention of the accused was that his crime is not of murder but falls under exception 4 of section 300, *i.e*., culpable homicide committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. But in this case the deceased was unarmed and one of the essential ingredients of exception 4 was not met and that is the offender should not take undue advantage or act in a cruel or inhuman manner. Since this essential was not satisfied the case fell squarely under section 302 read with section 34 IPC.

Culpable homicide not amounting to murder

In *Ranjitham* v. *Basavaraj*[10] the deceased died due to the fact that he was struck on the chest, a vital part of the body. The plea of right of private defence was put forth. The high court agreeing to it acquitted the accused. However, on a perusal of the case the apex court held that no evidence was led by the accused to establish his defense. The court then entered into an examination whether it was murder or culpable homicide not amounting to murder. The case had political overtones in as much that the accused and the deceased were from different political parties. The injury was inflicted on a vital part but it was caused by a penknife, ordinarily considered as a non-lethal weapon, which was in the key bunch of the accused. The situation in the village was tense but there was no premeditation and the crime

8 *Id.* at 216. See also *Mohd. Hussain* v. *State (Govt. of NCT of Delhi)* (2012) 9 SCC 408.
9 (2012) 10 SCC 144.
10 (2012) 1 SCC 414.

happened in a sudden fight in the heat of passion. Hence the accused was charged under section 304 part II IPC and sentenced to five years imprisonment.

In *Rampal Singh* v. *State of U.P.*[11] the question as to homicide was not in dispute but the plea of the appellant was that the offence was covered under part II of section 304 IPC and not under section 302 IPC. The court conceded that the case does not fall under section 302 but found the case as falling under section 304 part I. The court examining a catena of cases marking the distinction between part I and part II of section 304, observed thus:[12]

> An important corollary to this discussion is the marked distinction between the provisions of Section 304 Part I and Part II of the Code. Linguistic distinction between the two parts of Section 304 is evident from the very language of this section. There are two apparent distinctions, one in relation to the punishment while other is founded on the intention of causing that act, without any intention but with the knowledge that the act is likely to cause death. It is neither advisable nor possible to state any straitjacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merits. The Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with a clear demarcation as to under what category of cases, the case at hand falls and accordingly punish the accused.

In the instant case the appellant was with the armed forces and was so presumed to be fully aware of the consequences of using a rifle by taking a clear aim at his brother. The court, therefore, held that the case does not fall under part II of section 304 as it was not a case of knowledge alone for the aforesaid reason but falls under part I of section 304 which talks about intention to cause bodily injury that is likely to cause death.

Sudhakar v. *State of Maharashtra*[13] is a poignant saga of a father killing his errant son. The deceased son under the influence of alcohol created a ruckus in the house by throwing all household articles *etc*. The behavior of the son infuriated the father so much that he stabbed him and thereby inflicting an injury which unfortunately landed on the vital part of deceased's body resulting in his death. The court altered the conviction from section 302 IPC to section 304 part I IPC on the ground that there was no premeditation in the mind of the appellant to cause death.

Culpable homicide was again in issue in *Selvam* v. *State of T.N.*[14] In this case there was a property dispute and the deceased was hit by the blunt side of the weapon and he died nine days after the blow. The court held that there was no intention to kill but intention to cause such bodily injury as is likely to cause death. Hence the court altered the conviction from section 302/34 to 304 part I read with section 34 IPC.

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11 (2012) 8 SCC 289.

12 *Id.* at 300.

13 (2012) 9 SCC 725.

14 (2012) 10 SCC 402.

Reiterating the *Virsa*[15] dictum, the court in *Aradadi Ramudu* v. *The State*[16] held that if the accused had the intention to cause such injury on the body of the deceased that would in all likelihood cause her death in natural course of things then the culpability of the accused will fall under section 302 and it is immaterial whether or not he subjectively had an intention to cause death.

In *Abdul Nawaz* v. *State of West Bengal*[17] the appellant accused wanted to get his dinghy back which he had left behind as he fled along with others in another dinghy to avoid being apprehended by the police for taking diesel from a ferry boat. In the scuffle that ensued, the appellant accused hit the head constable on his head which started bleeding and then pushed him into the river and subsequently he died of drowning. The contention was that the accused hit the deceased with a *dao* which was in the dinghy and had not come armed with the intention to kill but killed in a sudden fight and in the heat of passion. The trial court and the high court had convicted the accused under section 302 IPC. But the apex court altered the conviction to section 304 part I and held him liable for culpable homicide not amounting to murder. What is little disturbing is that exception 4 to section 300 IPC was also invoked to aid the appellant. It is surprising as how can it come under the rubric of "sudden fight" inasmuch the appellant accused was well aware that the dinghy is in control of the police party who were discharging their lawful duty. He obviously was not expecting to reclaim the dinghy without harming the police party. Exception 4 to section 300 can only apply in cases of private disputes between private persons and not between the offender and police.

There are three faculties of a human being - volition, emotion and cognition. Volition means that the act must be voluntary emanating from a free will, the cognitive faculty guides the action and guides whether what one is doing is wrong or right. It the cognitive faculty is impaired the person gets a complete defence under section 84, and emotional faculty deals with behavioral responses and it may get disturbed by a sudden and grave provocation and in the scheme under IPC the accused is in such cases entitled to partial defence altering the conviction from murder to culpable homicide not amounting to murder. In *Sukhlal Sarkar* v. *Union of India*[18] the deceased had allegedly slapped the appellant who was a constable in BSF and provoked him to open fire from his rifle. The appellant in retaliation shot him. The defence of sudden and grave provocation was put forth by the appellant. The court explained the defence thus:[19]

> The expression "grave" indicates that provocation be of such a nature so as to give cause for alarm to the appellant. "Sudden" means an action which must be quick and unexpected so far as to provoke the appellant. The question whether provocation was grave and sudden is a question of fact and not one of law. Each case is to be considered according to its own facts.

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15 *Virsa Singh* v. *State of Punjab*, AIR 1958 SC 465.
16 (2012) 5 SCC 134.
17 (2012) 6 SCC 581.
18 (2012) 5 SCC 703.
19 *Id.* at 705.

The court refused to alter the conviction from 302 to 304 part I as by no stretch of imagination could slapping be a grave and sudden provocation so as to cause a reasonable man to lose his self-control. The court emphasized that it is not sufficient that the appellant (subjective test) lost his control but it also needs to be proved that a reasonable person (objective test) would have lost his self-control in the given circumstances. As the defence of provocation requires both subjective and objective test to be fulfilled, it is submitted that the court was right in not granting the defence of provocation. This is because causing of death by being slapped and pushed is grossly disproportionate a response in the context of objective or reasonable person's test.

Motive

In *Sampath Kumar* v. *Inspector of Police*[20] the trial court had convicted the accused person primarily on the strong motive which the appellants had and that was to get rid of the deceased due to his love affair with the sister of one of the appellants. The apex court giving the accused benefit of doubt held that "the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, cannot be a substitute for proof of guilt." The guilt has to be proved beyond reasonable doubt.

Corpus delicti

In *Prithipal Singh* v. *State of Punjab*[21] a human rights activist was allegedly killed by police officers but the dead body remained untraced. The court held that "in a murder case, it is not necessary that the dead body of the victim should be found and identified *i.e*. conviction for the offence of murder does not necessarily depend upon *corpus delicti* being found. The *corpus delicti* in a murder has two components – death as result, and criminal agency of another as the means. Where there is direct proof of one, the other may be proved by circumstantial evidence." The case reiterates the well-established criminal law principle that existence and identification of the dead body, *corpus delecti*, is not *sine qua non* for criminal liability. What is required to be established by the prosecution is the death of a person and not the presence of dead body. It is a laudable and settled principle in criminal jurisprudence; if the law were otherwise then destruction of the dead body would have provided complete immunity to the accused from the offence of homicide.

Hurt

In *Naresh Kumar* v. *State of Haryana*[22] the complainant and the accused were allowed to compound the offence under section 324 IPC as the incident took place in 1997 and it was only by the Act 25 of 2005 which came into effect on 23.6.2006 that section 324 IPC was made non-compoundable. The court was clearly guided by the constitutional mandate of no *ex post facto* application of criminal law.

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20 (2012) 4 SCC 124.

21 (2012) 1 SCC 10 at 30.

22 (2012) 9 SCC 330.

Rash and negligent driving

Deaths by road accidents are on the rise as per the statistics of National Crime Record Bureau. In cases of accident it is easier to prove that the accident happened but to prove *how* it happened may be very difficult. To overcome these technicalities the principle that could be brought to aid is the doctrine of *res ipsa loquitur*. The court speaking about the doctrine in *Ravi Kapur* v. *State of Rajasthan*[23] held thus:[24]

> The other principle that is pressed in aid by the courts in such cases is the doctrine of *res ipsa loquitur*. This doctrine serves two purposes — one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is *prima facie* evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of *res ipsa loquitur* in cases where no direct evidence was brought on record. …. The courts have also taken the concept of 'culpable rashness' and 'culpable negligence' into consideration in cases of road accidents…. In such a case the mere fact of accident is prima facie evidence of such negligence. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct.

Guru Basavaraj[25] is another instance of rash driving and negligence on the part of the accused. The court taking a stern view of the negligence of the driver was constrained to comment thus:[26]

> We may note with profit that an appropriate punishment works as an eye-opener for the persons who are not careful while driving vehicles on the road and exhibit a careless attitude possibly harbouring the notion that they would be shown indulgence or lives of others are like "flies to the wanton boys". They totally forget that the lives of many are in their hands, and the sublimity of safety of a human being is given an indecent burial by their rash and negligent act.

Investigation

The court in *Dayal Singh* v. *State of Uttaranchal*[27] reminded itself that the courts do not merely discharge the function to ensure that no innocent man is punished, "*but also that a guilty man does not escape"*. But there is no dearth of cases where due to shoddy investigation the prosecution case fails and the guilty is

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23 (2012) 9 SCC 284.

24 *Id*. at 296.

25 *Guru Basavaraj* v. *State of Karnataka* (2012) 8 SCC 734

26 *Id*. at 744.

27 (2012) 8 SCC 263 (Emphasis supplied).

never punished. Accordingly, the court directed thus:[28]

> We hold, declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution.

Since shoddy investigation can let the guilty go scot free, the court in *Hiralal Pandey* v. *State of U.P.*[29] quoting *State of U.P.* v. *Bhagwant Kishore Joshi*[30] held thus:[31]

> [U]nless the lapses on the part of the investigation are such as to cast reasonable doubt about the prosecution story or seriously prejudice the defence of the accused, the court will not set aside the conviction.

The observations were made since the injuries on the deceased were not correlated with the weapons allegedly possessed by the appellants and the serological report was not produced though the bloodstained mud was collected.

Police atrocities and torture

The police high handedness reached a new low in *Mehmood Nayyar Azam* v. *State of Chhattisgarh*[32] when the appellant who was a doctor by profession was implicated in multiple criminal cases for helping weaker sections of society against the coal mafia. And when he was taken in police custody, while he was required to be taken into judicial custody, he was abused, assaulted and was made to hold a placard on which it was written "*main Dr. M.N. Azam, chhal kapti evam chor hoon*" (I, Dr. M.N. Azam, am a cheat, fraud, thief and rascal) and was photographed. To add insult to injury this photograph was circulated in the public. This happened in a country where accused is to be presumed innocent until proven guilty. The case brings back the horrific memories of *Bhagalpur blinding* case.[33] The appellant invoked the writ jurisdiction of the court contending that his right to live with dignity as enshrined under article 21 had been transgressed. The court granted compensation of Rs. 5 lacs to the appellant and the amount was to be realized from the salary of the guilty officers in equal proportions. It is submitted that they also should have been stripped of their ranks for showing total disregard to the constitutional values of which they are supposed to be guardians.

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28 *Id.* at 288. See also *Gajoo* v. *State of Uttarakhand* (2012) 9 SCC 532.

29 (2012) 5 SCC 216.

30 AIR 1964 SC 221.

31 *Id.* at 226.

32 (2012) 8 SCC 1.

33 *Khatri* v. *State of Bihar* 1981 SCR (2) 408.

III GENERAL DEFENCES

Right of private defence

In *Arjun* v. *State of Maharashtra*[34] there was enmity between the deceased and the appellants and a civil suit was pending between the parties. The accused party had allegedly attacked the deceased and his family. Injuries were also witnessed on the appellants and the plea of right of self defence was set forth. It is settled law that an aggressor does not get the benefit of the right of self defence. Moreover, the "plea of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find out whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting."[35] The apex court endorsed the findings of the lower courts and held that there was no basis for right of private defence. The court came to the conclusion that the act was committed in the heat of passion when there was a fight between the parties and altered the conviction from section 302 IPC to section 304 part I IPC.

However, it is not clear from the judgment as to how the court reached the conclusion that there was a sudden fight when a knife was used for the murder and other members of the appellant party were also armed. This may indicate that the attack was planned and premeditated and hence exception 4 to section 300 could not be invoked.

Unsoundness of mind

In *State of Rajasthan* v. *Shera Ram*[36] the accused killed the temple priest by hurling a stone at him resulting in his instantaneous death. The plea of insanity was rejected by the trial court but on appeal was accepted by the high court resulting in acquittal. In appeal the apex court has in its judgment devoted 4 pages to appeal against acquittal![37] The court then examined the plea of insanity and also the fragile state of mind of the accused due to his epileptic condition. The court gave copious references from Modi's *Medical Jurisprudence and Toxicology*[38] and came to the conclusion that there was "evidence to show continuous mental sickness of the respondent." The case should have ended here with dismissing of the appeal. However the court then went on to examine the legal infirmity in the case as it was not proved whether the injury was "sufficient in the ordinary course of nature to cause death" or not. What is surprising is that having accepted the insanity defense which warrants a complete discharge from liability, the court then felt the need to enter into this debate. Having reached a conclusion the court could have avoided embarking on this issue which was irrelevant in the present factual context of the case.

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34 (2012) 5 SCC 530.

35 *Id*. at 535.

36 (2012) 1 SCC 602.

37 See also *ShyamBabu* v. *State of U.P*. (2012) 8 SCC 651.

38 24th edn. 2011.

IV INCHOATE OFFENCES

Abetment

The court in *Anand Mohan* v. *State of Bihar*[39] reiterated that "evidence of exhortation is in the very nature of things a weak piece of evidence and there is often quite a tendency to implicate some person in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim, and unless the evidence in this respect is clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant".[40] In this case along with other charges there was charge of exhortation and the court[41] carefully sifting through evidence discarded that deposition as regard exhortation.

The offence of abetment is specified in sections 107-120 of the IPC. However, abetment to commit suicide has been specifically provided by the code in section 306.[42] People who attempt to commit suicide generally display emotionally weak disposition due to surrounding circumstances or other reasons and if someone instigates them to end their lives they get that much needed impetus to end their lives. The factual matrix of *Praveen Pradhan* v. *State of Uttaranchal*[43] reveals a troubled employer – employee relationship. The employee as per the suicide note as well as the FIR registered by his brother was being constantly harassed by the employer by demoralizing him and insulting him repeatedly. This constant humiliation was enough to instigate the deceased to commit suicide and the employer Praveen Pradhan was held guilty of instigating the act of suicide under section 306 read with section 107 IPC. The court's observations on the issue are noteworthy:[44]

> [I]nstigation has to be gathered from the circumstances of a particular case. No strait jacket formula can be laid down to find out as to whether in a particular case there has been instigation which forced the person to commit suicide. In a particular case, there may not be direct evidence in regard to instigation which may have direct nexus to suicide. Therefore, in such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide.

In another case of abetment of suicide a young lady committed suicide by burning herself within 35 days of marriage. There was evidence that there was demand for money from the father of the deceased. On demand not being fulfilled, the appellant allegedly threatened that he knew how to extract money from his father-in-law through the daughter and thereby pledged the jewellery of the deceased. The trial court inspite of this evidence and clear provision of section 113-A of the Evidence Act gave the verdict of "not guilty" in favour of the husband in *Rakhal*

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39 (2012) 7 SCC 225.

40 *Id*. at 244.

41 *Ibid* quoting *Jainul Haque* v. *State of Bihar* (1974) 3 SCC 543.

42 Attempt to suicide is punishable under this.

43 (2012) 9 SCC 734.

44 *Id*. at 741.

Debnath v. *State of W.B.*[45] The high court and the Supreme Court rising to the occasion gave a verdict of guilty under section 306 for abetting the commission of suicide and section 498-A for cruelty.

Conspiracy

Conspiracies are hatched in secrecy and so no direct proof is available and conviction is generally based on inferences drawn from the available circumstantial evidence. However, once the court finds an accused guilty of the offence under section 120-B, where the accused had conspired to commit an offence and actually committed the offence with the other accused with whom he conspired, they all shall be punishable for the offence for which such conspiracy was hatched and so even when no seperate charge was framed under section 302 read with section 34, the court held that the trial court "for valid reasoning and upon proper appreciation of evidence, convicted this accused for an offence under section 120-B IPC and thus, for an offence under section 302 as well".[46]

Speaking further about the scope of criminal conspiracy under the penal code the apex court in *Subramanian Swamy* v. *A. Raja*[47] clarified that a criminal conspiracy cannot be inferred on the mere fact that there were official discussions between the ministers and the officers concerned. Suspicion, however strong, cannot take the place of legal proof. The court rightly held that "a wrong judgment or an inaccurate or incorrect approach or poor management by itself, even after due deliberations between the ministers or even with Prime Minister, by itself cannot be said to be a product of criminal conspiracy."[48]

In *CBI Hyderabad* v. *K. Narayana Rao*[49] the panel advocate for the bank was sought to be implicated in a criminal conspiracy to defraud the bank by sanction and disbursement of housing loan and incurring a loss to the tune of Rs. 1.27 crores. The allegation against the panel advocate was that he gave false legal opinion as to the genuineness of the properties in question. Examining the role of the advocate in the banking sector the court observed thus:[50]

> The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings viz. either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

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45 (2012) 11 SCC 347.
46 *Jitender Kumar* v. *State of Haryana* (2012) 6 SCC 204.
47 (2012) 9 SCC 257.
48 *Id.* at 283.
49 (2012) 9 SCC 512.
50 *Id.* at 531.

The court after analyzing the documents was of the view that it may be case of improper legal advice but there was no evidence to prove that the advocate had aided or abetted the original conspirators whose name figured in the FIR (the name of the panel advocate figured in the charge sheet). The court pontificated that the lawyer owes an "unremitting loyalty" to the best interest of his client but cautioned that merely because his opinion is not acceptable he cannot be criminally prosecuted. However, if there is evidence to the contrary he must face the consequences.

The factual matrix in *Baliya* v. *State of M.P.*[51] revealed that a man was lying on the road bleeding profusely and was declared dead when he was taken to the hospital. There was proof of some pamphlets, authored by the deceased, in circulation which cast aspersions on one Dr. Sandhya and her relationship with accused Balia. There was evidence to the effect that Baliya knew who the author was and told the other accused Manish and Gopal that the author of the pamphlet (deceased) should be killed. The charge *inter alia* was of conspiracy. The court held that there has to be an agreement between two or more person as defined under section 120A of IPC. The court further clarified that direct evidence to establish conspiracy is seldom available. It is more a matter of inference and the "court in drawing such an inference must consider whether the basic facts, *i.e.*, circumstances from which the inference is to be drawn have been proved beyond reasonable double." In the instant case there is no evidence to show the response of the duo - Manish and Gopal and thus their meeting of minds was difficult to infer. Hence, it was held that there was no criminal conspiracy.

V OFFENCES AGAINST PROPERTY

Criminal breach of trust

To prove the offence of criminal breach of trust under section 405 IPC what is required is that a person who has been entrusted with property or with any dominion over any property dishonestly misappropriates or disposes that property in violation of law prescribing the mode for doing so. And if the person committing the offence happens to be a public servant or banker or merchant or agent it is taken to be an aggravated form of the offence and meted with more severe punishment. In *Sadhupati Nageswara Rao* v. *State of A.P.*[52] the appellant was the in-charge of a fair price shop. He was entrusted with distribution of rice free of cost under "Food for Work Scheme" to the workers on the production of coupons. The coupons were to be necessarily taken and kept for proper records and were to be handed over to the revenue officer. Significant irregularities were imputed in the distribution and on inspection the appellant could not produce the coupons thereby putting a seal on the alleged irregularities. The apex court upheld his conviction under section 409 IPC which punishes criminal breach of trust by a public servant, banker, merchant or agent.

Theft

The factual matrix of *Deepak* v. *State of Maharashtra*[53] involved dacoity with murder. Robbery and dacoity are aggravated forms of theft and the court observed

51 (2012) 9 SCC 696.
52 (2012) 8 SCC 547.
53 (2012) 8 SCC 785.

that "when a person is involved in an offence of theft of higher magnitude, then it becomes dacoity and when dacoity is committed with murder and also results in causing grievous hurt to others, it becomes robbery punishable under sections 395, 396 and 397 IPC".

VI OFFENCES AGAINST WOMEN

The concern and caution of the apex court regarding offences against women is note worthy:[54]

> The primary concern both at national and international level is about the devastating increase in rape cases and cases relating to crime against women in the world. India is no exception to it. Although the statutory provisions provide strict penal action against such offenders, it is for the courts to ultimately decide whether such incident has occurred or not. The courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds.

Rape

Crimes against women are on the rise and in cases of rape the courts have in many cases upheld convictions on the sole testimony of the prosecutrix if it inspires confidence. However, the courts have to be very careful and should not let ever rising statistics of rape and reports of subordination of women in our society influence their judgments.

In *Narender Kumar* v. *State (NCT of Delhi)*[55] the appellant was charged for rape. The prosecution version was that the prosecutrix who was going from village Khirki to Chirag Delhi was dragged, at about 8 p.m., towards the bushes by the accused and was raped. She did not raise an alarm out of fear. There were certain nail marks on her breast. On medical examination rape could not be established but her physical appearance as in terms of torn clothes and nail marks could be suggestive of rape.

The trial court and the high court pronounced a guilty verdict. On appeal the apex court entered into a detailed discussion quoting from catena of cases. The court held thus:[56]

> A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, *if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence*, direct or substantial (*sic* circumstantial), which may lend assurance to her testimony.

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54 *State of U.P.* v. *Munesh* (2012) 9 SCC 742 at 749.

55 (2012) 7 SCC 171.

56 *Id.* at 178.

The court, however, made it clear that the character of the victim has no relevance on a charge of rape. The court stressed that "such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone."[57] Having said this the court, however, cautioned that courts cannot throw caution and fundamental principles to the winds. The court stated emphatically that like in all criminal cases the burden is on the prosecution to prove each ingredient of the offence which it seeks to establish. In the instant case the prosecution was unable to discharge this burden convincingly as there were many discrepancies and hence the judgment of the High Court of Delhi and the trial court convicting the accused was set aside and the accused was acquitted.

In *Kashinath Mondal* v. *State of West Bengal*[58] the accused was charged under sections 376 and 302 for the rape and murder of his niece. The case rested on circumstantial evidence. The house was locked from inside and the only two male members present at the house were the father of the deceased and the accused uncle. It was also brought on record that there was some property dispute between the two. The incident occurred in the absence of the wife of the accused. The fact that he did not run away from the house was seen by the court as a "calculated one". The apex court agreed with the concurrent finding of the lower courts as to the guilt of the accused. Dismissing the appeal the court upheld the conviction under sections 376 and 302 IPC. But what is distressing in the case is the role of the investigation agencies, with crime serials being aired regularly, even children are aware of lifting of fingerprints from the scene of crime. But in this case the fingerprints were not taken from the place of the incident and the court was constrained to say that "remissness and inefficiency of investigation agency should be no ground to acquit a person if there is enough evidence on record to establish his guilt beyond reasonable doubt, as in the present case."[59] Either the training is inept or it is a case of callousness and dereliction of duty which is at work. But in either case steps should be taken to ensure that proper investigation is conducted in all cases.

In *Ramesh Harijan* v. *State of U.P.*[60] the trial court had acquitted the accused charged with raping and thereafter killing a 5-6 year old girl by placing undue reliance on insignificant inconsistencies. The Supreme Court upheld the reversal of the verdict by the high court and held that the acquittal by the trial court was totally illegal.

In *Jugendra Singh* v. *State of U.P.*[61] a minor girl was killed after attempt of rape was foiled by people who rushed to the spot hearing cry for help from her brother. The accused throttled her and she died of asphyxiation. The trial court acquitted the accused on the basis of minor discrepancies. But the high court on re-appreciation of evidence convicted him under section 302 read with section 511

57 *Id.* at 179.
58 (2012) 7 SCC 699.
59 *Id.* at 705.
60 (2012) 5 SCC 777.
61 (2012) 6 SCC 297.

which was upheld by the Supreme Court. Particularly interesting in the judgment is the first para which need serious deliberation:[62]

> From the days of yore, every civilised society has developed various kinds of marriages to save the man from the tyranny of sex, for human nature in certain circumstances has the enormous potentiality of exhibiting intrigue, intricacy and complexity, in a way, a labyrinth. Instances do take place where a man becomes a slave to this tyrant and exposes unbridled appetite and lowers himself to an unimaginable extent for gratification of his carnal desire.

At a time when there is a strong demand for criminalizing marital rape such sentiments should not be made vocal since they may be misinterpreted to suggest that within marriage a man is free to satisfy his lust in whatsoever manner he feels and the woman almost loses all control over her body after marriage.

In *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*[63] the accused raped a minor girl of 3 years and left her in a naked condition to die. The injuries as described in the post mortem report showed extreme depravity and brutality. All her private parts were swollen and bleeding. She was bleeding through her nose and mouth and there were bite marks on the chest. And hence the extreme penalty of death was upheld by the apex court.

In *Bavo* v. *State of Gujarat*[64] the accused was given life imprisonment for raping a minor. The appeal was as to the quantum of sentence and the court taking note of various factors – including the age of the appellant accused being 18-19 years at the time of the incident, hailing from a poor family and the incident having taken place 10 years ago – reduced the punishment to 10 years which the counsel informed that, "he had served nearly 10 years". It is submitted that offences against children is on the rise and the enactment of Protection of Children from Sexual Offences Act, 2012 is a step in the right direction. What is needed now is its proper implementation.

The limited question in *Pushpanjali Sahu* v. *State of Orissa*[65] was as to the propriety of the sentence modified by the high court. The trial court as well as the high court gave concurrent findings as regards rape of the matron of a hostel by the chowkidar/night watchman of that hostel. The punishment awarded by the trial court which was confirmed by the sessions court was 7 years. On a revision petition the high court shockingly reduced the sentence to period already undergone and that was about one year. The apex court in this case depicting the trauma of rape observed that we must "reflect upon the dehumanizing act of physical violence on women escalating in the society. Sexual violence is not only an unlawful invasion of the right of privacy and sanctity of a woman but also a serious blow to her honour. It leaves a traumatic and humiliating impression on her conscience – offending her self esteem and dignity."

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62 *Id.* at 301.

63 (2012) 4 SCC 37.

64 (2012) 2 SCC 684.

65 (2012) 9 SCC 705.

The court emphasized on the principle of proportionality as foundational in penology and depreciated the high court's approach in reduction of sentence given to the accused. The court observing the fact that 'special reasons' and exceptional circumstances required for reduction of the quantum of punishment under section 376 are absent in the present case, sentenced the accused for a period of seven years setting aside the reduction of sentence by the high court.

Dowry death

In *Rohtash* v. *State of Haryana*[66] a young lady of 21 years died within one year of her marriage allegedly by consuming poison. The father alleged that there was demand of dowry and she was being regularly taunted for not bringing sufficient dowry. However, under the statement under section 161 Cr PC no such accusations were made. The trial court acquitted the accused husband but in appeal the high court convicted him under sections 304-B and 498 A. On an appeal under article 136 the Supreme Court on a re-appreciation of evidence found that according to the FSL (Forensic Science Laboratory) Report "no metallic poison could be detected". The court held that there were major improvements/embellishments in the prosecution case and the demand of Rs.10, 000/- does not find place in statements under section 161 Cr PC. Due to those inconsistencies, the accused could not be held guilty.

However, the apex court entered into a detailed examination on the alleged demanded money and came to the conclusion that the property sought to be bought by the demanded money was a *wakf* property and hence the prosecution theory of dowry demand falls. But the court did not stop here and went on to add in the judgment that "more so, even if such demand was there, it may not necessarily be a demand of dowry". Such an assumption, it is submitted, should have been avoided. The demand of dowry can be camouflaged under different garbs and the apex court had itself cautioned in *Bachni Devi* v. *State of Haryana*[67] that the ruling in *Appasaheb*[68] to the effect that "a demand for money on account of some financial stringency or for meeting some urgent domestic expense… cannot be termed as a demand for dowry" does not lay down a law of universal application. Each case has to be decided on its own facts and merits. Having noted that, it is disturbing that without any debate followed by conclusions as to the demand of Rs.10,800/- being a dowry demand or not, the court went on to record such a statement. It seems to be doubting its own decision and so trying to buttress it with additional arguments.

In *Pudhu Raja* v. *State*[69] a woman died within 2½ years of marriage under mysterious circumstances. There was clear cut proof as to demand of dowry as Panchayat had been convened once to sort out the matter. Inspite of this the trial court gave a verdict of acquittal. On re-appreciation of evidence the high court rubbished the theory of suicide and held that since the appellants were present at the place of occurrence they needed to explain and the onus was on them; and their

66 (2012) 6 SCC 589.
67 (2011) 4 SCC 427.
68 (2007) 9 SCC 721.
69 (2012) 11 SCC 196.

failure to do so clearly points to their guilt. The apex court was in synchronicity with the arguments of the high court and upheld the guilty verdict of the high court.

In case of *Mustafa Shahadal Shaikh* v. *State of Maharashtra*[70] the woman died due to poisoning within 7 months of marriage. There was evidence of cruelty "soon before her death". The accused which included the husband and his parents were held liable under section 304-B and 498-A read with section 34 IPC.

Cruelty

In *Ushaben* v. *Kishorbhai Chunilal Talpada*[71] the court made the law clear by reiterating that "if a complaint contains allegations about commission of offence under section 498-A IPC which is a cognizable offence, ….the Court can take cognizance thereof even on a police report."Since it is not a offence against marriage falling under chapter XX of IPC so the provision under section 198 Cr PC will not be applicable which mandates that there has to be a complaint from the aggrieved person before cognizance is taken of the offence.

Kidnapping or abduction

In *Chunda Murmu* v. *State of West Bengal*[72] conviction under sections 302 and 201 IPC was upheld but on section 364 IPC it was pointed out that the action of accused in bringing his wife back to the matrimonial home would not attract the ingredient of kidnapping or abduction. However, this observation of the court leaves one begging for an answer as to why the offence of abduction cannot be made out if the bringing back of his wife was without her consent? Absence of consent implies that she was made to be come back to the matrimonial house by force. This seriously is a blow to the personal autonomy of a woman. Perhaps, the fact that the accused was anyway convicted under section 302 read with section 201 of IPC for murder and concealment of evidence made the court deal with this issue without a serious consideration.

Adultery

On the provision of adultery under section 497 IPC which various committees have recommended must be repealed, the court held thus:[73]

> The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence.

70 (2012) 11 SCC 397.

71 (2012) 6 SCC 353.

72 (2012) 5 SCC 753.

73 *W. Kalyani* v. *State* (2012) 1 SCC 358 at 360.

VII JOINT LIABILITY

Common intention

The court in *Shyamal Ghosh* v. *State of West Bengal*[74] held eight persons guilty of the offence of murdering the deceased. They had demanded a sum of Rs.40, 800/- and extended the threat of dire consequences, if their demand was not met. Thereafter, they had an altercation with him and on the basis of the testimony of the eyewitnesses and the 'last seen' theory, it was established that they killed him and then the body was cut into pieces, put in a gunny bag and abandoned at a deserted place. The accused were convicted under section 302 read with section 34 IPC. The court made the following observations *vis-à-vis* section 34 which needs reproduction:[75]

> 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.

The court in *Thoti Manohar* v. *State of A.P.*[76] observed that "the previous meeting of minds with prearranged plan or prior concert … is difficult to prove by direct evidence. They are to be inferred from the conduct and circumstances". And in the instant case the appellant had an inimical relationship with the deceased and his family and a *panchayat* was to be held on the next day. The evidence proved that they were armed with lethal weapons and the deceased was unarmed. The two brothers A-1 and A-2 dragged the deceased outside the house and A-1 gave the blows. Though A-2 did not inflict any injury but his participation from the beginning to the end reveals that he shared a common intention with his brother.

In *Mano Dutt*v. *State of U.P.*[77] there were charges under section 302 read with sections 149 and 323 IPC. However, two persons were acquitted by the trial court and since the requirement of 5 or more persons not being met they could not be charged for unlawful assembly and so the charges were altered to sections 302/34

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74 (2012) 7 SCC 646.

75 *Id.* at 678. The court in *Kuriya* v. *State of Rajasthan* clarified that it is expected to examine "the prosecution evidence in regard to application of section 34 cumulatively…. It is difficult to state any hard-and-fast rule which can be applied universally to all cases."

76 (2012) 7 SCC 723 at 736.

77 (2012) 4 SCC 79.

and 323/34 IPC. The high court acquitted all the accused of offence under section 323/34 IPC. However, they were held liable for offences under section 302/34 as they had come a second time to the place where the deceased was working and gave a *lalkar* (exhortation) "*maro sale ko*" and then assaulted him with lathis. They went in appeal to the Supreme Court. The court dismissing the appeal held that "the extent of participation, even in a case of common intention covered under section 34 IPC would not depend on the extent of the overt act. If all the accused have committed the offence with common intention and inflicted injuries upon a deceased in a pre-planned manner, the provision of section 34 would be applicable to all."[78]

The legal position is well established that inference of common object has to be drawn from various factors such as the weapons with which the members were armed, their movements, the act of violence committed by them and the result.[79]

The observation made by the court in *Darbara Singh* v. *State of Punjab*[80] while deciding whether there was prejudice caused to the accused due to non framing of charge under section 302 read with section 34 IPC sums up the concerns of citizens. The court held:[81]

> "Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice"; not only by unjust conviction, but also *by acquittal of the guilty*, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights.

Unlawful assembly

In *State of Haryana* v. *Shakuntla*[82] the main question, *inter alia*, was of unlawful assembly and the contention of the accused was that "there was neither common intention amongst the members of the assembly to cause death of the deceased persons nor any common object". The court held they had come with the express object of killing the deceased and his family members. The court observed: "Where a person has the intention to cause injuries simpliciter to another, he/she would certainly not inflict 30/33 injuries on the different parts of the body of the victim." The common object and intention are inferred from the acts committed and it was clear from the facts of the case.

In *Roy Fernandes* v. *State of Goa*[83] there was an unlawful assembly with a common object of preventing the putting up of the fence around the chapel. In

78 *Id.* at 96. In *Suresh Sakharam Nangare* v. *State of Maharashtra* (2012) 9 SCC 249 the only adverse evidence was that the appellant used to associate with the accused to have *ganja* but no common intention could be proved of killing and hence was acquitted of the charges under S. 302 read with S. 34 IPC.

79 *Surendra* v. *State of U.P.* (2012) 4 SCC 776 at 781.

80 (2012)10 SCC 476 at 483. Also see, *Dahari* v. *State of U.P.* (2012) 10 SCC 256.

81 *Darbara Singh, id*. at 484 (emphasis added).

82 (2012) 5 SCC171.

83 (2012) 3 SCC 221.

doing so, one of the members committed a murder. The question was as to the liability of murder on members of the unlawful assembly. The court came to a conclusion that the murder was not in "prosecution of the common object" and neither was it covered by the latter part of section 149 IPC *i.e*. the members "knew that the same is likely to be committed in prosecution of the common object of the assembly." There was no evidence that the appellant knew that one of the member was carrying a knife with him. The court held that "the conduct of the members of the assembly especially the appellant also does not suggest that they intended to go beyond preventing the laying of the fence leave alone committing a heinous offence of murder… we have, therefore, no hesitation in holding that the court below fell in error in conviction the appellant for murder with the aid of section 149 IPC".[84]

As opposed to this in *Onkar* v. *State of U.P.*[85] the members of the unlawful assembly declared that no one would be left alive and had been exhorting one another to eliminate all and they were held liable for murder.

The plea in *Avtar Singh* v. *State of Haryana*[86] was that it was a sudden fight due to a property dispute which ended in a death of one of the member of the rival party. Hence they pleaded that section 149 IPC cannot be pressed into service. The court negativing their contention held thus:[87]

> The totality of the manner in which the assailants acted at the place of occurrence while inflicting the injuries on the deceased as well as others only displayed their united mind and effort in the fulfilment of their objective at the spot and, therefore, there was no scope to individualise the conduct of the assailants in order to mitigate the gravity of the charges found proved against the appellants.

Under section 149 IPC mere membership of an unlawful assembly is enough for conviction. So whether injury was caused by the weapons of some of the members of the unlawful assembly or not is immaterial. But strangely in *Krishnappa*v. *State of Karnataka* with *Tippanna Ningappa Kundargi* v. *State of Karntaka*[88] the trial court held some members guilty of murder and acquitted the others on a frivolous reasoning that "their acts are not solely responsible for the death of the deceased as they were merely holding KalliKatngi and just prevented the deceased from escaping the guilt"[89] The high court as well as the Supreme Court allowed the appeal of the state and held them guilty under section 302 read with section 149 IPC, as, according to the court, there was clear evidence of overt acts confirming their membership of the unlawful assembly.

VIII JUVENILE JUSTICE

India being a party to the Convention on the Rights of Child enacted a parallel

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84 *Id.* at 233.
85 (2012) 2 SCC 273.
86 (2012) 9 SCC 432.
87 *Id.* at 445.
88 (2012) 11 SCC 237.
89 *Id.* at 241.

criminal justice system to deal with children in conflict with the law. The present Act which deals with children is the Juvenile Justice (Care and Protection) Act, 2000 [JJ Act]. The age determination is a very important factor in such cases as the benefit of this benevolent legislation is given to accused persons below 18 years of age on the date of commission of the crime. In *Om Prakash* v. *State of Rajasthan*[90] the accused had raped a girl of 13½ years in a manner indicating evil and matured skill of accused. As far as the determination of age is concerned it was held in *Bhoop Ram* v. *State of U.P.*[91] that the medical certificate is based on estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out and since there was no material to throw doubts on the entries in the school certificate, the court accepted the age as shown in the school certificate. Moreover, when two views are possible, the courts should lean in favour of juvenility. In the instant case there was some ambiguity as far as the age is concerned but the sessions court declared him a juvenile. The apex court took note of the heinous crime and stated that "when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice."[92] The court ordered a trial before a court of competent jurisdiction and held thus:[93]

> The Juvenile Justice Act which is certainly meant to treat a child accused with care and sensitivity offering him a chance to reform and settle into the mainstream of society, the same cannot be allowed to be used as a ploy to dupe the course of justice while conducting the trial and treatment of heinous offences. This would clearly be treated as an effort to weaken the justice dispensation system and hence cannot be encouraged.

It is submitted that in borderline cases where the accused is sitting on the fence *i.e.* above 16 and not yet 18 the maturity of understanding should be the deciding factor. The judgment is a reflection of a new trend which must be applauded.

Section 20 of the JJ Act, 2000 enables the court to consider and determine the juvenility of a person even after conviction by the regular court. In *Vijay Singh* v. *State of Delhi*[94] the High Court of Delhi had convicted the accused under section 307 IPC and awarded a sentence of five years rigorous imprisonment. In the special leave petition one of the points raised was that the appellant was juvenile on the date of the commission of the offence. The district and sessions judge was directed to give a report after due inquiry. The report concluded that the appellant was a juvenile at the date of the commission of offence and hence the court while upholding the conviction imposed on the appellant, set aside the sentence imposed on him

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90 (2012) 5 SCC 201.

91 AIR 1989 SC 1329.

92 *Supra* note 90 at 209.

93 *Id.* at 213.

94 (2012) 8 SCC 763.

and directed him to be released. In *Babla* v. *State of Uttarakhand*[95] the appellant was one of the accused and was awarded life imprisonment under section 302 read with section 149 IPC by the trial court. In the appeal in the high court the plea of juvenility was raised for the first time which was rejected on the ground that it was not raised before the trial court. The apex court in appeal held that "the issue of raising the plea for determination of juvenility for the first time at the appellate stage is no more *res integra*". It opined that the high court had erred on this count.[96]

Speaking about the nature of enquiry as to the juvenile status the court in *Ashwani Kumar Saxena* v. *State of M.P.*[97] stressed that the inquiry is to be done as per the beneficial provisions of JJ Act and not an investigation or a trial as per provisions of Cr PC. And for that section 7-A of the JJ Act has laid down rules which must be followed.[98]

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95 (2012) 8 SCC 800.

96 *Id.* at 802. The court reiterated in *Anil Agarwala*v. *State of West Bengal* (2012) 9 SCC 768 that the plea of juvenility can be raised at anypoint of time and no limitation exists. And the court is then under an obligation to first look into the question of juvenility and then decide the case.

97 (2012) 9 SCC 1.

98 Rules under the Juvenile Justice Act Rule 12:
12. Procedure to be followed in determination of Age–(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and sent him to the observation home or in jail.
(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining–
(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.
and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.
(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee

It was again reiterated in *Abuzar Hossain* v. *State of West Bengal*[99] that claim of juvenility may be raised at any stage even after the final disposal of the case. The only rider that was put was:[100]

> For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

IX PREVENTIVE DETENTION

Article 21 of the Constitution gives every person the right to life and personal liberty. These two sacrosanct rights can only be taken away by procedure established by law. In *Huidrom Konungjao Singh* v. *State of Manipur*[101] the detenu was already in jail and orders for his detention were passed under section 3(2) of the National Security Act, 1980. There are authorities to support the proposition that a detention order can be passed while the detenu is in custody but subject to fulfillment of certain conditions.[102]

> [T]there is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:
>
> (*1*) The authority was fully aware of the fact that the detenu was actually in custody.
>
> (*2*) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.

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shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.
(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.
(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

99 (2012) 10 SCC 489.
100 *Id.* at 509.
101 (2012) 7 SCC 181.See also *Rashid Kapadia* v. *Medha Gadgil* (2012) 11 SCC 745.
102 *Id.* at 185.

> (*3*) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.
>
> In case either of these facts does not exist the detention order would stand vitiated.

In the instant case the detenu had not even moved papers for his bail and hence there was no basis for the suspicion that he would indulge in activities detrimental to the state while on bail. The court was of the opinion that the present case does not satisfy the essential conditions of preventive detention and the same was quashed.

In *Subramanian* v. *State of Tamil Nadu*[103] the question was as to the legality of a detention order against the detenu under section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum Grabbers and Video Pirates Act, 1982 under which the detenu was held to be a 'goonda'. Upholding the detention order the court held that the fact situation revealed that because of the threat by the detenu and his associates by showing weapons, the nearby shopkeepers closed their shops out of fear and auto drivers took their autos from their stand and left the place. Such a scenario cannot be treated as a law and order problem.

X SENTENCING

"Extraordinary situations demand extraordinary remedies. While dealing with an unprecedented case, the court has to innovate the law and may also pass an unconventional order keeping in mind that an extraordinary fact situation requires extraordinary measures" was the dictum in *Prithipal Singh*.[104]

Seven helpless people sleeping on the pavement were mowed down and many injured in a case of drunken driving. The trial court sentenced the accused to six months simple imprisonment with a fine of Rs. 5 lakhs for an offence under section 304A IPC.[105] There was lot of furore over this travesty of justice and, the Bombay High Court took *suo motu* cognizance of the judgment. The court found the accused guilty under sections 304 part II, 337 and 378 and sentenced him to three years rigorous imprisonment for offence under section 304 Part II and one year rigorous imprisonment for the offence under section 338 and six months imprisonment for the offence under section 337 which perhaps were to run concurrently. The appellant moved the apex court. The court posed to itself a few questions which, *inter alia,* included whether indictment under section 304 Part II and section 338 IPC can coexist in a case of single rash act. The court answered in the affirmative and then went on to talk about the sentencing policy and whether punishment of three years awarded in the instant case required any modification. The court observed thus:[106]

> Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just

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103 (2012) 4 SCC 699.

104 *Prithipal Singh* v. *State of Punjab* (2012) 1 SCC 10 at 29.

105 *Alister Anthony Pareira* v. *State of Maharashtra* (2012) 2 SCC 648.

106 *Id*. at 674.

> and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

Having said this the court came to a conclusion that the sentence was too meager and not adequate but since the state did not prefer any appeal the matter was not pressed further. It is indeed a sorry state of affairs that the poor get killed and the state does not feel the need to file an appeal for enhancement of sentence and the court lets the matter rest because the rules say so. One wonders whether the technical reason of non-filing of appeal by state weighed so heavily on the court's psyche that despite the finding of inadequacy of sentence the court only displayed its helplessness to proceed further. It remains a question why the court did not enhance the sentence *suo motu* as was laid in *Prithipal Singh*.[107]

There is another disturbing case where six persons were done to death by Sanjeev Nanda in a case of drunken driving.[108] The BMW was being driven so fast that it violently dashed against these persons and the impact was so severe and great that they flew in the air and fell on the bonnet and windscreen. Some of them rolled down and came beneath the car and were dragged by the car. It seems to be a scene lifted from a Hollywood action movie but this was real with no dummies but actual men being flung. The trial court found the accused guilty under section 304 part II and awarded five years imprisonment. On appeal the high court converted the conviction from 304 part II to 304-A, *i.e.*, for rash and negligent act and reduced the sentence to two years which is the maximum punishment that can be awarded under that section. The appeal in the apex court restored the trial court verdict as far as conviction was concerned, *i.e.*, he was held guilty under section 304 part II but retained the sentence given by the high court! Making a mockery of the sentencing policy the court awarded a sentence for a period already undergone and the mitigating circumstances for such benevolence *inter alia* were:[109]

> *a*) Offence was said to have been committed in the year 1999, almost 13 years back.
>
> (*b*) The respondent was aged 21 years at that time, and was prosecuting his course in a foreign country. He had come to India on a short holiday.
>
> (*c*) He has already undergone the sentence of two years awarded by the High Court and only thereafter, after the period of limitation of filing the appeal had expired, he got married to his long time love, now they are *blessed* with a daughter.

107 *Supra* note 104 and discussion in the text of *infra* notes 124 and 125.

108 *State* v. *Sanjeev Nanda* (2012) 8 SCC 450.

109 *Id.* at 467 (Emphasis added).

(*d*) His behaviour and conduct in jail was extremely good, which is evident from the two affidavits filed in support of the respondent by two NGOs.

(*f*) He had neither any previous criminal record nor has been involved in any criminal activity ever since then. The case of *Alister Anthony* does not apply to the facts of this case.

(*g*) It was contended that the respondent has already learnt a sufficient lesson at a young age and *no useful purpose would be served, if he is sent to jail again*.

(*h*) The victim and/or families of the deceased have been *paid handsome amount of compensation* of Rs 65 lakhs, in the year 1999 itself i.e. Rs 10 lakhs each to the families of the deceased and Rs 5 lakhs to the injured.

(*i*) It *would not only be humiliating but great embarrassment to the respondent,* if he is again sent to jail for a little more period, over and above the period of two years awarded and undergone.

(*j*) He had neither intention nor knowledge of the ultimate consequences of the offence said to have been committed.

The surveyor cannot help but quote Jonathan Swift when he remarked "laws are like cobwebs, which may catch small flies, but let wasps and hornets break through." Apart from the imprisonment already undergone by the accused as per the order of the court, since two separate judgments were pronounced, was to pay Rs. 50 lakhs to the Union of India which would serve as a *corpus to compensate* victims of hit and run cases and was asked to do community service for two years to be arranged by the Ministry of Social Justice and Empowerment. Wonder from where the court got a mandate to give this punishment as section 304 nowhere provides for an option of community service as a punishment for homicide. The Editor's note on the case attributes it to article 142 of the Constitution.

The scheme of the penal code is such that the judges have been given lot of discretion in sentencing. India does not also have any sentencing guidelines in spite of recommendations by various committees to limit the judicial discretion. However, in certain heinous crimes a minimum is prescribed and if the judge decides to impose a sentence below the minimum "special and adequate reasons" have to be given. The expression has to be understood in its logical manner and the reasons have to be adequate justifying the reduction and fanciful reasons would not suffice,

In *State of Rajasthan* v. *Vinod Kumar*[110] a scheduled caste woman was raped and the trial court held the accused Vinod Kumar, guilty under section 376 IPC and the other accused HeeraLal guilty under section 376 read with section 120B IPC. Both of them were awarded seven years rigorous imprisonment by the trial court. Interestingly in appeal the high court without re-appreciation of evidence confirmed rape but reduced the punishment of Vinod Kumar and also held that since Heera Lal only accompanied Vinod Kumar his punishment be reduced to 11 months and 25 days. It is indeed shocking that such heinous crime against the female belonging to the disadvantaged section of the society could be treated in such a casual manner by the appellate court. The judicial academies of the states as well as the National Judicial Academy must tailor their training so as to sensitize the judges. Such

110 (2012) 6 SCC 770.

judgments are a blot on the system. The Supreme Court in very strong words criticized the approach of the high court and restored the seven years rigorous imprisonment awarded by the trial court.

Ever since *Swami Shraddananda (II)* case[111] the trend has been to commute death penalty to life imprisonment till the very end of natural life. In *Sandeep* v. *State of U.P.*[112] a young girl along with the *foetus* in the womb were killed mercilessly by the appellants. One of them had fathered the *foetus* and had wanted to get rid of it. The pregnant girlfriend did not agree for an abortion and was killed in a heinous manner with the aid of car tools (jack, *etc.*) blades and acid. The trial court had awarded death penalty which was confirmed by the high court. The apex court taking into account the facts and circumstances of the case held that inspite of its brutality it fell short of "rarest of rare category" and gave life imprisonment. However, taking a cue from earlier cases it held that the "accused Sandeep must serve a minimum of 30 years in jail without remissions before consideration of his case for premature release." The surveyor had eulogized this judicial ingenuity in *Shraddananda* case[113] where the judges had stated that it would in no way interfere with the constitutional provisions of remission, *etc*. However, this trend does not augur well since it may be unconstitutional inasmuch the judgment directs that "Sandeep must serve a minimum of 30 years in jail without remissions and his friend 20 years without remission".

The Constitution has bestowed a pardoning power on the executive and judicial fiat cannot take it away. If life imprisonment is insufficient as it practically operates there have to be amendments in the Police Act and Cr PC but judiciary must not encroach the domain of executive. The trend may also be a blow to the reformation theory which supposedly is the basis for punishment in this 21st century.

In *Neel Kumar* v. *State of Haryana*[114] a father had raped his 4 year old daughter and then killed her. The medical report of the child victim was testimony of the ghastly crime perpetrated on the helpless child. What adds to the enormity of the crime is that the protector became the perpetrator. The death sentence awarded to him was commuted to life imprisonment, following the post *Shraddananda* trend with a qualification that "the appellant must serve a minimum of 30 years in jail without remissions." The editorial note in this case has eulogized the *Shraddananda* case but the surveyor after a critical review of the matter is now of the opinion that it may be unconstitutional.

In *Ramnaresh* v. *State of Chhattisgarh*[115] there was a gang rape which resulted in death. The trial court gave the extreme penalty of death which was upheld by the high court. The Supreme Court confirming the guilt of the accused entered into a discourse on capital punishment running into 13 pages[116] and finally commuted death penalty to life imprisonment (21 years). The specified term is written in brackets in this case and unlike the cases mentioned above it does not put an express

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111 *Swamy Shraddananda* (II) v. *State of Karnataka* (2008) 13 SCC 767.

112 (2012) 6 SCC 107.

113 See Jyoti Dogra Sood, "*Criminal Law*" XLIV *ASIL* 200 (2008).

114 (2012) 5 SCC 766.

115 (2012) 4 SCC 257.

116 *Id.* at 276-289.

bar on remission for 21 years. But impliedly, given the trend in the year, it seems that remission must have been barred.

Similarly in *Brajendra Singh* v. *State of M.P.*[117] keeping in view the mitigating circumstances the death sentence was commuted to "life imprisonment (21 years)". The term 21 years is not qualified and is put in paranthesis. There is an Editor's note which mentions the *Swami Shraddananda* case. The court perhaps wanted us to assume that remission before 21 years is not to be given.

In *Amit* v. *State of U.P.*[118] a 3 year old girl was raped, and murdered by the accused appellant, who also committed unnatural offences against the victim. The apex court did not approve of the death penalty but directed that "life imprisonment shall 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 reasons."[119] So in this case no mandatory 21 or 30 year term, as in the earlier cases, was specified. In *Sonu Sardar* v. *State of Chhatisgarh*[120] the court upheld the death penalty where five members of a family including two minor children and the driver were ruthlessly killed in a case of dacoity.

The Supreme Court in *L.K. Venkat* v. *Union of India*[121] had transferred the writs pending in Madras High Courts to the Supreme Court under article 139A (1) regarding under article 72 of the Constitution since it is already seized of the similar matter in *Devender Pal Singh Bhullar & Mahendra Nath*[122] that whether long delay in the decision of the mercy petitions entitles the convicts to seek commutation of death sentence. It would be of interest to see how the court decides this issue and shapes the future course of punishments.

Upholding life imprisonment in case of kidnapping for ransom the court after a perusal of the statement of objects and reasons stated in the Amendment Act of 1993 introducing section 364A IPC held thus:[123]

> It is clear from the above the concern of Parliament in dealing with cases relating to kidnapping for ransom, a crime which called for a deterrent punishment, irrespective of the fact that kidnapping had not resulted in death of the victim. Considering the alarming rise in cases of kidnapping young children for ransom, the legislature in its wisdom provided for stringent sentence. Therefore, we are of the view that in those cases whoever kidnaps or abducts young children for ransom, no leniency be shown in awarding sentence, on the other hand, it must be dealt with in the harshest possible manner and an obligation rests on the courts as well.

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117 (2012) 4 SCC 289. See also *AbsarAlam*v. *State of Bihar* (2012) 2 SCC 728.

118 (2012) 4 SCC 107.

119 *Id*. at 115.

120 (2012) 4 SCC 97.

121 (2012) 5 SCC 292.

122 *Devender Pal Singh Bhullar* v. *State of NCT of Delhi*, Writ Petition (Criminal)D. No. 16039 of 2011 and *Mahendra Nath Das* v. *Union of India*, SLP (Cri) No. 1105 of 2012.

123 *Akram Khan* v. *State of West Bengal* (2012) 1 SCC 406 at 413-14.

In *Prithipal Singh* v. *State of Punjab*[124] the apex court clarified the position that the high court in exercise of its power under section 386(c) Cr PC is competent to enhance the sentence *suo motu*. The only rider to the competence is that it must give an opportunity of hearing to the accused. The court upheld the enhancement of punishment to life imprisonment and observed thus:[125]

> We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, *suo motu*. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. The High Court's power of enhancement of sentence, in an appropriate case, by exercising *suo motu* power of revision is still extant under Section 397 read with Section 401, Criminal Procedure Code, 1973, inasmuch as the High Court can 'by itself' call for the record of proceedings of any inferior criminal court under its jurisdiction.

Section 27(3) the Arms Act mandates death penalty. It reads thus: "27(3) whoever uses any prohibited arms or ammunition or does any act in contravention of Section 7 and such use or act results in the death of any other person shall be punishable with death." In *State of Punjab* v. *Dalbir Singh*[126] the *vires* of this section was challenged. Many Privy Council cases, US Supreme Court and Indian cases including *Mithu*[127] wherein section 303 was declared unconstitutional were pressed into service. And the court came with the following diktat:[128]

> Section 27(3) of the Act also deprives the judiciary from discharging its constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure. This power has been acknowledged in Section 302 of the Penal Code and in *Bachan Singh case* it has been held that the sentencing power has to be exercised in accordance with the statutory sentencing structure under Section 235(2) and also under Section 354(3) of the Code of Criminal Procedure, 1973. Section 27(3) of the said Act while purporting to impose mandatory death penalty seeks to nullify those salutary provisions in the Code.

XI CONCLUSION

Sentencing has been the most problematic area in the period under survey. On the one hand mandatory death penalty in Arms Act was held unconstitutional but in other cases there has been an encroachment in the domain outside the boundaries

124 (2012) 1 SCC 10.
125 *Id*. at 25. See *Surendra Singh Rautela* v. *State of Bihar* (2002) 1 SCC 266 at 271 para 8.
126 (2012) 3 SCC 346.
127 *Mithu* v. *State of Punjab* (1983) 2 SCC 277.
128 *Supra* note 126 at 376.

of judiciary. Perhaps following the Malimath Committee's[129] recommendation wherein it was stated *inter alia*, "in respect of offences for which death is a punishment "imprisonment for life without commutation or remission" be prescribed as an alternative sentence. It is time that the legislature steps in to clear the air.

Sanjeev Nanda's case is an eyesore and the case needs to be probed further may be through RTI as to the kind of community service which he is doing in lieu of imprisonment. Investigation though the most vital remains one of the weakest links in our criminal trials. The court has shown utmost restraint and caution in cases of criminal conspiracy which needs to be appreciated as this intent loaded offence is very prone to abuse. As far as juvenile justice administration is concerned the court's warning in *Om Prakash* v. *State of Rajasthan*[130] needs to be taken seriously when it cautioned against taking a casual approach towards juvenility in heinous crimes which may end up in duping the course of justice.

129 Ministry of Home Affairs, I Committee on Reforms of Criminal Justice System, 288 (2003).

130 *Supra* note 90.